No. 88-1125-CFX
Status: GRANTED

Title: Jane Hodgson, et al, Petitioners
v.
Minnesota, et al.

Docketed:
January 4, 1989

Court: United States Court of Appeals
for the Eighth Circuit

Vide:
88-1309

Counsel for petitioner: Benshoof,Janet

Counsel for respondent: Galus,John, Raschke Jr.,Kenneth E.

Entry	Date	Note	Proceedings and Orders
1	Oct 20 1988	G	Application (A88-322) to extend the time to file a petition for a writ of certiorari from November 6, 1988 to January 5, 1989, submitted to Justice Blackmun.
2	Oct 25 1988		Application (A88-322) granted by Justice Blackmun extending the time to file until January 5, 1988.
3	Jan 4 1989	G	Petition for writ of certiorari filed.
4	Jan 4 1989		Appendix of petitioner Janet Hodgson, et al. filed.
5	Feb 3 1989		Brief of respondents Minnesota, et al. in opposition filed.
6	Mar 8 1989		DISTRIBUTED. March 24, 1989
7	Jun 23 1989		REDISTRIBUTED. June 29, 1989
8	Jul 3 1989		Petition GRANTED. The case is consolidated with 88-1309, and a total of one hour is allotted for oral argument.
			**********
10	Jul 11 1989		Order extending time to file brief of petitioner on the merits until September 1, 1989.
53	Aug 3 1989		Brief amicus curiae of American Family Association filed.
12	Aug 16 1989	D	Motion of Alan Ernest for leave to represent children unborn and born alive filed.
13	Aug 16 1989	D	Motion of Legal Defense for Unborn Children for leave to file a brief as amicus curiae filed.
17	Aug 25 1989		Record filed.
		*	Certified copy of original record and proceedings, 25 volumes, box, received.
14	Aug 28 1989		Brief amicus curiae of United States Catholic Conference filed. VIDED.
15	Aug 28 1989		Brief amicus curiae of Knights of Columbus filed. VIDED.
16	Aug 28 1989		Brief amici curiae of Focus on the Family and Family Research Council, et al. filed. VIDED.
19	Sep 1 1989		Brief amici curiae of The Center for Population Options, et al. filed. VIDED.
20	Sep 1 1989		Brief amici curiae of American Psychological Association, et al. filed. VIDED.
21	Sep 1 1989		Brief of petitioners Janet Hodgson, et al. filed. VIDED.
42	Sep 1 1989		Joint appendix filed. VIDED.
18	Sep 5 1989		Lodging received.
23	Sep 16 1989		Order extending time to file brief of respondent on the merits until October 14, 1989.
26	Sep 25 1989		Brief amicus curiae of Lutheran Church-Missouri Synod filed. VIDED.
31	Sep 25 1989		Brief amicus curiae of James Joseph Lynch, Jr. filed.
27	Sep 26 1989		SET FOR ARGUMENT WEDNESDAY, NOVEMBER 29, 1989. (CONSOLIDATED WITH 88-1309) (2ND CASE)

ntry	Date	Note	Proceedings and Orders
28	Sep 29 1989		Brief amicus curiae of General Assembly of the Commonwealth of Pennsylvania filed. VIDED.
24	Oct 2 1989		Motion of Alan Ernest for leave to represent children unborn and born alive DENIED.
25	Oct 2 1989		Motion of Legal Defense for Unborn Children for leave to file a brief as amicus curiae DENIED.
29	Oct 10 1989		Brief amicus curiae of Assn. of American Physicians and Surgeons filed. VIDED.
30	Oct 10 1989		Record filed.
		*	Certified copy of original supplemental record, box, received. (Vide: 88-1309).
36	Oct 11 1989		Brief amici curiae of Elliot Institute for Social Sciences Research, et al. filed. VIDED.
38	Oct 11 1989	D	Motion of Jeff White, et al. for leave to file a brief as amici curiae filed.
39	Oct 11 1989	D	Motion of Stanley John for leave to file a brief as amicus curiae filed.
40	Oct 11 1989	D	Motion of Kenneth Fisher for leave to file a brief as amicus curiae filed.
41	Oct 11 1989	D	Motion of Herbert Ratner for leave to file a brief as amicus curiae filed.
34	Oct 12 1989		Brief amici curiae of Attorneys General of Arizona, Missouri and Pennsylvania filed. VIDED.
32	Oct 13 1989		Brief of respondents Minnesota, et al. filed.
35	Oct 13 1989		Brief amicus curiae of 13 Individual Members of the Panel on Adolescent Pregnancy filed. VIDED.
37	Oct 13 1989		Brief amicus curiae of United States filed. VIDED.
33	Oct 14 1989		Brief of respondents Jane Hodgson, M.D., et al. filed. VIDED.
43	Oct 16 1989		Lodging received. (10 copies).
44	Oct 18 1989		CIRCULATED.
46	Oct 30 1989		Motion of Jeff White, et al. for leave to file a brief as amici curiae DENIED.
47	Oct 30 1989		Motion of Stanley John for leave to file a brief as amicus curiae DENIED.
48	Oct 30 1989		Motion of Kenneth Fisher for leave to file a brief as amicus curiae DENIED.
49	Oct 30 1989		Motion of Herbert Ratner for leave to file a brief as amicus curiae DENIED.
50	Nov 1 1989	G	Motion of Abortion Rights Council, et al. for leave to consider their brief as amici curiae filed in No. 88-790 and No. 88-805, filed in these cases filed.
51	Nov 1 1989		Lodging received.
52	Nov 13 1989		Motion of Abortion Rights Council, et al. for leave to consider their brief as amici curiae filed in No. 88-790 and No. 88-805, filed in these cases GRANTED.
54	Nov 13 1989		Brief amici curiae of 274 Organizations in Support of Roe v. Wade filed. VIDED.
55	Nov 13 1989	X	Reply brief of petitioners Janet Hodgson, et al. filed. VIDED.
56	Nov 16 1989		LODGING BY PETITIONERS HODGSON, ET AL. (One copy of

Entry	Date	Note	Proceedings and Orders
			"1987 Minnesota Health Statistics.")
57	Nov 20 1989		2 envelopes of sealed exhibits, 55a through 55s received.
58	Nov 29 1989		ARGUED.

88-1125

No. 88-_____

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JANE HODGSON, M.D.; ARTHUR HOROWITZ, M.D.; NADINE T., JANET T., ELLEN Z., HEATHER P., MARY J., SHARON L., KATHY M., and JUDY M., individually and on behalf of all other persons similarly situated; DIANE P., SARAH L., and JACKIE H.; MEADOWBROOK WOMEN'S CLINIC, P.A., PLANNED PARENTHOOD OF MINNESOTA, a nonprofit Minnesota corporation; MIDWEST HEALTH CENTER FOR WOMEN, P.A., a nonprofit Minnesota corporation; WOMEN'S HEALTH CENTER OF DULUTH, P.A., a nonprofit Minnesota corporation,

Petitioners,

—v.—

THE STATE OF MINNESOTA; RUDY PERPICH, as Governor of the State of Minnesota; HUBERT H. HUMPHREY, III, as Attorney General of the State of Minnesota,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

WILLIAM Z. PENTELOVITCH, ESQ.
BECKY PALMER, ESQ.
CHARLES HOFFMAN, ESQ.
Maslon, Edelman, Borman & Brand
1800 Midwest Plaza
Minneapolis, Minnesota 55402
(612) 339-8015

Attorneys for Petitioner
Planned Parenthood of Minnesota

JANET BENSHOOF
(Counsel of Record)
RACHAEL PINE
LYNN PALTROW
American Civil Liberties
Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800

LINDA OJALA, ESQ.
KURZMAN, GRANT & OJALA
2445 Park Avenue South
Minneapolis, Minnesota 55404
(612) 871-9004

Attorneys for Petitioners
Other Than Planned
Parenthood of Minnesota

QUESTIONS PRESENTED

1. Whether the Eighth Circuit erred in holding constitutional a requirement that both biological parents be notified prior to a minor's abortion, regardless of whether they had ever married, or were separated or divorced, unless the minor obtained an order from a state court.

2. Whether the Eighth Circuit erred in holding that the imposition of a mandatory 48-hour waiting period, after constructive notification to both parents, was constitutional.

3. Whether the Eighth Circuit erred in holding that *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983), precludes invalidation of the Minnesota parental notification/judicial bypass statute as unconstitutional in its entirety, despite factual findings that after five years of operation it failed to promote any state interests, and, in fact, undermined family integrity, communication, and privacy interests for many minors.

4. Whether the Eighth Circuit erred in holding that the statute is consistent with the equal protection clause of the United States Constitution.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-_____

JANE HODGSON, M.D.; ARTHUR HOROWITZ, M.D.; NADINE T., JANET T., ELLEN Z., HEATHER P., MARY J., SHARON L., KATHY M., and JUDY M., individually and on behalf of all other persons similarly situated; DIANE P., SARAH L., and JACKIE H.; MEADOWBROOK WOMEN'S CLINIC, P.A., PLANNED PARENTHOOD OF MINNESOTA, a nonprofit Minnesota corporation; MIDWEST HEALTH CENTER FOR WOMEN, P.A., a nonprofit Minnesota corporation; WOMEN'S HEALTH CENTER OF DULUTH, P.A., a nonprofit Minnesota corporation,

Petitioners,

—v.—

THE STATE OF MINNESOTA; RUDY PERPICH, as Governor of the State of Minnesota; HUBERT H. HUMPHREY, III, as Attorney General of the State of Minnesota,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PARTIES TO THE PROCEEDING

The parties to the instant proceeding are those set forth in the caption on the cover of this petition.[1]

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1 This caption differs from those used in the courts below. The lower courts erroneously failed to use the substituted caption entered by order of the district court on April 3, 1986. This order is reprinted in the Appendix submitted herewith. (6a-7a). Citations to the Appendix are made to the page number therein as "(_____a)".

OPINIONS BELOW

The opinion of the district court was issued on November 6, 1986. It is reported at 648 F. Supp. 756 (D. Minn. 1986). (10a-52a).

A panel of the Eighth Circuit Court of Appeals issued its decision on August 27, 1987. The decision was set for publication at 827 F.2d 1191 (8th Cir. 1987), (53a-72a), but was subsequently withdrawn by the court. 835 F.2d 1545 (8th Cir. 1987). (158a-159a).

The en banc opinion of the Eighth Circuit Court of Appeals was issued on August 8, 1988. It is reported at 853 F.2d 1452 (8th Cir. 1988). (74a-109a).

JURISDICTION

Jurisdiction is proper pursuant to 28 U.S.C. § 1254(1), which provides for review by certiorari "upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

STATUTES INVOLVED

Minnesota Statutes Annotated § 144.343(1)-(7). (1a-4a).

STATEMENT OF THE CASE

I. HISTORY OF THE LEGISLATION.

In April, 1981, the Minnesota legislature enacted Minn. Laws 1981 Ch. 228, codified as Minn. Stat. Ann. § 144.343(1)-(7). (1a-4a).[2] Subdivision 2 of the statute provides that no abortion

2 The statute was an amendment to the Minors' Consent to Health Services Act, passed in 1971, which permits all minors to give effective consent for all medical, mental or other health services to treat pregnancy, venereal disease or drug abuse. § 144.343(1). (1a). The health professional is permitted to inform parents where failure to inform would jeopardize the minor's health. Minn. Stat. Ann. § 144.346. (5a).

may be performed upon an unemancipated minor until at least 48 hours after written notice to both parents. (1a-2a). Subdivision 6 provides that if the parental notification provision of subdivision 2 is ever judicially enjoined, the statute will then be enforced with a judicial bypass as an option to parental notification. (3a-4a). Under the judicial bypass provision, a minor may seek a state court order permitting her to obtain an abortion without notification to both parents if she can convince a judge that she is "mature and capable of giving informed consent" or that an abortion without notice to both parents would serve her "best interests." (3a).[3] Subdivision 5 subjects anyone performing an abortion in violation of the statute to criminal penalties and civil liability. (2a-3a).[4]

The asserted purpose of the statute is to foster intra-family communication and to protect pregnant minors by promoting parental involvement in the minor daughter's abortion decision, (57a), but, as found by the district court, the legislature also intended to create an obstacle that would prevent at least some minors from obtaining abortions. (25a).

II. HISTORY OF THE LITIGATION.

Plaintiffs[5] consist of a class of mature minors seeking abortions in Minnesota without the involvement of one or both of their parents, three divorced mothers who support their minor daughters' abortion decisions and fear notice to their ex-

3 The statute further provides for a guardian *ad litem* and an attorney to be appointed by the court, § 144.343(6)(c)(ii), (3a), for confidentiality and expedition in processing, § 144.343(6)(c)(iii), (4a), and for expedited appeal and for access to the trial courts 24 hours a day, seven days a week. § 144.343(6)(c)(iv). (4a).

4 The statutory exceptions to the two-parent notice requirement are as follows: 1) where the physician certifies the minor's life is endangered such that there is no time for notification, § 144.343(4)(a); 2) where written consent is given, § 144.343(4)(b); and 3) where the minor is a reported victim of sexual or physical abuse, § 144.343(4)(c). (2a).

5 Petitioners will be referred to as "plaintiffs" and respondents as "defendants."

husbands,[6] four medical clinics in Minnesota which together perform nearly all the abortions in the state, and two physicians who provide abortion services for their minor patients. Defendants are the State of Minnesota, its Governor and Attorney General. (11a-13a).

Plaintiffs challenged the statute on the ground that on its face and as applied it violated the equal protection and due process rights of minors under the United States and Minnesota Constitutions. (13a-14a). On July 31, 1981, a Temporary Restraining Order enjoining subdivision 2, requiring two parent notice without a bypass, was granted, but § 144.343(2)-(6) (two-parent notice with a judicial bypass procedure) was permitted to go into effect on August 1, 1981. (14a). On March 22, 1982 a preliminary injunction was issued as to subdivision 2 but denied as to subdivision 6. (14a). On January 23, 1985 the district court granted defendants' motion for summary judgment on their claim that subdivision 6 was constitutional on its face, but denied their claim that Minn. Stat. Ann. § 144.343(2)-(6) was constitutional as applied. *Id.* Trial commenced in February of 1986 after subdivision 6 of the statute had been in effect in Minnesota for approximately five years.

During the trial, which lasted five weeks, the federal district court heard from seventy-five witnesses, including the Minnesota state court judges who collectively had heard over ninety percent of all the judicial bypass petitions over the five years the statute had been in operation, public defenders, guardians *ad litem* for the minors, physicians and counselors whose medical care for the minors had been affected by the law, epidemiologists, experts in adolescent development and family communication, psychiatrists with clinical practices encompassing pregnant minors, twenty-four members of the minor class and four single parents or family members of pregnant minors.

The district court held that 1) subdivision 2, the notification requirement, standing alone, was facially invalid; 2) the notice/

6 The district court incorrectly refers to only one single parent plaintiff. Diane P., Sarah L., and Jackie H., all divorced mothers, were substituted for Lauren Z. by order of the district court on April 3, 1986. *See supra* note 1.

bypass requirement was facially invalid to the extent it required two-parent notification and a 48-hour waiting period instead of some shorter period; 3) the 48-hour waiting period, but not the two-parent requirement, was severable;[7] and 4) but for this Court's decision in *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983), the district court would have found the statute unconstitutional as applied in its entirety because it failed to serve the state's asserted interests. (57a-58a). The district court enjoined the entire statute because of the inseverability of the two-parent notification requirement. (51a).

On August 27, 1987, a panel of the Eighth Circuit affirmed the district court's decision. The panel, accepting the district court's findings of fact, agreed that 1) subdivision 2 (notification without a bypass option) was unconstitutional because a bypass option was required under the decisions of this Court, (62a); 2) compelling notice to both biological parents without exception was "almost always disastrous" to minors and their families, (62a); and 3) the two-parent notification requirement was not severable from the remainder of the statute, (71a).[8] The panel specifically held that the two-parent requirement could not be saved by the presence of a judicial bypass system when "as in this case, the underlying notification requirement impermissibly burdens the minor's abortion decision." (68a).

On November 13, 1987, the panel granted defendants' request for rehearing by the panel, vacated and withdrew its prior opinion, held any further decision in abeyance pending a decision by the United States Supreme Court in *Hartigan v. Zbaraz*, ____ U.S. ____, 108 S. Ct. 479 (1987), and denied rehearing en banc as moot. (158a-159a).

7 Although there was no proof that the 48-hour waiting period in Minnesota facilitated any parent/child communication, the district court ruled that *H.L. v. Matheson*, 450 U.S. 398 (1981), precluded a holding that waiting periods are unconstitutional per se. Noting, however, that the waiting period, in practice, often extended far beyond 48 hours, the court invalidated the 48-hour waiting period as excessively burdensome and severed it from the statute. (50a).

8 The panel did not reach the question of the constitutionality or severability of the mandatory 48-hour waiting period.

After an equally divided Supreme Court affirmed the decision of the Seventh Circuit without opinion in the *Zbaraz* case, the Eighth Circuit *sua sponte* granted the state's request for en banc review, setting oral argument before the court en banc for February 12, 1988. (160a). The en banc opinion was issued August 8, 1988. (74a).

The court en banc agreed with the district court and with the panel that Minnesota could not constitutionally require a minor to notify her parents of her intention to have an abortion without providing a judicial bypass option. (81a). The court also agreed with the panel that the district court's factual findings were not clearly erroneous. However, the court disagreed with the panel and with the lower court and found the facts to be immaterial based on a misimpression that the Supreme Court had previously considered such facts when upholding the facial validity of "similar statut[es]." (85a). In addition, the court found that a non-custodial parent's interest in being informed of his minor child's activities outweighed the minor's constitutional right to privacy. (92a-95a); *see also* (104a-105a) (Lay, C.J., dissenting).

The court found that the district court had erred in finding the two-parent notification requirement burdensome in the following respects: 1) the district court did not give enough weight to "parental and family interests," (92a-96a); 2) the district court gave too much weight to the 42% of minors who do not live with both biological parents, (91a-95a); and 3) the district court incorrectly considered the impact of the two-parent notification statute in isolation from the bypass system. (96a). For similar reasons the en banc opinion found the 48-hour delay requirement not to be a significant burden.

The Eighth Circuit granted a stay of the mandate on its en banc decision pending review by this Court. (110a-111a).

III. THE FACTUAL RECORD.

A. While in operation, Minnesota's criminal two-parent notification statute caused unnecessary psychological and physical harm to teenagers, reduced family communication, imposed substantial and dangerous delays, and undermined single-parent families.

Minn. Stat. Ann. § 144.343(2) requires that a minor seeking an abortion notify both biological parents, if they are living, unless the second one cannot be located through reasonably diligent effort. (1a). The statute makes no exception for a non-custodial parent who is divorced, separated, or never married, or for an absent parent who has never met the minor. (21a). No exception is made for the parent, custodial or not, whom the minor fears will react abusively to notification, unless the minor is willing to charge formally that parent with previous sexual or physical abuse. *Id.*

Upon reviewing the evidence of the actual impact of the Minnesota law over its five years of operation, the district court concluded that the statute had effected no increase in intra-family communication on the subject of pregnancy or abortion. (41a-42a). Specifically, the court found that a "sizable proportion of minors seeking an abortion in Minnesota voluntarily notif[ied] at least one parent" before the statute and that this proportion did not change after the statute took effect. (41a).

Based on the testimony of numerous experts at trial, the panel, agreeing with the district court, concluded that "although family relationships benefit from voluntary and open communication, compelling parental notice has an opposite effect . . . . [i]t is almost always disastrous." (62a); *see also* (21a-22a). Compelling notification to both parents, especially when they are divorced or separated, can be harmful to the child's welfare, as the district court found. (30a-31a).[9] In

9 "National statistics reveal that approximately [50%] of all marriages end in divorce. There [was] no testimony [at trial] indicating that the divorce rate in Minnesota differs from the national average. To the contrary, clinic experience indicates that only 50% of minors in the state of Minnesota reside

functional families, a non-custodial parent often reintegrates into the family in a disruptive manner, but in abusive, or dysfunctional families, compelled notification is especially dangerous. *Id.*[10] Notification of a non-custodial or absent parent in such families can provoke violent and abusive reactions. (31a). Dr. Lenore Walker, one of plaintiffs' expert witnesses, gave unrebutted testimony that pregnancy triggers violent reactions in abusive dysfunctional families "like a red cape to a bull." (141a).[11]

The court further found that compelled two-parent notification, in operation, inhibited voluntarily initiated intra-family communication in a large number of cases. (46a). Twenty to twenty-five percent of the minors who used the judicial bypass option had already notified one parent, and that parent often accompanied the minor to court. *Id.* The vast majority of these voluntarily informed parents were women such as the plaintiffs Diane P. and Sarah L., who were divorced and had not seen their husbands in years. (31a). The court found that compelling single mothers either to notify a disinterested or abusive non-custodial parent or to seek court authorization not to do so is traumatic, burdensome, interferes with voluntarily initiated

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with both biological parents. This figure is corroborated by one study that found that 9% of minors in Minnesota live with neither parent, 33% live with only one parent and thus 42% do not live with both biological parents." (29a).

10 The district court found that a large percentage of families in Minnesota in particular and in the United States in general, are dysfunctional. Reports indicate that there are an average of 31,200 reported assaults on women by their partners each year in Minnesota alone, and that family violence occurs in two million families in the United States. (30a). Even these numbers substantially underestimate the problem because members of dysfunctional families are characteristically secretive about such matters and minors are particularly reluctant to reveal violence or abuse. *Id.* Whatever the actual numbers, the court found that "[m]any minors in Minnesota live in fear of violence by family members; many of them are in fact, victims of rape, incest, neglect, and violence." *Id.*

11 Studies of abusive dysfunctional families reveal that family violence is at its height during pregnancy, immediately following childbirth, and during adolescence. (140a-141a).

parent-child communication, and infringes upon the privacy of both mother and daughter. (46a-47a); *see also* (22a).[12]

The district court concluded that a "regulation requiring notification of both parents when the nuclear family is broken apart or never formed is not reasonably designed to further the State's interest in protecting pregnant minors." (46a). Moreover, in considering the statute as a whole, the court found that "five weeks of trial have produced no factual basis upon which this court can find that Minn. Stat. Ann. § 144.343(2)-(7) on the whole furthers in any meaningful way the state's interest in protecting pregnant minors or assuring family integrity," (41a), and that the statute failed to improve family relations "more than it undermine[d] them." (29a). For these reasons, the court concluded that the substantial burden imposed by § 144.343(2)-(7) "is not justified by the state's interests." (42a).[13]

B. The judicial bypass procedure, while assuring that some minors received the privacy critical to an abortion choice, increased medical risks and was so formidable an obstacle as to force teenage motherhood for some mature and best interest minors.

Minnesota's two-parent notification and judicial bypass mechanism went into effect on August 1, 1981. As of March, 1986, the time of trial, 3,573 petitions had been filed by minors, (23a), representing nearly one-half of all minors seeking abortions during that period.

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12 For example, Jackie H., one of the three named single mother plaintiffs, testified at trial that while at state court with her daughter, seeking an order under this statute, she was forced to reveal, before her daughter, that her divorce had been based on physical abuse. (117a-118a).

13 Parental involvement requirements, with or without a judicial bypass system, cannot be sustained unless the state is able to prove that the statute is necessary, narrowly tailored, and actually serving state interests previously recognized as significant or compelling by this Court. *See H.L. v. Matheson*, 450 U.S. 388, 413 (1981); *Zbaraz v. Hartigan*, 763 F.2d 1532, 1536-37 (7th Cir. 1985), *aff'd per curiam by an equally divided court*, 108 S. Ct. 479 (1987). *See generally infra*, Reasons For Granting The Writ.

The factual record shows that the judicial bypass provided an essential escape route for minors. Judges who had heard over ninety percent of these petitions testified at trial that the minors gave compelling, disturbing, and believable reasons in support of the necessity of privacy regarding their abortion. (114a-115a; 122a-124a). Some minors would have been forced to leave home if their parents had discovered that they were pregnant. (123a). Others feared physical and mental harassment by a father or stepfather, who in some cases may have been the father of the child they wished to abort. (115a; 122a; 123a-124a). Many said that notifying their parents of their pregnancy would only exacerbate an already stressful and strife-ridden family situation. (123a-124a). Some minors with parents who were severely ill or overly sensitive to stress felt that it would be in their parent(s)' best interest not to be informed. (114a; 122a; 124a). Whatever the particular reasons, these judges testified that, based on years of judicial experience, they found the minors to be truthful and indeed the best judges of the appropriate course of action under their own unique family circumstances. (114a-115a; 123a; 126a).

Although the district court found that there was not "a systemic failure to provide a judicial bypass" in the most expeditious manner, (18a), minors seeking to invoke the bypass option were inevitably delayed anywhere from two or three days to a total of one week or more in obtaining an abortion. (20a).[14] The court found these delays "unavoidable." (18a). The district court found that going to court produces "fear and tension" in minors, making them feel "guilty and ashamed." (20a). Some minors were so upset about the judicial procedure that they considered it more difficult than the abortion itself; their anxiety affected the medical procedure. *Id.*[15] The court found the judicial bypass so daunting to some teenagers that some mature and best interest minors carried unwanted pregnancies to term. *Id.*[16]

14 A minor must first call a clinic to learn of her options. After this the teenager who chooses to go to court must call to get an appointment. Some counties have no sitting judges. (19a). Class members Heather P. and Sharon L. had to wait two weeks and one and a half weeks respectively for abortions because of delay due to scheduling problems with the court. (115a; 124a). Two class members, Cynthia J. and Bonnie L., testified they were pushed into the second trimester by these added delays, (132a; 133a-134a); another was forced to go to Iowa with her mother because she didn't have time to await the conclusion of judiciary proceedings. (121a).

Finally, the time demands of the judicial procedure (several hours) threatened to compromise the minors' privacy as well as the medical care they received. Particularly for minors living outside of the two metropolitan areas,[17] travel time together with the time required for court proceedings made it nearly impossible to have the abortion and return home early enough to maintain privacy. (199a-120a). To accommodate these time pressures, physicians and counselors were sometimes compelled to cut short counseling sessions and other ancillary personal

15 Some minors coming from court to the clinic had to be given sedatives (which were not given before this law) because of the effect of the stress and pressure on their vital signs. (120a).

16 Between 1981 and 1984 the birth rate for teenagers 15-17 years old in the City of Minneapolis went up *35.8%*, (136a), compared to a rise in birthrate of *.3%* for 18-19 year olds, (137a), during the same period; these groups would normally be expected to share statistical trends. (112a). A representative of the Minneapolis Health Department attributed the disparity to the imposition of the parental notification law, which affects only minors 17 and under. (112a).

The social, psychological, economic and educational effects of teenage motherhood have been recognized by this Court. *Carey v. Population Services Int'l*, 431 U.S. 678, 696 n.21 (1977) (plurality). In terms of mortality, it is 20 times safer to have an early abortion than to carry to term, *see* LeBolt, Grimes & Cates, *Mortality From Abortion and Childbirth: Are the Populations Comparable?*, 248 J.A.M.A. 188, 191 (1982); an abortion at any stage of pregnancy is safer than childbirth.

17 In Minnesota, no abortion providers are located in 82 out of 87 counties, (14a), virtually all abortion services are in the two metropolitan centers, Minneapolis/St. Paul and Duluth, (15a), and out of 87 private and public hospitals in Minnesota, only two hospitals are generally open for abortion services. (15a). Transportation problems force some women to drive seven hours to a clinic. (76a). Air or bus travel is difficult or non-existent in some cases. *Id.* Because the further a woman has to travel the less likely she is to get an abortion, (15a), there is a great unmet need for abortion services in Minnesota. (116a). In general, women in Minnesota get abortions later than in the United States as a whole. (16a).

and psychological support services which would ordinarily be available, (131a); some physicians were forced to use alternate medical procedures in order to accommodate the stresses and pressures added by the court process.[18]

C. The mandatory 48-hour waiting period was unnecessarily long and, in operation, combined with other factors to produce substantial and dangerous delays.

Minn. Stat. Ann. § 144.343(2) prohibits performing an abortion upon an unemancipated minor until at least 48 hours after written notice of the pending operation has been delivered to the minor's parents. (1a). The district court found that the "waiting period exceeds that necessary to allow parents to consult with minors contemplating abortion . . . [and] fails to further the State's interest in protecting pregnant minors." (32a).

Moreover, the court found that the waiting period, in operation, often caused much longer delays. If notice is mailed, constructive delivery occurs at noon on the next regular mailing day. Consequently, minors in Minnesota who choose to notify their parents by certified letter commonly must wait 72 hours between initiating the notification process and the abortion itself. (47a). The waiting period was further compounded by "scheduling factors such as clinic hours,[19] transportation

18 Plaintiff Dr. Jane Hodgson testified that although laminaria (a substance used to dilate the cervix) is often used only for second trimester patients, it was a better medical practice to use the substance with all teenagers. (118a-119a). To be effective, laminaria must be inserted several hours before the abortion procedure. (120a). This could not be done for her teenage patients in Duluth who travel far to get to court, do not get through court until midafternoon, and must have their abortion and return home the same day. (119a-120a). Dr. Hodgson was thus forced to choose between not using laminaria and not doing the procedure at all. (120a).

19 Because the Duluth Clinic is not open for abortions every day, mailed notice means a minor must often wait an entire week before the procedure can be performed, even when the minor has one parent's consent. (128a-129a).

requirements,[20] weather, a minor's school and work commitments, and sometimes a single parent's family and work commitments. In many cases, the effective length of the delay may reach a week or more." (22a-23a) (footnotes added).

The court found that delays of any length can increase the statistical risk of mortality and morbidity in performing an abortion. (23a). These delays forced some minors to have more expensive,[21] riskier[22] procedures, and the percentage of minors getting second trimester abortions increased.[23]

20 "In view of the logistical obstacles facing Minnesota women who live in counties without a regular provider of abortion services, the court believes a 48 hour waiting period is excessively long. Travel to an abortion provider, particularly in winter from a rural area in Minnesota, can be a very burdensome undertaking. A requirement that a minor either bear this burden twice or spend up to three additional days in a city distant from her home cannot be justified by the State's interest in encouraging parental consultation, because a shorter period would effectuate that interest as completely." (49a).

21 A first trimester abortion averaged $225.00 (up to 12 weeks); a delay of even a few days raised this to $275.00 (12-14 weeks) for plaintiff minors. (16a). For teenagers in the Duluth area, the delay also meant the additional cost of overnight travel to Minneapolis where second trimester abortions are performed. (119a). There is no Medicaid funding for abortions in Minnesota. (120a). Some teenagers were forced to hitchhike in the winter, (120a), and some to sleep in their cars. (132a).

22 The district court found a one-week delay significantly increased medical risks. (20a).

23 Between 1978 and 1983 the percentage of minors obtaining second trimester abortions in Minnesota went from 18.4% to 23.0%, (135a), an increase of 26.5%. An official from the Minnesota Department of Health, testifying as the state's witness, agreed that these statistics presented a public health problem. (114a). Furthermore, there is evidence that this number is increasing. Meadowbrook Women's Clinic, which performs nearly all the second trimester abortions in the State, said as of December 1985, thirty percent of its minor patients seeking abortions were already in the second trimester. (130a).

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS ISSUES OF GRAVE PUBLIC IMPORTANCE BECAUSE CRIMINAL PARENTAL NOTICE AND CONSENT LAWS, SINGLING OUT ABORTION, HAVE A PROFOUND AND IRREPARABLE IMPACT ON MINORS NATIONWIDE.

A. Mandatory parental involvement laws have been widely and repeatedly enjoined since this Court's opinion in *Ashcroft*.

Criminal parental notice and consent laws singling out abortion are a catastrophe in the lives of pregnant minors and their families.[24] These laws present an exception to a trend in state laws assuring privacy for minors regarding pregnancy-related care, venereal disease, substance abuse and contraception. *See* Minn. Stat. Ann. § 144.343(1) (providing that any minor may give effective consent for medical or mental treatment for pregnancy, venereal disease and alcohol or drug abuse). (1a).[25] Despite this Court's previous decisions, the constitutionality of these statutes has remained a perennial question in the federal courts, as more and more states have singled out abortion for a requirement of notice or consent. At present, twenty-four states have parental notification or consent statutes which are either

24 A study of seventeen deaths following illegal abortions reported in the United States between 1975 and 1979 revealed that a "desire for secrecy was the primary reason four women sought illegal abortions and was a secondary factor for five others." One who died was a fifteen year old honor student at a Roman Catholic girls' school. She was found dead in the bathroom of her home, a plastic tube in her vagina. Binkin, Gold & Cates, *Illegal Abortion Deaths in the United States: Why Are They Still Occurring?*, 14 Family Planning Perspectives 163, 165 (May/June 1982).

25 *See generally* English, *Adolescent Health Care: Barriers to Access; Consent, Confidentiality, and Payment*, 20 Clearinghouse Review 481, 484-86 (Summer 1986). The necessity for privacy has been repeatedly recognized by the United States Congress. For example, under Title X, minors must be given access to contraception without parental consent. *See Planned Parenthood Fed'n of America v. Heckler*, 712 F.2d 650 (D.C. Cir. 1983).

in effect or under judicial review.[26] One such statute, invalidated by the Sixth Circuit, has recently been appealed to this Court. *Ohio v. Akron Center for Reproductive Health*, 57 U.S.L.W. 3378 (U.S. Nov. 28, 1988) (No. 88-805). Although ten of these statutes are presently under court injunction for facial invalidity,[27] and five states do not enforce their stat-

26 NOTIFICATION: **Georgia:** Ga. Code Ann. § 15-11-112 (Supp. 1988); **Idaho:** Idaho Code § 18-609(6) (1987); **Illinois:** Ill. Ann. Stat. ch. 38 para. 81-64.4 (Smith-Hurd Supp. 1988); **Maryland:** Md. Health-Gen. Code Ann. § 20-103 (1987); **Minnesota:** Minn. Stat. Ann. § 144.343 subd. 2-6 (West Supp. 1989); **Montana:** Mont. Code Ann. § 50-20-107 (1987); **Nevada:** Nev. Rev. Stat. Ann. § 442.255 (Michie 1986); **Ohio:** Ohio Rev. Code Ann. § 2919.12 (Anderson 1987); **Utah:** Utah Code Ann. § 76-7-304 (1978); **West Virginia:** W. Va. Code § 16-2F-3(a) (1985). CONSENT: **Alabama:** Ala. Code § 26-21-1 to 26-21-8 (Supp. 1988); **California:** Cal. Health & Safety Code § 25958 (West Supp. 1988); **Florida:** Fla. Stat. Ann. § 390-001(4)(a) (West 1986); **Indiana:** Ind. Code Ann. § 35-1-58.5-2.5 (Burns Supp. 1988); **Kentucky:** Ky. Rev. Stat. Ann. § 311.732 (Michie Supp. 1988); **Louisiana:** La. Rev. Stat. Ann. § 40:1299-35.5 (West Supp. 1988); **Massachusetts:** Mass. Gen. Laws Ann. ch. 112, § 12S (West 1983); **Mississippi:** Miss. Code Ann. § 41-41-53 (Supp. 1988); **Missouri:** Mo. Ann. Stat. § 188.028 (Vernon Supp. 1989); **North Dakota:** N.D. Cent. Code § 14-02.1-03.1 (Supp. 1987); **Pennsylvania:** 18 Pa. Cons. Stat. Ann. § 3206 (Purdon 1983); **Rhode Island:** R.I. Gen. Laws § 23-4.7-6 (1985); **South Carolina:** S.C. Code Ann. § 44-41-30 (Law Co-op. 1985); **Tennessee:** Tenn. Code Ann. § 37-10-303 (Supp. 1988) (effective July 1, 1989).

27 ENJOINED NOTIFICATION STATUTES: **Georgia:** *Planned Parenthood Ass'n of Atlanta v. Harris*, 691 F. Supp. 1419 (N.D. Ga. 1988) (preliminary injunction); **Illinois:** *Zbaraz v. Hartigan*, 584 F. Supp. 1452 (N.D. Ill. 1984) (permanent injunction), *vacated in part and remanded*, 763 F.2d 1532 (7th Cir. 1985), *aff'd by an equally divided Court*, ____ U.S. ____, 108 S.Ct. 479 (1987) (per curiam); **Minnesota:** *Hodgson v. Minnesota*, 648 F. Supp. 756 (D. Minn. 1986) (permanent injunction), *aff'd*, 827 F.2d 1191 (8th Cir. 1987), *vacated and withdrawn*, 835 F.2d 1545 (8th Cir. 1987) (per curiam), *petition for reh'g en banc granted*, 835 F.2d 1546 (8th Cir. 1987), *rev'd*, 853 F.2d 1452 (8th Cir. 1988) (en banc) (stay of mandate granted Oct. 7, 1988); **Nevada:** *Glick v. McKay*, 616 F. Supp. 322 (D. Nev. 1985) (preliminary injunction); **Ohio:** *Akron Center for Reproductive Health v. Rosen*, 633 F. Supp. 1123 (N.D. Ohio 1986) (permanent injunction), *aff'd*, 854 F.2d 852 (6th Cir. 1988), *appeal filed sub nom., Ohio v. Akron Center for Reproductive Health*, 57 U.S.L.W. 3378 (U.S. Nov. 28, 1988) (No. 88-805).

utes,[28] nine of these laws are daily affecting the lives and constitutional rights of thousands of teenagers and their families.[29]

B. It is of great public importance that this Court review the unique factual record in this case which demonstrates, for the first time, the unanticipated impact on privacy rights of compelled parental notification.

This is the first time that this Court will have the opportunity to review the constitutionality of a criminal parental notification law on a fully developed record based on five years of the law's operation. The factual findings of the district court in Minnesota, which remain undisturbed by the Eighth Circuit, contradict some of the underlying assumptions upon which this Court has relied when considering the constitutionality of requiring parental involvement in a minor's abortion decision. Indeed, Justice Stevens, in his concurring opinion in *Bellotti II*, was prophetic when predicting that "[a] real statute—rather than a mere outline of a possible statute—and a real case or controversy may well present questions that appear quite different from the hypothetical questions Mr. Justice Powell has

ENJOINED CONSENT STATUTES: **California:** *American Academy of Pediatrics, California District IX v. Van de Kamp*, No. 884574 (Cal. Sup. Ct., San Francisco Cty. Dec. 28, 1987) (preliminary injunction); **Florida:** *Jacksonville Clergy Consultation Service, Inc. v. Martinez*, 696 F. Supp. 1445 (M.D. Fla. 1988) (preliminary injunction); **Kentucky:** *Eubanks v. Collins* II, No. C82-0360-L(A) (W.D. Ky. Aug. 23, 1988) (temporary restraining order); **Mississippi:** *Barnes v. Mississippi*, No. J86-0458(w) (S.D. Miss. filed July 24, 1986) (preliminary injunction); **Pennsylvania:** *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 686 F. Supp. 1089 (E.D. Pa. 1988) (preliminary injunction).

Arizona maintains on the books a consent statute, Ariz. Rev. Stat. Ann. § 36-2152 (Supp. 1988), which was permanently enjoined in *Roe v. Collins*, No. 85-2118PHX CLH (D. Ariz. Aug. 14, 1987). This statute is no longer under judicial review.

28 Not enforced: Idaho, Montana, South Carolina and Tennessee. Maryland's statute was declared unconstitutional per opinion of the Attorney General. No. 85-035 (Dec. 31, 1985).

29 Alabama, Indiana, Louisiana, Massachusetts, Missouri, North Dakota, Rhode Island, Utah and West Virginia.

elected to address." *Bellotti v. Baird*, 443 U.S. 622, 656 n.4 (1979) (Stevens, J., concurring in the judgment) (hereinafter *Bellotti II*).

While this Court in *Bellotti II* was hopeful that a notice or consent and judicial bypass scheme would serve significant state interests, the evidence compiled in this case reveals what this Court previously could not have known: that a requirement of two-parent notice, even with a judicial bypass system, is disastrous for pregnant minors and their families. It is a matter of profound importance to minors and their families nationwide for this Court to revisit the question of the constitutionality of such laws, particularly laws with the two-parent notification requirement, on the factual record herein.

II. THE EIGHTH CIRCUIT'S DECISION CONFLICTS WITH PRECEDENTS OF THIS COURT.

A. The Eighth Circuit's holding that two-parent notification is constitutional conflicts with this Court's previous rulings regarding minors' fundamental privacy rights and the integrity of families.

1. The Eighth Circuit erred in concluding that notice is less burdensome than consent.

While upholding the requirement of two-parent notice without exception in the Minnesota statute, the Eighth Circuit relies on its assumption that a notice requirement is "substantially less burdensome" than a consent requirement. (94a).[30] This assumption is in error for three reasons.

First, this Court has treated notice and consent statutes as the same for purposes of constitutional review. *See City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 427 n. 10 (1983) (it is "parental involvement" which minors must be given an opportunity to avoid, whether that involvement means notice or consent); *Bellotti II*, 443 U.S. at 647 (stat-

30 The Eighth Circuit came to this conclusion notwithstanding its own finding that this Court held that notice and consent were the same and both required a bypass option. (81a).

ute unconstitutional because it fails, *inter alia*, to provide every minor an opportunity to "go directly to a court without first consulting or notifying her parents"); *see also Zbaraz v. Hartigan*, 763 F.2d 1532, 1539 (7th Cir. 1985), *aff'd per curiam by an equally divided court*, 108 S. Ct. 479 (1987); *Planned Parenthood of Rhode Island v. Board of Medical Review*, 598 F. Supp. 625, 634 (D.R.I. 1984) (spousal notice the same as spousal consent).

Second, notice and consent statutes are, in fact, treated as the same by minors, parents and health officials. *See, e.g.*, (119a). This is particularly true in Minnesota, where the statute requires written proof of compliance and where parents, therefore, were required to sign an acknowledgment that they were in fact notified. (2a). Further, undisputed proof at trial showed that it is the initial notice, not denied consent, that presents an obstacle to minors.[31]

Third, even assuming, *arguendo*, that consent and notice are *not* factually the same, the standard of review adopted by this Court does not distinguish between degrees of burden on a constitutional right. Because the right to choose to have an abortion is a fundamental one, the only question is whether a particular statute burdens that right, not whether it burdens it by a specific amount. *See Akron*, 462 U.S. at 419 n.1 (rejecting the dissent's use of an "undue burden" standard). The standard to be employed in the present case is, therefore, the same as in all challenges involving fundamental rights.

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31 As this Court itself has stated: "[M]any parents hold strong views on the subject of abortion, and young pregnant minors, especially those living at home, are particularly vulnerable to their parents' efforts to obstruct both an abortion and their access to court." *Bellotti II*, 443 U.S. at 647 (plurality).

Indeed, a former Massachusetts judge testified in *Hodgson* that, of the 200 minors he saw pursuant to Massachusetts' parental consent statute, Mass. Gen. Laws. Ann. ch. 112, § 12S (West 1983), he could not recall one instance where the minor resorted to judicial bypass following her parents' refusal to grant consent. Instead, minors went to court to avoid the initial notice to their parents. (112a-113a).

2. The Eighth Circuit erred in concluding that a right to be involved in the medical decisions of minor offspring is inherent in every biological parent and is independent of the best interests of the minor.

Although this Court has permitted greater state regulation of a minor's right to privacy than that allowable for adults, *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 74 (1976), the state interests recognized as sufficient to justify such regulation are specific and are not to be expanded at will by lower courts.[32] This Court has recognized that the state's predominant interest in minors is the protection of their welfare. *Bellotti II*, 443 U.S. at 635 (plurality) (citing *McKeiver v. Pennsylvania*, 403 U.S. 528, 550 (1971)); *H.L. v. Matheson*, 450 U.S. 388, 409 (1981). Although this Court has referred to the protection of family integrity and parental authority, *Bellotti II*, 443 U.S. at 637-39 (plurality), the latter interest has never been treated as absolute or as independent of the best interests of the minor.[33]

In upholding Minnesota's two-parent requirement, the Eighth Circuit appears to believe that a state has a significant interest in protecting *every* biological parent's involvement in his or her child's abortion decision. (89a-92a). This view conflicts with this Court's precedent for two reasons. First, by requiring that every biological parent be involved in the abortion decision, it sanctions an absent and/or non-custodial par-

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32 In an affirmative constitutional challenge to a state statute, a law that impinges on a fundamental right is considered presumptively unconstitutional. *Harris v. McRae*, 448 U.S. 297, 312 (1980) (quoting *Mobile v. Bolden*, 446 U.S. 55, 76 (1980) (plurality)). Thus, even where it is a minor whose rights are infringed, the state must prove that "the statute plainly serves important state interests [and] is *narrowly drawn* to protect *only* those interests . . . ." *H.L. v. Matheson*, 450 U.S. 388, 413 (1981) (emphasis added). *Cf. Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 75 (1976); *Zbaraz v. Hartigan*, 763 F.2d at 1536-37.

33 It is for this reason that even immature minors may obtain an abortion without parental knowledge if it is in *their* best interest to do so. *Bellotti II*, 443 U.S. at 647-48. This is so notwithstanding any independent right or interest of her parents.

ent's interference with the integrity of the single-parent family and the authority of the single parent.[34] As a result, single parents, like plaintiffs herein, have had to bear the burden of appearing in court, sometimes being compelled to reveal private information about their relationships with the absent parent. *See supra* note 12 and accompanying text.

Second, the parental interest discussed by the Eighth Circuit can only extend as far as is contiguous with the child's best interests. If, as the district court found, there are many parents who do not act in their children's best interests and indeed who act in a detrimental manner, *see supra* notes 10, 11, then states should not require that *all* parents be informed of their daughters' abortion decision. As noted by Justice Marshall, parental authority has been "denied legal protection when its exercise threatens the health or safety of the minor children." *Matheson*, 450 U.S. at 449 (Marshall, J., dissenting) (citing *Prince v. Massachusetts*, 321 U.S. 158, 169-70 (1944)); *see also Bellotti II*, 443 U.S. at 649 (parental involvement must be consistent with the child's best interests); *Wisconsin v. Yoder*, 406 U.S. 205, 233-34 (1972) (". . . the power of the parent . . . may be subject to limitation under *Prince* if it appears that parental decisions will jeopardize the health or safety of the child . . .").

A requirement that is so extensive, and so unproductive can hardly be considered "narrowly drawn" to serve a state interest. The requirement is, therefore, unconstitutional.

34 Furthermore, as noted by Chief Judge Lay in his dissent, it gives the non-custodial parent more rights than he or she may otherwise have had, since such a parent typically "loses all power with respect to [even] major decisions." (105a) (quoting Wexler, *Rethinking the Modification of Child Custody Decrees*, 94 Yale L.J. 757, 808 (1985)).

B. The Eighth Circuit's conclusion, that the facial approval of statutes modeled on the standards set forth in *Bellotti II* mandated approval of Minnesota's law, conflicts in principle with this Court's constitutional jurisprudence.

1. The Eighth Circuit erred in failing to recognize the materiality of the district court's findings of fact to a determination on the constitutionality of Minnesota's law.

The Eighth Circuit upheld Minnesota's parental notice statute citing to this Court's opinions in *Bellotti II* and *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983). *See* (85a-86a). Noting only that "similar" laws had been upheld, and erroneously believing that this Court had previously been presented with a factual record such as the one below, the court, *sub silentio*, concluded that the actual effects of a law in operation are irrelevant to judicial review of its constitutionality. This notion is antithetical to the principles of constitutional adjudication embraced by this Court.

Resolution of conflicts between the Constitution and laws "is the very essence of judicial duty." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803). A function vital to the fulfillment of this duty is the lower federal courts' capacity to act as finders of fact. The question of whether a particular statute actually burdens the plaintiff class, *see Storer v. Brown*, 415 U.S. 724, 740 (1974), or substantially serves asserted state interests, *see Plyler v. Doe*, 457 U.S. 202, 228 (1982); *Horton v. Marshall Public Schools*, 769 F.2d 1323, 1330 (8th Cir. 1985), has always been, therefore, one of fact to be determined by the district court on the record. *See also United States v. Carolene Products Co.*, 304 U.S. 144, 153-54 (1938); *New Jersey Citizen Action v. Edison Township*, 797 F.2d 1250, 1260 (3d Cir. 1986), *cert. denied sub nom. Township of Piscataway v. New Jersey Citizen Action*, ____ U.S. ____, 94 L.Ed.2d 186 (1987).[35]

35 Of course, where no factual record exists, or none is placed before it, this Court's decision is perforce based on the face of the statute and is

Moreover, even a law found to be valid on its face and as a matter of law may subsequently be held unconstitutional in operation based on the facts. Thus, in *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court specifically held that a finding of facial validity would not preclude a future finding of invidious discrimination based on factual proof that the scheme is discriminatory in effect once in operation. *Id.* at 97 n.131. *See also Storer*, 415 U.S. at 740; *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 461-62 (1945); *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395-97 (1926).[36]

The Eighth Circuit paid only lip service to these established principles. (85a). For instance, the court declined "to allow specific factual findings with reference to no- and one-parent households to invalidate the notice/bypass procedure . . . ." (89a-90a). In so doing, the court assumed that "the Supreme Court has considered the issues factually before the district court [in *Hodgson*] and has recognized as a *matter of law* that parental notice or consent requirements do not unconstitutionally burden a minor's rights when an appropriate judicial bypass is in place." (85a) (emphasis added) (footnote omitted). In a similar vein, the en banc opinion also stated that the "approval given to similar statutory plans [in prior Supreme Court cases] mandates approval in this case." *Id.*

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restricted to statutory construction. Thus, in the absence of factual records in *Bellotti II*, 443 at 656 n.4 (Stevens, J., concurring in the judgment), and *Ashcroft*, 462 U.S. at 491, the parties as well as this Court treated the questions presented as pure matters of statutory construction.

36 Lower courts have also preserved this distinction. For instance, in *Elbe v. Yankton Independent School District*, 714 F.2d 848 (8th Cir. 1983), the Eighth Circuit held that "[f]acial neutrality of a particular statute is not sufficient if the statute, as construed, applied or administered violates first amendment proscriptions." *Id.* at 852. Similarly, in *New Jersey Citizen Action*, the Third Circuit held that neither factual assumptions in prior Supreme Court cases on a different issue, nor the "meager record" in a prior circuit court opinion could "be considered to have foreclosed all future litigation anywhere else . . . on this issue no matter how compelling the facts produced by the challengers" of a different though comparable ordinance. 797 F.2d at 1259-60.

The logic of these statements is plainly faulty. First, this Court could not have previously considered the factual issues before the *Hodgson* district court because the factual record developed before that court is the first and only one of its kind—all prior challenges to parental notice and consent statutes had been facial in nature. *See Matheson*, 450 U.S. at 405; *Ashcroft*, 462 U.S. at 491; *Bellotti II*, 443 U.S. at 656 n.4 (Stevens, J., concurring in the judgment). In short, because the statutes at issue in *Bellotti* and *Ashcroft* were enjoined *before* going into effect, by definition there could not have been facts before the Court on the actual impact of such laws in operation.

Second, by refusing to consider the facts that were presented, the en banc opinion ignores the importance of the fact finder's function, not only in the first instance, but also to this Court's review process. Third, by stating that the statute was constitutional as a "matter of law," the opinion vitiates this Court's distinction between facial and operational challenges.[37] Finally, by relying on this Court's findings of facial validity in "similar" statutes, the opinion ignores the differences between these statutes and the situations to which they were applied.

2. The Eighth Circuit's reliance on its own factual conclusions, notwithstanding findings of the district court to the contrary, conflicts with decisions of this Court and with Rule 52 of the Federal Rules of Civil Procedure.

The en banc opinion constructs a new theory of constitutional adjudication, one making facts irrelevant to a court's decision. *See* Section B(1), *supra*. Furthermore, wherever the court did review the factual record presented, it either misconstrued the record or *sua sponte* found a "fact" not found by the district court. Failure to abide by the Federal Rules of Civil Procedure conflicts with this Court's decisions.

Rule 52 of the Federal Rules of Civil Procedure states, "[f]indings of fact, whether based on oral or documentary evi-

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37 *See generally*, Pine, *Speculation and Reality: The Role of Facts in Judicial Protection of Fundamental Rights*, 136 U. Pa. L. Rev. 655 (1988).

dence, shall not be set aside unless clearly erroneous . . . ." Fed. R. Civ. P. 52(a).[38] As this Court held in *Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985),

> [t]he reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court . . . . If the district court's account of the evidence is plausible in the light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as trier of fact, it would have weighed the evidence differently.

Id.

Contrary to these standards, the Eighth Circuit overruled the district court's findings in several respects. For example, the en banc opinion states that the bypass procedure "provides an effective and independent method for analyzing the situation of the individual pregnant minor." (90a). The district court found, however, that the only minors who utilized the procedure were those who were mature or "best interest" minors. *See* (23a-24a). The district court also found that although there was no systemic failure to provide a bypass proceeding in the most expeditious manner, the court bypass was so daunting that some mature minors and best interest minors did not avail themselves of the opportunity to use the procedure. (20a).

The en banc opinion also states that "[a]ny added burden the two-parent notification requirement imposes in individual cases is negated by the judicial bypass mechanism, which enables a mature or 'best interests' minor to go directly to court without consulting or notifying both parents." (93a). The district court, however, made no finding that such a "negation" occurred.[39]

38 "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed." *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985) (quoting *U.S. v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

39 There is also some question as to the extent of the Eighth Circuit's belief in the existence of this negation. In its opinion it notes that

On the contrary, it found that the bypass procedure itself imposed burdens on those minors utilizing it—burdens ranging from delays in obtaining abortions to added expense to great emotional stress. It also found that the bypass mechanism imposed burdens on the single parent plaintiffs who accompanied their daughters to court in order to avoid notifying the absent parent. *See supra* note 12 and accompanying text.

3. The Eighth Circuit's determination that Minnesota's law was constitutional, without first concluding that the statute was narrowly drawn to serve a significant state interest, conflicts with this Court's prior decisions regarding the standard of review.

As noted in Section II(A), *supra*, this Court has held that laws burdening a minor's fundamental right to privacy must not only be necessary to further a significant state interest, but also must be narrowly tailored to serve that interest. *Matheson*, 450 U.S. at 413. *See Danforth*, 428 U.S. at 75 (mandatory consent provision invalid for overbroadness). Statutes that are not so "narrowly tailored" are invalid notwithstanding the presence of a state interest furthered by the law. Thus, in *Akron*, this Court held invalid a municipal ordinance, requiring all second trimester abortions to be performed in a hospital, on the basis that its scope was broader than necessary to serve the state's interest in health regulation. 462 U.S. at 438. *See also*, *Plyler*, 457 U.S. at 228.

In the present case, the Eighth Circuit did not even inquire whether the statute was narrowly tailored to serve only the state's interest in protecting the welfare of immature minors and those whose best interests would be served by consultation with their parents. Instead, the court intimated that the district court erred in "concentrating upon the impact of the statute on the pregnant minor not living with both parents, and on the mature minor or non-best interest pregnant minor" and in only

". . . the trauma of the bypass procedure, compared to its efffectiveness raise[s] considerable questions about the practical wisdom of this statute." (85a).

giving "limited consideration to the 50% or more pregnant minors who live with both parents and to pregnant minors who are immature and whose best interests may require parental involvement." (95a). The court concluded that "the statute may not be invalidated because it does not correspond perfectly in all cases to the state's asserted interests", (93a) (citation omitted), and that "[i]f there is to be any regulation . . . it must apply to all." (90a).

This conclusion is erroneous for two reasons. First, it ignores the fact that the state's asserted interest in this case can *only* be to protect immature minors whose best interest is served by parental involvement. Thus, the statute must be scrutinized as to whether it is tailored to serve *that* interest without burdening the rights of other minors. As the district court found, "Minn. Stat. § 144.343(2)-(7) imposes the substantial burden of obtaining a judicial waiver of the parental notification requirement upon a group of minors composed almost entirely of either mature minors or minors whose best interests are not served by notification." (42a).

Second, although it may be true that this Court has never demanded that a statute's fit be "perfect", it is also true that this Court nevertheless requires that a statute's fit be "reasonable." *See Akron*, 462 U.S. at 438 (statute not reasonable in light of evidence that second trimester abortions can be safely performed outside of hospitals). Allowing a margin of error of approximately 50% hardly seems reasonable in the light of the harm caused by its operation.

C. The Eighth Circuit's holding that the mandatory waiting period did not unconstitutionally burden minors' right to abortion conflicts with this Court's prior decisions as well as with the decisions of other courts.

In *Akron*, this Court invalidated a statute requiring a 24 hour waiting period after a woman gave her consent to an abortion. 462 U.S. at 450-51. In addition, nearly every court to consider a waiting period has found it unconstitutional as imposing a direct and substantial burden on women, whether adult or

minor, who seek to obtain an abortion.[40] *Zbaraz*, 763 F.2d at 1537; *American College of Obstetricians v. Thornburgh*, 737 F.2d 283, 293 (3d Cir. 1984) (parental consent and informed consent statute struck down); *Planned Parenthood Ass'n of Kansas City v. Ashcroft*, 655 F.2d 848, 866 (8th Cir. 1981), *aff'd in part, rev'd in part on other grounds*, 462 U.S. 476 (1983); *Indiana Planned Parenthood v. Pearson*, 716 F.2d 1127, 1142-43 (7th Cir. 1983).

In the face of this precedent, the Eighth Circuit found that the mandatory waiting period was not unconstitutional because the state had a significant interest in "ensuring that notification results in parental involvement." (97a). This decision does not logically follow, however, from the findings made by the district court. If, as the district court found, the notice requirement fails *in fact* to further intra-family communication, it is irrational to impose a burdensome waiting period so as to permit parent-child consultation which will not *in fact* occur. As noted in Section II(B), *supra*, a statute burdening a fundamental right must further a significant state interest; if it does not, it is not constitutional.

D. The Eighth Circuit's decision that Minnesota's parental notice statute is consistent with the equal protection clause of the United States Constitution conflicts with prior decisions of this Court.

The equal protection clause of the Fourteenth Amendment directs that "all persons similarly situated . . . be treated alike." *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)). Statutes that "impinge on personal rights protected by the Constitution" are subject to strict scrutiny by the courts and "will be sustained only if they are suitably tailored to serve a compelling state interest." *Cleburne*, 473 U.S. at 440. *See also Attorney General of New York v. Soto-Lopez*, 476 U.S. ____, 106 S.Ct.

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40 As noted in the Statement Of The Case, *supra*, the district court found that "[d]elay of any length in performing an abortion increases the statistical risk of mortality and morbidity." (23a).

2317 (1986); *Carey v. Brown*, 447 U.S. 455, 461-62 (1980); *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969).

In the case at hand, though Minnesota's law in operation clearly impinges on minors' fundamental rights,[41] the Eighth Circuit failed to subject it to the strict scrutiny required by this Court. (98a).[42] Instead, the court rejected plaintiffs' challenge under the equal protection clause based on a recitation of general precedent in the area of abortion "in other contexts", relying in particular on this Court's rejection of a challenge to a "similar" statute in *Matheson*. (98a).[43] Further, the Eighth Cir-

41 The district court found that the statute affirmatively burdens the abortion right by deterring minors who desire abortions from exercising this right. (20a). Morever, the increases in medical cost, risk and emotional trauma caused by the statute effectively punish minors for exercising their rights.

42 Indeed, the undisturbed findings of fact by the district court compel invalidation of the Minnesota statute even under heightened rational basis review. *See, e.g., Plyler*, 457 U.S. at 221, 223-24 (discrimination is not rational unless the state demonstrates that the statute "furthers some substantial goal of the State"); *Williams v. Vermont*, 472 U.S. 14, 25-28 (1985) (statute struck down under rational basis review because legislation's use of a proxy criterion, rather than legitimate governmental interest, too imprecise a classification). *See generally, Cleburne*, 473 U.S. 432, 439-50 (1985) (requirement of special use permit for home for the mentally retarded invalidated); *Hopper v. Bernalillo County Assessor*, 472 U.S. 612, 618-23 (1985) (property tax exemption for certain veterans held unlawful); *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 876-83 (1985) (tax statute preferring domestic insurance companies invalidated).

43 The "other contexts" to which the Eighth Circuit refers concern the issue of funding for abortions. *See Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464 (1977). Not only is that issue of minimal relevance to the case at hand, the court's reliance is misplaced for another reason. In the cases cited by the Eighth Circuit, this Court upheld the statutes in question because they placed no affirmative burden on the plaintiffs' rights; instead, the statutes merely failed to remove the obstacles that were already present. *McRae*, 448 U.S. at 316 ("although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation"); *Maher*, 432 U.S. at 474-77 & nn. 9, 10. *See also Akron*, 462 U.S. at 444 n.33 (statutes in *McRae* and *Maher* are "permissible . . . *only* because . . . [they] did not add any 'restriction on access to abortions that was not already there.' ") (citation omitted) (emphasis added). In the present case, however, the statutes created the obstacles. *See* footnote 2 and accompanying text *supra*. These distinguishable cases do not preclude a strict scrutiny of the statute at hand.

cuit addressed its conclusion exclusively to plaintiffs' claim that the statute impermissibly burdens minors who choose an abortion without imposing such burdens on those choosing to carry to term. (98a).[44]

The court's application of *H.L. v. Matheson* cannot be supported by the case itself or by basic principles of judicial review. First, the "primary" holding in *Matheson* concerned the standing of the plaintiff therein. *Akron*, 462 U.S. at 441 n.30. The part of the decision on which the Eighth Circuit relies concerned *only* the facial constitutionality of a statute directed at immature, unemancipated minors living with and dependent on their parents. *Matheson*, 450 U.S. at 407. Second, no factual record was present in *Matheson*; this Court therefore had no opportunity to review the effects of the statute on different classes of minors. Despite the existence of a factual record in this case, however, the Eighth Circuit does not cite to it even once in its dismissal of plaintiffs' equal protection claim. Third, *Matheson* itself relies on the conclusion that the medical deci-

44 The Eighth Circuit rejected, without analysis, plaintiffs' challenge to the statute's impermissible discrimination between those minors who can notify both parents and those who cannot. In so doing, the court stated that plaintiffs had not raised the claim at trial. (98a). Plaintiffs are entitled to the relief supported by the facts. *See, e.g., Schumann v. Levi*, 728 F.2d 1141, 1143 (8th Cir. 1984) (trial court must grant relief to which party is entitled); *Charles Schmitt & Co. v. Barrett*, 670 F.2d 802, 806 (8th Cir. 1982) (final judgment shall grant relief to which prevailing party is entitled) (citations omitted); *U.S. v. Marin*, 651 F.2d 24, 30-31 (1st Cir. 1981) (court must grant whatever relief is appropriate in case on facts proved). Plaintiffs pled and raised their claims under the equal protection clause, *Hodgson v. Minnesota*, No. 3-81 Civ. 538 (D. Minn. Jan. 23, 1985), and the facts at trial demonstrate without doubt that minors from different family settings are differentially and irrationally burdened by the Minnesota law. (21a-22a; 29a-31a; 43a-44a). Where a claim for relief under the equal protection clause has been stated and briefed and the facts demonstrate an irrational legislative classification, substantial injustice would result from a peremptory refusal to consider plaintiffs' claim. *See Singleton v. Wulff*, 428 U.S. 106, 121 (1976) (exception to general rule where "injustice might otherwise result") (quoting *Hormel v. Helvering*, 312 U.S. 552, 557 (1941)).

sions surrounding the abortion decision are graver than the decisions surrounding childbirth. *Matheson*, 470 U.S. at 411-13. This conclusion, made in the absence of a factual record, is irrational in the light of the evidence presented to, and ignored by, the Eighth Circuit.[45]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

January 5, 1989

/s/ JANET BENSHOOF

WILLIAM Z. PENTELOVITCH
BECKY PALMER
CHARLES HOFFMAN
Maslon, Edelman, Borman & Brand
1800 Midwest Plaza
Minneapolis, MN 55402
(612) 339-8015

JANET BENSHOOF
RACHAEL PINE
LYNN PALTROW
American Civil Liberties Union Foundation
132 West 43rd Street
New York, NY 10036
(212) 944-9800

LINDA OJALA
Kurzman, Grant & Ojala
2445 Park Avenue South
Minneapolis, MN 55404
(612) 871-9004

45 The evidence presented in this case shows that abortions are much safer than childbirth. Between 1976 and 1978, women in the United States were ten times more likely to die from childbirth than from a legal abortion. LeBolt, Grimes & Cates, *Mortality From Abortion and Childbirth: Are the Populations Comparable?*, 248 J.A.M.A. 188, 190 (1982). Since 1978, abortions have become even safer. *Id.* Teenagers, particularly younger teenagers, have a higher risk of death from continued pregnancy or childbirth than adult women. (144a-145a). Teenagers also have a higher risk of morbidity, i.e. major complication, from childbirth than adult women. (141a-142a). The psychological sequelae, both negative and positive, of an abortion decision bear similar results. For instance, a young woman who obtains an abortion is less likely to suffer negative outcomes than a young woman who carries to term. (138a). Further, the outlook for children of women who are denied abortions is more negative than for children of women who are not. (139a-140a).

88 No. 1125

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JANE HODGSON, M.D.; ARTHUR HOROWITZ, M.D.; NADINE T., JANET T., ELLEN Z., HEATHER P., MARY J., SHARON L., KATHY M., and JUDY M., individually and on behalf of all other persons similarly situated; DIANE P., SARAH L., and JACKIE H.; MEADOWBROOK WOMEN'S CLINIC, P.A., PLANNED PARENTHOOD OF MINNESOTA, a nonprofit Minnesota corporation; MIDWEST HEALTH CENTER FOR WOMEN, P.A., a nonprofit Minnesota corporation; WOMEN'S HEALTH CENTER OF DULUTH, P.A., a nonprofit Minnesota corporation,

Petitioners,

—v.—

THE STATE OF MINNESOTA; RUDY PERPICH, as Governor of the State of Minnesota; HUBERT H. HUMPHREY, III, as Attorney General of the State of Minnesota,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

WILLIAM Z. PENTELOVITCH, ESQ.
BECKY PALMER, ESQ.
CHARLES HOFFMAN, ESQ.
Maslon, Edelman, Borman & Brand
1800 Midwest Plaza
Minneapolis, Minnesota 55402
(612) 339-8015

Attorneys for Petitioner
Planned Parenthood of Minnesota

JANET BENSHOOF
(Counsel of Record)
RACHAEL PINE
LYNN PALTROW
American Civil Liberties
Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800

LINDA OJALA, ESQ.
KURZMAN, GRANT & OJALA
2445 Park Avenue South
Minneapolis, Minnesota 55404
(612) 871-9004

Attorneys for Petitioners
Other Than Planned
Parenthood of Minnesota

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ABORTIONS—NOTICE TO PARENTS

CHAPTER 228

H.F. No. 284

An Act relating to health; prescribing procedures for notification of parents, guardians, and conservators prior to performing abortions on certain persons; providing a penalty; amending Minnesota Statutes 1980, Section 144.343.

Be it enacted by the Legislature of the State of Minnesota:

Section 1. Minnesota Statutes 1980, Section 144.343, is amended to read:

144.343. Pregnancy, venereal disease, and alcohol or drug abuse,

Subdivision 1. Minor's consent valid. Any minor may give effective consent for medical, mental and other health services to determine the presence of or to treat pregnancy and conditions associated therewith, venereal disease, alcohol and other drug abuse, and the consent of no other person is required.

Subd. 2. Notification concerning abortion. Notwithstanding the provisions of Minnesota Statutes, Section 15.162, Subdivisiosn 4, section 13.02, subdivision 8, no abortion operation shall be performed upon an unemancipated minor or upon a woman for whom a guardian or conservator has been appointed pursuant to sections 525.54 to 525.551 because of a finding of incompetency, until at least 48 hours after written notice of the pending operation has been delivered in the manner specified in subdivisions 2 to 4.

(a) The notice shall be addressed to the parent at his usual place of abode and delivered personally to the parent by the physician or his agent.

(b) In lieu of the delivery required by clause (a), notice shall be made by certified mail addressed to the parent at this usual palce of abode with return receipt requested and restricted delivery to the addressee which means postal

employee can only deliver the mail to the authorized addressee. Time of delivery shall be deemed to occur at 12 o'clock noon on the next day on which regular mail delivery takes place, subsequent to mailing.

Subd. 3. Parent, abortion; definitions. For purposes of this section, "parent" means both parents of the pregnant woman if they are both living, one parent of the pregnant woman if only one is living or if the second one cannot be located through reasonably diligent effort, or the guardian or conservator if the pregnant woman has one.

For purposes of this section, "abortion" means the use of any means to terminate the pregnancy of a woman known to be pregnant with knowledge that the termination with those means will, with reasonable likelihood, cause the death of the fetus and "fetus" means any individual human organism from fertilization until birth.

Subd. 4. Limitations. No notice shall be required under this section if:

(a) The attending physician certifies in the pregnant woman's medical record that the abortion is necessary to prevent the woman's death and there is insufficient time to provide the required notice; or

(b) The abortion is authorized in writing by the person or persons who are entitled to notice; or

(c) The pregnant minor woman declares that she is a victim of sexual abuse, neglect, or physical abuse as defined in section 626.556. Notice of that declaration shall be made to the proper authorities as provided in section 626.556, subdivision 3.

Subd. 5. Penalty. Performance of an abortion in violation of this section shall be a misdemeanor and shall be grounds for a civil action by a person wrongfully denied notification. A person shall not he held liable under this section if the person establishes by written evidence that the person relied upon evidence sufficient to convince a careful and prudent person that

the representations of the pregnant woman regarding information necessary to comply with this section are bona fide and true, or if the person has attempted with reasonable diligence to deliver notice, but has been unable to do so.

Subd. 6. Substitute notification provisions. If subdivision 2 of this law is ever temporarily or permanently restrained or enjoined by judicial order, subdivision 2 shall be enforced as though the following paragraph were incorporated as paragraph (c) of that subdivision; provided, however, that if such temporary or permanent restraining order or injunction is ever stayed or dissolved, or otherwise ceases to have effect, subdivision 2 shall have full force and effect, without being modified by the addition to the following substitute paragraph which shall have no force or effect until or unless an injunction or restraining order is again in effect.

(c) (i) If such a pregnant woman elects not to allow the notification of one or both of her parents or guardian or conservator, any judge of a court of competent jurisdiction shall, upon petition, or motion, and after an appropriate hearing, authorize a physician to perform the abortion if said judge determines that the pregnant woman is mature and capable of giving informed consent to the proposed abortion. If said judge determines that the pregnant woman is not mature, or if the pregnant woman does not claim to be mature, the judge shall determine whether the performance of an abortion upon her without notification of her parents, guardian, or conservator would be in her best interests and shall authorize a physician to perform the abortion without such notification if said judge concludes that the pregnant woman's best interests would be served thereby.

(ii) Such a pregnant woman may participate in proceedings in the court on her own behalf, and the court may appoint a guardian ad litem for her. The court shall, however, advise her that she has a right to court appointed counsel, and shall, upon her request, provide her with such counsel.

(iii) Proceedings in the court under this section shall be confidential and shall be given such precedence over other pending matters so that the court may reach a decision promptly and without delay so as to serve the best interests of the pregnant woman. A judge of the court who conducts proceedings under this section shall make in writing specific factual findings and legal conclusions supporting his decision and shall order a record of the evidence to be maintained including his own findings and conclusions.

(iv) An expedited confidential appeal shall be available to any such pregnant woman for whom the court denies an order authorizing an abortion without notification. An order authorizing an abortion without notification shall not be subject to appeal. No filing fees shall be required of any such pregnant woman at either the trial or the appellate level. Access to the trial court for the purposes of such a petition or motion, and access to the appellate courts for purposes of making an appeal from denial of the same, shall be afforded such a pregnant woman 24 hours a day, seven days a week.

Subd. 7 Severability. If any provision, word, phrase or clause of Laws 1981, Chapter 228 or the application thereof to any person or circumnstance shall be held invalid, such invalidity shall not affect the provisions, words, phrases, clauses or application of Laws 1981, Chapter 228 which can be given effect without the invalid provision, word, phrase, clause or application, and to this end the provisions, words, phrases, and clauses of Laws 1981, Chapter 228 are declared to be severable.

Approved May 19, 1981

144.346 Information to parents

The professional may inform the parent or legal guardian of the minor patient of any treatment given or needed where, in the judgment of the professional, failure to inform the parent or guardian would seriously jeopardize the health of the minor patient.

Laws 1971, c. 544, § 6, eff. May 27, 1971.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil No. 3-81-538

Filed April 3, 1986

JANE HODGSON, M.D.; ARTHUR HOROWITZ, M.D.; NADINE T., JANET T., ELLEN Z., HEATHER P., MARY J., SHARON L., KATHY M., and JUDY M., individually and on behalf of all other persons similarly situated; DIANE P., SARAH L. and JACKIE H.; MEADOWBROOK WOMEN'S CLINIC, P.A., PLANNED PARENTHOOD OF MINNESOTA, a nonprofit Minnesota corporation; MIDWEST HEALTH CENTER FOR WOMEN, P.A., a nonprofit Minnesota corporation; WOMEN'S HEALTH CENTER OF DULUTH, P.A., a nonprofit Minnesota corporation,

Plaintiffs,

—v.—

THE STATE OF MINNESOTA; RUDY PERPICH, as Governor of the State of Minnesota; HUBERT H. HUMPHREY, III, as Attorney General of the State of Minnesota,

Defendants.

Jane Hodgson, M.D., et al,

Plaintiffs,

—v.—

The State of Minnesota, et al,

Defendants.

ORDER

The matter having come before this Court on the trial of the above captioned case and the Court having made certain rulings on the record pursuant to the agreement of counsel, it is on this 3rd day of April, 1986.

ORDERED that the attached caption be substituted in all future filings with the Court.

/s/ DONALD J. ALSOP
Honorable Donald J. Alsop,
U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

3-81 CIV 538

Jane Hodgson, M.D.; Arthur Horowitz, M.D.; Michelle Roe, Alice Roe, Diane Roe, Nadine T., Janet T., and Ellen Z.: individually and on behalf of all other persons similarly situated; Lauren Z.; Meadowbrook Women's Clinic, P.A., Planned Parenthood of Minnesota, a nonprofit Minnesota corporation, Midwest Health Center for Women, P.A., a nonprofit Minnesota corporation; Women's Health Center of Duluth, P.A., a nonprofit Minnesota corporation,

Plaintiffs,

—v.—

The State of Minnesota; Rudy Perpich, as Governor of the Stte of Minnesota; Hubert H. Humphrey, III, as Attorney General of the State of Minnesota,

Defendants.

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that The State of Minnesota, Rudy Perpich and Hubert H. Humphrey, III, defendants above named, hereby appeal to the United States Court of Appeals for the Eighth Circuit from the final judgment entered against defendants in this action on the 6th day of November, 1986.

Dated: November 18, 1986.

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota

By: _____

JOHN B. GALUS
Special Assistant
Attorney General

515 Transportation
Building
St. Paul, Minnesota 55155
Telephone: (612) 296-2654

Attorneys for Defendants

UNITED STATES DISTRICT COURT
UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

3-81 CIV 538

JANE HODGSON, M.D.; ARTHUR HOROWITZ, M.D.; MICHELLE ROE, ALICE ROE, DIANE ROE, NADINE T., JANET T., and ELLEN Z., individually and on behalf of all other persons similarly situated; LAUREN Z; MEADOWBROOK WOMEN'S CLINIC, P.A., PLANNED PARENTHOOD OF MINNESOTA, a nonprofit Minnesota corporation, MIDWEST HEALTH CENTER FOR WOMEN, P.A., a nonprofit Minnesota corporation; WOMEN'S HEALTH CENTER OF DULUTH, P.A., a nonprofit Minnesota corporation,

Plaintiffs,

—v.—

THE STATE OF MINNESOTA; RUDY PERPICH, as Governor of the State of Minnesota; HUBERT H. HUMPHREY, III, as Attorney General of the State of Minnesota,

Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

AMERICAN CIVIL LIBERTIES UNION FOUNDATION by JANET BENSHOOF, Esq., RACHAEL PINE, Esq. and SUZANNE LYNN, Esq. of New York, New York, appeared on behalf of plaintiffs.

MASLON, EDELMAN, BORMAN & BRAND by WILLIAM PENTELOVITCH, Esq. of Minneapolis, Minnesota, appeared on behalf of plaintiff Planned Parenthood of Minnesota.

HUBERT H. HUMPHREY, III, Attorney General of the State of Minnesota by JOHN GALUS, special Assistant Attorney General

and PETER M. ACKERBERT, Special Assistant Attorney General, St. Paul, Minnesota, appeared on behalf of defendants.

The above-entitled matter came before the court for trial from February 10, 1986, until March 13, 1986, and for argument on June 11, 1986. Having considered the evidence and being fully advised in the premises, the court makes the following:

FINDINGS OF FACT

1. *INTRODUCTION*

1. Plaintiffs Jane Hodgson, M.D., and Arthur Horowitz, M.D., are licensed physicians engaged in the practice of obstetrics and gynecology, including the performing of abortions, in Minnesota.

2. Plaintiff Meadowbrook Women's Clinic, P.A., provides birth control, abortions and related medical services to its patients, including unemancipated minor women under the age of 18 at a medical facility located in St. Louis Park, Minnesota.

3. Plaintiff Planned Parenthood of Minnesota provides birth control, abortions and related medical services to its patients, including unemancipated minor women under the age of 18, at a clinic located in St. Paul, Minnesota.

4. Plaintiff Midwest Health Center for Women provides birth control services, abortions, and related medical services to its patients, including unemancipated minor women under the age of 18, at a clinic located in Minneapolis, Minnesota.

5. Plaintiff Women's Health Center of Duluth, P.A., provides birth control services, abortions, and related medical services to its patients, including unemancipated minor women under the age of 18, at a clinic located in Duluth, Minnesota.

6. Plaintiff Alice Roe was a 16-year old unemancipated minor and seven weeks pregnant at the commencement of this

action. Alice Roe asserts that she was at that time mature and that notification of her parents of her desire to have an abortion would not have been in her best interests.

7. Plaintiff Michelle Roe was a 15-year-old unemancipated minor who was pregnant at the commencement of this action. Michelle Roe asserts that she was at that time mature and that notification of her parents of her desire to have an abortion would not have been in her best interests.

8. Diane Roe was a 16-year-old unemancipated minor and eight weeks pregnant at the commencement of this action. Diane Roe asserts that she was at that time mature and that notification of her parents of her desire to have an abortion would not have been in her best interests.

9. Plaintiff Nadine T. was a 16-year-old unemancipated minor and pregnant as of the time of the filing of the amended complaint in this action. Nadine T. asserts that she was at that time mature and that notification of her parents of her desire to have an abortion would have not been in her best interests.

10. Plaintiff Janet T. was a 16-year-old unemancipated minor and pregnant as of the time of the filing of the amended complaint in this action. Janet T. asserts that she was at that time mature and that notification of her father of her desire to have an abortion would have not been in her best interests.

11. Ellen Z. was a 17-year-old unemancipated minor and pregnant as of the time of the filing of the amended complaint in this action. Ellen Z. asserts that she was then mature and that notification of her father of her desire to have an abortion would not have been in her best interests.

12. Plaintiffs Alice Roe, Michelle Roe, Diane Roe, Nadine T., Janet T., and Ellen Z. represent a class composed of pregnant minors who assert that they are mature and that notification of one or both of their parents would not be in their best interests.

13. Lauren Z. is the mother of plaintiff Ellen Z. Lauren Z. asserts that notification of Ellen Z.'s father of Ellen Z.'s desire

to have an abortion would not have been in Ellen Z.'s best interests.

14. Defendants are the State of Minnesota, its Governor and its Attorney General.

15. In 1981, the Legislature of the State of Minnesota enacted Minn. Laws 1981, ch. 228, codified as Minn. Stat. § 144.343 (2)-(7). The statute was to become effective August 1, 1981.

16. Subdivision 2 of the statute generally requires physicians or their agents to attempt with reasonable diligence to notify the parents of an unemancipated minor under the age of 18 at least 48 hours before performing an abortion. Subdivision 3 defines "parent" as both parents if both are living, one parent if only one is living or if the second one cannot be located through reasonably diligent effort, or the guardian or conservator if the pregnant woman has one. Subdivision 4 of the statute provides that the statutory notice requirement does not apply when the parents have consented to the abortion, when prompt action is needed to preserve the life of the minor, or when the minor reports that she is a victim of sexual or physical abuse or neglect as defined in Minn. Stat. § 626.556. Subdivision 5 subjects anyone performing an abortion in violation of Minn. Stat. § 144.343 (2)-(7) to criminal penalties and civil liability.

17. Subdivision 6 of the statute provides, in the alternative, that if subdivision 2 is ever enjoined by judicial order, then the same notice requirement shall be effective together with an optional procedure whereby an unemancipated minor may obtain a court order permitting an abortion without notice to her parents upon showing that she is mature and capable of giving informed consent to an abortion or, if she is not mature, that an abortion without notice to her parents nevertheless would be in her best interests.

18. In their amended complaints, plaintiffs seek a declaratory judgment that Minn. Stat. § 144.343 (2)-(7) violates the constitutions of the United States and the State of Minnesota and seek a permanent injunction against its enforcement. More particularly, plaintiffs claim that the statute violates their due

process rights, both on its face and as applied; that the statute violates the equal protection clause; and that the statute violates the due process, privacy and equal protection provisions of Article 1 of the Minnesota Constitution and also constitutes the delegation of administrative power to Minnesota state courts in violation of article 3 of the Minnesota Constitution.

19. Before the statute took effect on August 1, 1981, plaintiffs sought a temporary restraining order and preliminary injunction against the statute.

20. On July 31, 1981, the court temporarily restrained enforcement of subdivision 2 of the statute, but denied plaintiffs' motion for an order temporarily restraining enforcement of subdivision 6. On March 22, 1982, the court preliminarily enjoined subdivision 2 but denied a preliminary injunction of subdivision 6. By virtue of these two rulings, the parental notification requirement and the judicial bypass option of subdivision 6 went into effect on August 1, 1981, and have remained in effect since that date.

21. By memorandum order of January 23, 1985, the court granted in part and denied in part defendants' motion for partial summary judgment as to all of plaintiffs' claims concerning the judicial bypass procedure of subdivision 6. Specifically, the court granted partial summary judgment for defendants by dismissing all of plaintiffs' state constitutional claims on jurisdictional grounds and by ruling that, on its face, the judicial bypass procedure in subdivision 6 does not violate the constitutional equal protection and due process rights of pregnant minors. The court concluded, however, that plaintiffs should have the opportunity of a trial to prove their allegations that subdivision 6 is being applied unconstitutionally.

II. *AVAILABILITY OF ABORTION SERVICES IN THE STATE OF MINNESOTA*

22. Abortion services are less accessible in Minnesota than in the country as a whole. In Minnesota, 94% of the counties, or 82 out of 87 counties, have no readily available abortion provider. In 1982, 44% of women in Minnesota ages 15-44 lived in

a county with an abortion provider as compared to 72% of the same group in the country as a whole.

23. Access to information about abortion services in outstate Minnesota is comparatively limited. Many second trimester patients come from counties with no abortion providers and thus with no media advertising or listing in telephone books for abortion services.

24. Abortions are performed in only four public and nine private hospitals in Minnesota, and then only if a staff doctor requests it. There are only two hospitals where a patient can walk in and obtain an abortion: Hennepin County Medical Center and St. Paul-Ramsey. Virtually all of Minnesota's abortion providers are located in the two major metropolitan areas of the state: Duluth and Minneapolis-St. Paul. Many women have to travel long distances to obtain abortion services.

25. The transportation problems facing women seeking abortion in Minnesota are illustrated by the experiences of those attending the Women's Health Center Clinic in Duluth. The Health Center serves women from 24 counties in Minnesota, 14 counties in Wisconsin, 4 counties in Michigan and the Canadian Province of Ontario. Some of the women served by the Health Center drive six to seven hours to get to the clinic. Airline flights are not available from some areas. Bus service from some areas is infrequent, requiring some women to spend the night in Duluth.

Having to travel long distances creates barriers to obtaining services. These barriers include increased cost, particularly if lodging is required; delayed pregnancy diagnosis and delayed treatment of post-abortion complications; jeopardized privacy of women away from home; and more hazardous travel during winter.

Nearly 30% of all abortions performed in Minnesota in 1982 were obtained by women who lived outside the Twin Cities metropolitan area, an increase of 20% since 1976. The farther a women [sic] has to travel to obtain a abortion, the less likely she is to obtain one.

26. Women of all ages in Minnesota have abortions later in their pregnancies than in the United States as a whole. In 1981, 9.5% of women having abortions in the United States had second trimester abortion, while 13.5% of all women obtaining abortions in Minnesota did so in their second trimester. In 1982, 15% of women from outside the metropolitan area who had abortions did so during the second trimester as compared with only 10% of metro area women.

27. The cost of an abortion increases with gestational age because the procedure becomes more difficult and requires more skill on the part of the doctor. The Meadowbrook Clinic has the following fee schedule: under 12 weeks gestation, $225; 12-14 weeks, $275; 14-16 weeks, $395; 16-18 weeks, $450; 18-19 weeks, $550; 19-21 weeks, $650. After 21 weeks, Meadowbrook refers patients to St. Paul-Ramsey Hospital where a later abortion (22 weeks) costs $1600-1800; or to Wichita, Kansas, where a late abortion (up to 24 weeks) costs $2000 cash. None of these fees includes the cost of transportation or lodging. Minnesota will fund abortions for indigent women only if the pregnancy is the result of rape or incest, or if continuing the pregnancy would endanger the life of the woman.

28. Unfavorable publicity surrounding the abortion procedures and delivery of services has dissuaded some physicians from performing abortions. For example, the Women's Health Center in Duluth has been unable to contract local physicians to perform abortions. The Center has had to import physicians from small communities some distance from Duluth. Physicians are also concerned about the bombings of clinics and doctors' offices. Consequently, some physicians refer their abortion patients elsewhere.

III. *APPLICATION OF MINN. STAT. § 144.343 IN MINNESOTA, AUGUST 1, 1981, TO MARCH 13, 1986.*

A. *Compliance with* Bellotti v. Baird, *432 U.S. 622 (1979)*

1. *Legal Standard*

29. Minnesota Statutes § 144.343 (6) provides:

> (c)(i) If such a pregnant woman elects not to allow the notification of one or both of her parents or guardian or conservator, any judge of a court of competent jurisdiction shall, upon petition, or motion, and after an appropriate hearing, authorize a physician to perform the abortion if said judge determines that the pregnant woman is mature and capable of giving informed consent to the proposed abortion. If said judge determines that the pregnant woman is not mature, or if the pregnant woman does not claim to be mature, the judge shall determine whether the performance of an abortion upon her without notification of her parents, guardian, or conservator would be in her best interests and shall authorize a physician to perform the abortion without such notification if said judge concludes that the pregnant woman's best interests would be served thereby.

30. With the exception of a hearing occurring shortly after the enactment of § 144.343, judges in Minnesota have faithfully applied the standards set forth in subdivision 6. Those judges who consider themselves unable to faithfully apply this standard have consistently refused to hear bypass petitions.

31. Courts hearing bypass petitions regularly appoint guardians ad litem and provide appointed counsel to assist minors participating in bypass proceedings.

32. Judges, public defenders, and guardians ad litem do not adhere to a single interpretation of either the "maturity" or "best interests" standard. However, the variation in interpretation of these standards does not exceed that typical of verbally expressed legal standards. Moreover, these differences of inter-

pretation do not produce different results in actual bypass proceedings.

2. *Expedition*

33. Courts in Hennepin, Ramsey, and St. Louis Counties schedule bypass hearings on a regular basis. When necessitated by pressing need, these courts will hear a number of petitions greater than that normally scheduled for a single day. These courts also have in place procedures for hearing bypass petitions outside of normal business hours on an emergency basis.

34. Two or three days commonly elapse between a minor's first contact with the court and the hearing on her petition. A delay of this duration creates an increased medical risk to an abortion patient, albeit small in magnitude, and may increase the emotional tension attendant upon the judicial proceeding. Moreover, this delay sometimes combines with scheduling difficulties of a minor or her clinic to produce a longer delay. Thus, the delay in judicial bypass system as executed by courts in the metropolitan counties is burdensome to minor petitioners. However, this delay and its resultant burden are unavoidable and do not reflect a systemic failure to provide a judicial bypass option in the most expeditious practicable manner.

35. Although the court systems of the non-metropolitan areas have had less frequent occasion to apply the judicial bypass procedures than Hennepin, Ramsey, and St. Louis County courts, these court systems are acquainted with the statute and have applied it conscientiously when called upon to do so.

36. Courts of non-metropolitan counties called upon to hear bypass petitions generally have complied with their statutory obligation to advise petitioners of their right to appointed counsel and to provide such counsel upon request. These courts also generally have appointed guardians ad litem to assist petitioners.

37. Despite conscientious efforts to provide an expeditious court bypass option in non-metropolitan areas, a number of

counties are not served by a judge who is willing to hear bypass petitions. A minor in one of these counties must travel to another county, most commonly a metropolitan county, to obtain an expeditious hearing of her petition. Although burdensome, this necessity also does not reflect a systematic failure to provide a judicial bypass option in the most expeditious practicable manner.

38. On August 13, 1981, the Supreme Court of Minnesota issued an order directing that all petitions under subdivision 6 should initially be filed in and considered by the county courts throughout the state or, in the cases of Hennepin and Ramsey Counties, in the juvenile division of the district court of those two counties. In the same order, the Minnesota Supreme Court directed that all appeals should be on the record to a judge of the district court, including the district courts of Hennepin and Ramsey counties.

39. In an amended and supplemental order effective July 1, 1984, the Supreme Court of Minnesota provided that in a unified judicial district, an order denying a petition pursuant to the judicial bypass procedure shall be appealable on the record to two district court judges and if there be a division between those judges, the order denying the petition should stand.

40. No minor has been unable to obtain an expeditious appeal of an order denying her bypass petition.

3. *Anonymity*

41. Judges, public defenders, guardians ad litem, and court personnel involved in bypass proceedings are aware that Minn. Stat. § 144.343 (6) requires that bypass proceedings be kept strictly confidential. Those involved in the proceedings take steps to insure confidentiality, including destroying interview notes, holding hearings in judges' chambers rather than in open court, and referring to petitioners by first name only. In addition, public defenders and courts have departed from normal routines when adhering to the routine would have threatened confidentiality.

42. The record discloses that the confidentiality of minors electing the judicial bypass option has been breached only in a small number of isolated cases.

B. *Burdens Imposed by Minn. Stat § 144.343 (2)-(7)*

1. *Judicial Bypass Procedure*

43. As discussed above, scheduling practices in Minnesota courts typically require minors to wait two or three days between their first contact with the court and the hearing on their petitions. This delay may combine with other factors to result in a delay of a week or more. A delay of this magnitude increases the medical risk associated with the abortion procedures to a statistically significant degree. Even a shorter delay may push the minor into the second trimester, when the abortion procedure entails significantly greater costs, inconvienence, and medical risk.

44. The experience of going to court for a judicial authorization produces fear and tension in many minors. Minors are apprehensive about the prospect of facing an authority figure who holds in his hands the power to veto their decision to proceed without notifying one or both parents. Many minors are angry and resentful at being required to justify their decision before complete strangers. Despite the confidentiality of the proceeding, many minors resent having to reveal intimate details of their personal and family lives to these strangers. Finally, minors are left feeling guilty and ashamed about their lifestyle and their decision to terminate their pregnancy. Some mature minors and some minors in whose best interests it is to proceed without notifying their parents are so daunted by the judicial proceeding that they forego the bypass option and either notify their parents or carry to term.

Some minors are so upset by the bypass proceeding that they consider it more difficult than the medical procedure itself. Indeed, the anxiety resulting from the bypass proceeding may linger until the time of the medical procedure and thus render the latter more difficult than necessary.

2. *Two Parent Notice Requirement*

45. A minor who chooses not to go to court to avoid notifying her parents must notify both parents, if they are living, unless the second one cannot be located through reasonably diligent effort. The statute makes no exception for a non-custodial parent who is divorced or separated from the custodial parent, or for a parent who never married the custodial parent. No exception is made in the case of a parent, custodial or not, whom the minor considers likely to react abusively to notification, unless the minor is willing to declare that she is a victim of sexual or physical abuse.

46. If a minor declares that she is the victim of sexual or physical abuse, Minn. Stat. § 144.343(4)(c) obligates the recipient of this information to report it to the local welfare agency, police department, or the country sheriff pursuant to Minn. Stat. § 626.556(3). This obligation binds counselors and physicians at abortion clinics. The welfare agency must report the information to the law enforcement agency, and vice versa. Minn. Stat. § 626.556(3).

47. Minors who are victims of sexual or physical abuse often are reluctant to reveal the existence of the abuse to those outside the home. More importantly, notification to government authorities creates a substantial risk that the confidentiality of the minor's decision to terminate her pregnancy will be lost. Thus, few minors choose to declare they are victims of sexual or physical abuse despite the prevalence of such abuse in Minnesota, as elsewhere.

48. In practice, the requirement that the minor notify both parents, if living, affects many minors in single parent homes who have voluntarily notified the custodial parent. No exception is made, for example, in the case of a non-custodial parent who for years has exhibited no interest in the minor's development. No exception is made for parents likely to react with psychological, sexual or physical violence toward either the minor or the custodial parent. Minors in such circumstances must notify the non-custodial parent, or else go to court for authorization to proceed without notifying the non-custodial parent.

Notification of an abusive or even a disinterested absent parent may reintroduce that parent's disruptive or unhelpful participation into the family at a time of acute stress. Alternatively, going to court to seek authorization introduces a traumatic distraction into the family relationship at a stressful juncture. The emotional trauma attending either option tends to interfere with and burden the parent-child communication the minor voluntarily initiated with the custodial parent.

49. The two parent notification requirement also affects minors in two parent homes who voluntarily have consulted with one parent but not with the other out of fear of psychological, sexual, or physical abuse toward either the minor or the notified parent. Here, too, the minor must choose either to notify the second parent or to endure the court bypass procedure. Once again, the emotional trauma attending either option tends to interfere with and burden the parent-child communication the minor voluntarily initiated with the custodial parent.

50. Instances, such as those described above, in which the requirement that the minor notify both parents of her decision interferes with and burdens parent-child ommunication voluntarily initiated by the minor are not uncommon. Approximately 20-25% of minors who go to court for authorization are accompanied by one parent or indicate that they have already consulted with one parent.

3. *Forty-Eight Hour Waiting Period*

51. Minors who elect to notify one or both parents by written notice, including those whose parents refuse to sign acknowledgement forms despite having been told of their daughters' decision, must wait until 48 hours after actual or constructive delivery of written notice. Constructive delivery of mailed notice occurs at noon on the regular mail delivery day following mailing. Thus, Minn. Stat. § 144.343 delays effectuation of a minor's decision to terminate her pregnancy by at least 48 hours and more commonly by 72 hours.

52. This statutorily imposed delay frequently is compounded by scheduling factors such as clinic hours, transportation

requirements, weather, a minor's school and work commitments, and sometimes a single parent's family and work commitments. In many cases, the effective length of the delay may reach a week or more.

53. Delay of any length in performing an abortion increases the statistical risk of mortality and morbidity. The increase in risk becomes statistically significant when the length of delay reaches one week. Moreover, even delays of less than one week may push a woman into the second trimester. Second trimester procedures entail significantly greater costs, inconvenience, and risk.

C. *Results of Bypass Proceedings, August 1, 1981, to March 1, 1986*

54. The parties agreed to submit statistics reflecting disposition of bypass petitions filed in Minnesota from August 1, 1981, to March 1, 1986, in the form of tables compiling information obtained by affidavit from court officials in each Minnesota county. The table summarizing these statistics by judicial district is appended hereto.

55. During the period for which statistics have been compiled, 3,573 bypass petitions were filed in Minnesota courts. Six petitions were withdrawn before decision. Nine petitions were denied and 3,558 were granted.

56. Anomalous circumstances surrounded several of the petitions which were denied. Three denials occurred in Hennepin County. The Honorable Allen Oleisky, Judge of the Hennepin County District Court, Juvenile Division, recalls denying two of the more than one thousand petitions he has heard. One of these petitions was brought by a minor who did not actually wish to have an abortion, but rather to marry her boyfriend. Judge Oleisky denied the petition in order to assist the minor in effectuating this desire by shifting responsibility for preventing the abortion from the minor to the court. The second denial involved a minor whom the judge determined was being coerced into having an abortion by her parents. After determining the

minor did not actually wish to have an abortion, Judge Oleisky denied the petition.

The Honorable Gerald G. Martin, County Court Judge for the St. Louis County Family and Juvenile Court, granted all but one of the 225 or 226 petitions he heard during the period for which statistics were compiled. The petition Judge Martin denied was submitted by a rather immature 14 year old who was accompanied to court by her mother. The minor's father had been out of contact with the minor and her mother for more than seven years. Rather than proceed to the best interests inquiry, Judge Martin denied the petition because he was certain a notice mailed to the father's last known address would not reach him.

57. The single denials occurring in Anoka, Mower, and Lyon Counties each occurred in the first petition brought in those respective counties. The Nobles County Court denied one of the two petitions brought there to date. A comparison to the experience in the metropolitan counties, where the courts have heard large numbers of petitions and granted nearly all, suggests that some or all of the denials occurring in non-metropolitan counties are due more to the courts' unfamiliarity with the judicial bypass statute than to the petitioners' immaturity or best interests. For example, the Anoka County Court denied the first petition brought before it and then granted each of the 19 petitions heard during the remainder of the period for which statistics were compiled.

D. *Effectuation of State Interests*

1. *Asserted State Interests*

58. The Minnesota legislature had several purposes in mind when it amended Minn. Stat. § 144.343 in 1981. The primary purpose was to protect the well-being of minors by encouraging minors to discuss with their parents the decision whether to terminate their pregnancies. Encouraging such discussion was intended to achieve several salutory results. Parents can provide emotional support and guidance and thus forestall irrational and emotional decision-making. Parents can also provide information concerning the minor's medical history of which the minor may not be aware. Parents can also supervise post-abortion care. In addition, parents can support the minor's psychological sequelae that may attend the abortion procedure.

59. The court finds that a desire to deter and dissuade minors from choosing to terminate their pregnancies also motivated the legislature. Testimony before a legislative committee considering the proposed notification requirement indicated that influential supporters of the measure hoped it "would save lives" by influencing minors to carry their pregnancies to term rather than aborting.

2. *Testimony as to Beneficial Effect of Minn. Stat. § 144.343*

a. *Judicial Bypass/Notice Requirement*

60. The court heard testimony of judges who collectively have adjudicated over 90 percent of the parental notification petitions filed since August 1, 1981. None of these judges, on direct or cross examination, identified a positive effect of the law.

Honorable Allen Oleisky has heard over 1,000 parental notification petitions. He characterizes his function as "a routine clerical function on my part, just like putting my seal and stamp on it." Moreover, he believes that the statute dissuades some minors from having abortions because of the fear of going to court in a distant city.

Honorable Gerald Martin stated that he doesn't "perceive any useful public purpose to what [he is] doing in these cases;" moreover, he finds the court experience difficult for minors. "I think they find it a very nervewracking experience," he testified.

Honorable Neil Riley testified that he saw no beneficial effects of the statute and further that he sympathized with "the predicament" the minors were in.

Honorable William Sweeney testified, "I know as a judge you would like to think your decisions are important, that you are providing some—you are doing some legitimate purpose.

What I have come to believe . . . [is] that really the judicial function is merely a rubber stamp. The decision has already been made before they have gotten to my chambers. The young women I have seen have been very mature and capable of giving the required consent."

He further testified that "the level of apprehension that I have seen contrasted with even the orders for protection, which is a very intense situation, very volatile, and the custody questions, is that the level of apprehension is twice what I normally see in court . . . . You see all the typical things that you would see with somebody under incredible amounts of stress, answering monosyllabically, tone of voice, tenor of voice, shaky, wringing of hands, you know, one young lady had her—her hands were turning blue and it was warm in my office . . . ."

Mr. Paul Garrity, who adjudicated the same bypass petitions while a judge in Massachusetts, believed that the Massachusetts law accomplished nothing. "It just gives these kids a rough time. I can't think it accomplishes a darn thing. I think it basically erects another barrier to abortion." Further, he felt going to court was "absolutely" traumatic for minors. "You know, it was just—it was just another thing at a very, very difficult time in their lives," he said.

61. Clinic counselors, who participate on a daily basis in the law's implementation, are of a similar mind. Paula Wendt has counseled or supervised the counseling of more than 3,000 minors since the law went into effect. She concludes from her conversations with both parents and minors that the law has not promoted family integrity or communication. The law has, more than anything, disrupted and harmed families.

On the basis of her experience, Tina Welsh concludes that the law has not benefitted intra-family communication. A minor's unplanned pregnancy is a crisis which is not conducive to an attempt to build good family communications. Ms. Welsh does not believe that the law helps teenagers make a better decision about whether to [sic] have an abortion or continue the pregnancy. Requiring a minor to tell either her parents or a judge about her pregnancy and the reasons she wants an abortion makes no beneficial contribution to the minor's decision.

62. The public defenders who participate in bypass proceedings believe that the law serves no beneficial purpose. Its sole function, in their view, is to create a hurdle and impose additional stress upon the young women. Similarly, the guardians ad litem do not perceive a beneficial purpose to their participation in the process.

63. In most cases, minors seeking judicial authorization to terminate their pregnancies without informing their parents have already made up their minds before coming to court. Thus, judges, public defenders, and guardians ad litem find they impart no information and provide no counseling in the course of the bypass proceeding. Neither does the court system refer minors to their parents for guidance and support, as is demonstrated by the overwhelming rate of approval. At most, the bypass proceeding furthers the state's interest in providing minors with guidance and emotional support only insofar as the abortion clinics have expanded their counseling of minors at the insistence of judges who hear the petitions. Counselors and administrators from the major Minnesota clinics testified, however, that counseling of minors going to court and that of minors who do not differs merely in that the former are counseled about the court process and the latter are not.

64. Minors who seek authorization in Minnesota courts for confidential abortions tend to be above average in intelligence, education, and personal motivation. They also tend to be ambitious and concerned about the effect their decision will have on their futures.

65. Minnesota courts have denied only an infinitesimal proportion of the petitions brought since 1981. This fact indicates that in Minnesota immature, non-best interest minors rarely seek judicial authorization to terminate their pregnancies without parental involvement. Such minors either inform their parents, obtain an abortion outside Minnesota, or carry the pregnancy to term.

Dr. Gary B. Melton suggested two partial explanations for this phenomenon. First, comparisons of personality functioning between adolescents who abort and those who carry to term

generally show more adaptive, healthier functioning in the former group. Adaptation, in turn, marks a level of psychological and emotional development colloquially referred to as "maturity." Second, minor's desire to maintain a measure of privacy of information about her personal matters is an important indication of individuation, a principal development task of adolescence. Indeed, defendants' witness Dr. Vincent Rue testified that teenagers in the early stage of adolescence are much more likely to discuss a pregnancy than are teenagers in the mid-phase of adolescence who typically would desire more privacy, and teenagers in the latter stages of adolescence who would be the most private, and insist upon confidentiality. Adult women, in Dr. Rue's view, would be most insistent upon maintaining the confidentiality of their decision. Therefore, while there may be "no logical relationship between the capacity to become pregnant and the capacity for mature judgment concerning the wisdom of an abortion," *H. L. v. Matheson*, 450 U.S. 398, 408 (1981), some relationship does exist between the decision to abort in privacy and the capacity for mature judgment concerning the wisdom of this decision. Consequently, a regulation that affects only minors who have elected to terminate their pregnancies and to do so in privacy tends inevitably to reach only mature minors and immature minors driven to this choice by their own best interests. Such a regulation will fail to further the State's interest in protecting immature, non-best interest minors.

66. Dr. Jane Hodgson, a leading practitioner in the field of obstetrics and gynecology, has given Minnesota's parental notification law considerable thought. She concludes, "I honestly think there is no benefit whatsoever." The law has created "nothing but problems" for her teenage patients. Testimony by plaintiffs' other expert witnesses, each of unquestionably high standing in his or her respective field, corroborates this opinion. For example, Dr. Stephen Butzer testified, on the basis of his clinical experience, that when knowledge of an adolescent's pregnancy or abortion is inadvertently communicated to one or both parents, the effect of the communication on the family or

relationship between adolescent and parents is "almost universally negative."

67. Defendants offered the court no persuasive testimony upon which to base a finding that Minnesota's parental notification law enhances parent-child communications, or improves family relations generally. Dr. Vincent Rue possesses neither the academic qualifications nor the professional experience of plaintiffs' expert witnesses. More importantly, his testimony lacked the analytical force of contrary testimony offered by plaintiffs' witnesses. Dr. Richard T. F. Schmidt does not practice medicine in Minnesota, has never performed an abortion, and does not regularly counsel minors who wish to obtain abortions. Therefore, his testimony is less persuasive than the contrary testimony of witnesses closer in each of these respects to the issue before the court.

The court did not expect defendants to establish that in every case Minnesota's parental notification law protects pregnant minors, promotes parent-child communication, and improves family relations generally. Defendants did establish that notification can serve these interests in individual cases. Defendants failed, however, to establish that the law promotes these values more than it undermines them. Five weeks of trial have produced no factual basis upon which the court can find that Minn. Stat. § 144.343(2)-(7) on the whole furthers in any meaningful way the State's interest in protecting pregnant minors or assuring family integrity.

b. *Two Parent Requirement*

68. National statistics reveal that approximately one out of every two marriages ends in divorce. There is no testimony in the trial of this case indicating that the divorce rate in Minnesota differs from the national average. To the contrary, clinic experience indicates that only 50% of minors in the state of Minnesota reside with both biological parents. This figure is corroborated by one study indicating that 9% of minors in Minnesota live with neither parent, 33% live with only one parent and thus 42% do not live with both biological parents.

69. Studies indicating that family violence occurs in two million families in the United States substantially underestimate the actual number of such families. In Minnesota alone, reports indicate that there are an average of 31,200 incidents of assault on women by their partners each year. Based on these statistics, state officials suggest that the "battering" of women by their partners "has come to be recognized as perhaps the most frequently committed violent crime in the state" of Minnesota. These numbers do not include incidents of psychological or sexual abuse, low-level physical abuse, abuse of any sort of the child of a batterer, or those incidents which are not reported. Many minors in Minnesota live in fear of violence by family members; many of them are, in fact, victims of rape, incest, neglect and violence. It is impossible to accurately assess the magnitude of the problem of family violence in Minnesota because members of dysfunctional families are characteristically secretive about such matters and minors are particularly reluctant to reveal violence or abuse in their families. Thus the incidence of such family violence is dramatically underreported.

70. Divorce or separation usually impairs family communication severely. The non-custodial parent often has very little communication with the child. In addition, communication between divorced or separated spouses frequently is marked with the kind of hostility and angry vindictiveness that characterized the divorce or separation.

The effect of compelling an adolescent to share information about her pregnancy and abortion decision with both parents in a divorced or separated situation can be harmful. The non-custodial parent often will reintegrate with the family in a disruptive manner. The adolescent may be perplexed as to why the non-custodial parent should become an important factor in her life at this point, especially when the parent previously has paid her oittle [sic] attention and offered little support. Moreover, the testimony revealed no instances in which beneficial relations between a minor and an absent parent were reestablished following required notification. Therefore, the minor may suffer disappointment when an anticipated reestablishment of her

relationship with the absent parent does not occur, as is most likely given the trying circumstances under which communication is renewed.

Involuntary involvement of the second biological parent is especially detrimental when the minor comes from an abusive, dysfunctional family. Notification of the minor's pregnancy and abortion decision can provoke violence, even where the parents are divorced or separated. Studies have shown that violence and harrassment may continue well beyond the divorce, especially when children are involved.

The reaction of the custodial parent to the requirement of forced notification is often one of anger, resentment and frustration at the intrusion of the absent parent. Frequently, the custodial parent fears that the absent parent will use the notification to threaten the custody rights of the custodial parent. Furthermore, a mother's perception in a dysfunctional family that there will be violence if the father learns of the daughter's pregnancy is likely to be an accurate perception.

71. Twenty to twenty-five percent of the minors who go to court either are accompanied by one parent who knows and consents to the abortion or have already told one parent of their intent to terminate their pregnancy. The vast majority of these voluntarily informed parents are women who are divorced or separated from spouses whom they have not seen in years. Going to court to avoid notifying the other parent burdens the privacy of both the minor and the accompanying parent. The custodial parents are angry that their consent is not sufficient and fear tht notification will bring the absent parent back into the family in an intrusive and abusive way.

72. Minors who ordinarily would notify one parent may be dissuaded from doing so by the two-parent requirement. A minor who must go to court for authorization in any event may elect not to tell either parent. In these instances, the requirement that minors notify both biological parents actually reduces parent-child communication.

c. *48 Hour Waiting Period*

73. Some period of mandatory delay between the time of actual or constructive notification of the minor's parent and the abortion itself would reasonably effectuate the State's interest in protecting pregnant minors. A waiting period may allow parents to aid, counsel, advise, and assist minors in determining whether to undergo an abortion or to provide the physician with information which may be relevant to the medical judgments involved.

74. The interest effectuated by the State's 48 hour waiting period could be effectuated as completely by a shorter waiting period. Therefore, to the extent the waiting period exceeds that necessary to allow parents to consult with minors contemplating abortion, it fails to further the State's interest in protecting pregnant minors.

CONCLUSIONS OF LAW

Plaintiffs attack the constitutionality of Minn. Stat. § 144.343 on several fronts. First, plaintiffs contend that § 144.343, subd. 2 is facially unconstitutional because it fails to afford minors the opportunity to obtain a judicial or administrative waiver of the statute's notification requirement. *See Planned Parenthood Ass'n of Kansas City v. Ashcroft*, 462 U.S. 476 (1983) (*Ashcroft*); *Bellotti v. Baird*, 432 U.S. 622 (1979) (*Bellotti II*). Second, plaintiffs contend that even with the judicial bypass procedure of subd. 6 incorporated as subd. 2(c) by virtue of this court's temporary restraining order of July 31, 1981, § 144.343(2)-(7), as applied in Minnesota, unduly burdens the fourteenth amnedment due process rights of pregnant minors. Even if § 144.343(2)-(7) is not unconstitutional in its entirety, plaintiffs contend that the statute's requirement that minors notify both parents except when one parent is dead or the minor is unable to locate a parent with reasonable diligence, § 144.343(2), (3), is unconstitutional. Finally, plaintiffs contend the 48-72 hour waiting period imposed upon minors who choose to notify one or both of their parents in writing, *see*

Minn. Stat. § 144.343(2)-(4), is unconstitutional because it impermissibly burdens a minor's right to choose abortion.

Noting "a requirement unduly burdensome in operation will be struck down even if not clearly invalid on its face," *see Planned Parenthood League of Massachusetts v. Bellotti*, 641 F.2d 1006, 1011 (1st Cir. 1981), this court denied defendant's motion for summary judgment with respect to plaintiffs' as applied due process challenge to § 144.343(2)-(7). *Hodgson v. Minnesota*, Civ. No. 3-81 538 slip op. at 11 (Jan. 23, 1985). The court found that dispute existed with respect to material issues of fact including the confidentiality of the judicial bypass procedure, delays and inconvenience, and lack of access to the courts in rural counties. This list of material facts was not all inclusive. *Hodgson*, slip op. at 10. Therefore, the action proceeded to trial upon these issues and others.

I. *STANDARD OF REVIEW*

Every woman has the fundamental right to terminate her pregnancy free from unwarranted government intrusion. *Roe v. Wade*, 410 U.S. 113 (1973); *see Thornburgh v. American College of Obstetricians and Gynecologists*, ____ U.S. ____, 106 S.Ct. 2169, 2178 (1986) (specifically reaffirming *Roe v. Wade*); *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 420 (1983) (*Akron*) (similar). The right to choose abortion rather than childbirth is "not unqualified and must be considered against important state interests in regulation." *Roe v. Wade*, 410 U.S. at 154. Rather, the right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy. *Maher v. Roe*, 432 U.S. 464, 473-74 (1977).

A state regulation that burdens an individual's right to decide to terminate her pregnancy by substantially limiting her access to the means of effectuating that decision is subject to strict judicial scrutiny. *Carey v. Population Services International*, 431 U.S. 678, 688 (1977). Such a burden is imposed by a regulation that places an obstacle, absolute or otherwise, in the path of one seeking to exercise the protected right. *Maher v. Roe*, 432 U.S. 464, 472 (1977).

The term "undue burden" does not accurately describe the magnitude of interference necessary to trigger heightened judicial scrutiny. The Supreme Court has squarely rejected this analysis as "wholly incompatible with the existence of the fundamental right recognized in *Roe v. Wade*." *Akron*, 462 U.S. at 419-21 n. 1. Indeed, the Court's traditional three tiered constitutional analysis exists to provide the courts a value-neutral framework by which to test the constitutionality of legislative enactments. Determining whether a burden is "undue" as a threshold inquiry would leave available to judges no standard for making this determination but their individual assessment of a statute's worth. *Cf. Mississippi University for Women v. Hogan*, 458 U.S. 713, 724 n. 9 (1982) ("[W]hen a classification expressly discriminates on the basis of gender, the analysis and level of scrutiny applied to determine the validity of the classification do not vary simply because the objective appears acceptable to individual Members of the Court. While the validity and importance of the objective may effect the outcome of the analysis, the analysis itself does not change."). Thus the term "undue burden" as used, for example, in *Maher*, 432 U.S. at 473-74, refers to the ultimate constitutional issue under heightened judicial scrutiny, rather than the threshold requirement for triggering such scrutiny. *Charles v. Carey*, 627 F.2d 772, 777 (7th Cir. 1980); *Planned Parenthood of Rhode Island v. Board of Medical Review*, 598 F. Supp. 625, 630 n. 2 (D.R.I. 1984).

Regulations imposing a constitutionally significant burden on the free exercise of a protected right, including the right to choose to terminate one's pregnancy, must be supported by a compelling state interest. *Akron*, 462 U.S. at 427; *Roe v. Wade*, 410 U.S. at 155. Such a regulation must also be narrowly drawn to express only the legitimate state interests at stake. *Carey v. Population Services International*, 431 U.S. 678, 686, 688 (1977).

Constitutional rights do not mature and come into being only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 74 (1976) (*Danforth*). *See Bellotti II*,

433 U.S. at 633; *Carey v. Population Services International*, 431 U.S. at 693. Similarly, the burdens imposed by state regulation of abortion are no different for minors than for adults. *Zbaraz v. Hartigan*, 763 F.2d 1532, 1536 (7th Cir. 1985), *appeal docketed*, No. 85-673 (U.S. Oct. 16, 1985); *see Bellotti II*, 443 U.S. at 642 ("[T]he potentially severe detriment facing a pregnant woman is not mitigated by her minority. Indeed, considering her probable education, employment skills, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor."). Therefore, the degree of burden that triggers heightened judicial scrutiny depends in no way upon whether the regulation applies to minor or adult women.

The Supreme Court, however, long has recognized that a State has somewhat broader authority to regulate the activities of children than of adults. *Danforth*, 428 U.S. at 74. This broader authority derives from the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing. Thus the difference between abortion statutes which regulate adults and those which regulate only minors is that the latter may be justified by a significant state interest that is not present in the case of an adult. *Zbaraz v. Hartigan*, 763 F.2d at 1536. *See Akron*, 462 U.S. at 427 n. 10; *Carey v. Population Services International*, 431 U.S. at 693 n. 15; *Danforth*, 428 U.S. at 75. In addition, the State is not constitutionally bound to employ the least burdensome method of effectuating its interests. *Indiana Planned Parenthood Affiliates Ass'n, Inc. v. Pearson*, 716 F.2d 1127, 1133 (7th Cir. 1983) (*Pearson*). *Compare Pearson with Carey v. Population Services*, 431 U.S. at 688 (state regulation burdening the right of adult women to terminate their pregnancies must "be narrowly drawn to express only the legitimate state interests at stake."). Instead, the state regulation must be rationally calculated to serve the state's significant interests. *Planned Parenthood of Rhode Island v. Board of Medical Review*, 598 F. Supp. 625, 640 (D.R.I. 1984).

As immature minors often lack the ability to make fully informed choices that take account of both immediate and

long-range consequences, a State reasonably may determine that parental consultation often is desirable and in the best interests of the minor. *Bellotti II*, 443 U.S. at 640. Therefore, a State's interest in protecting immature minors will sustain the requirement of consent, either parental or judicial. *Akron*, 462 U.S. at 439. But even the State's interest in encouraging parental involvement in their minor children's decision to have an abortion must give way to the constitutional right of a mature minor or an immature minor whose best inerests are contrary to parental involvement. *Id.* at 427 n. 10; *Planned Parenthood of Rhode Island v. Board of Medical Review*, 598 F. Supp. at 640. *See Bellotti II*, 443 U.S. 649.

Even under the less rigorous standard applicable to regulations burdening the rights of minor women to obtain an abortion, the burden of demonstrating a connection between the regulation and the asserted state policy falls on the state. *Carey v. Population Services International*, 431 U.S. at 696, 696 n. 22; *Pearson*, 716 F.2d at 1133. Neither a bare assertion that the burden is connected to a significant state policy, *Carey*, 431 U.S. at 696, nor sentiment or folklore, *In re Gault*, 387 U.S. 1, 21-22 (1967), will satisfy this burden.

Minnesota Statute § 144.343(2)-(7) requires minors either to notify their parents of their desire to obtain an abortion, or to obtain the judicial waiver of this requirement. The statute does not require parental consent or a waiver of parental consent. The parties agreed in response to a question from the court that the constitutional analysis applicable to notice requirements does not differ from that applicable to consent requirements. Moreover, despite the contrary suggestions of individual Members of the Supreme Court, *see Akron*, 462 U.S. at 469 (O'Connor, J., dissenting); *H.L. v. Matheson*, 450 U.S. 338, 421 (Stevens, J., concurring), the court concludes that it is "parental involvement" that an emancipated or mature minor must have an opportunity to avoid, without regard to whether that "involvement" takes the form of notification or consent. *See Akron*, 462 U.S. at 427 n. 10; *Pearson*, 716 F.2d at 1132. *See also Bellotti II*, 443 U.S. at 647 (statute unconstitutional because, *inter alia*, it failed to provide every minor an opportunity to "go directly to a court without first consulting or notifying her parents").

II. *Minn. Stat. § 144.343(2)*

Subdivision 2 of § 144.343 prohibits performing an abortion upon an unemancipated minor, or upon a woman for whom a guardian or conservator has been appointed because of a finding of incompetency, until at least 48 hours after written notice of the pending operation has been delivered to the minor's parents or guardian or conservator. By its order of July 31, 1981, this court temporarily restrained defendants from enforcing the provisions of Minn. Stat. § 144.343(2) because the court found it probable that plaintiffs would be successful in their challenge to subdivision 2. As a result of this restraining order, subdivision 6 of § 144.343 took effect. This subdivision provides that subdivision 2 shall be enforced as though the judicial bypass provisions of subdivision 6 were incorporated as paragraph c of subdivision 2. Subdivision 6 further provides that if the court's temporary injunction is ever stayed or dissolved, or otherwise ceases to have effect, subdivision 2 shall have full force and effect, without being modified by the addition of the substitute paragraph, and the substitute paragraph shall have no force or effect until or unless an injunction or restraining order is again in effect.

A State choosing to encourage parental involvement in their minor child's decision to have an abortion must provide an alternative procedure through which a minor may demonstrate that she is mature enough to make her own decision or that the abortion is in her best interests. *Akron*, 462 U.S. at 430 n. 10; *see Bellotti II*, 443 U.S. at 643-44. The unique nature and consequences of the abortion decision make it inappropriate "to give a third party an absolute, and possibly arbitrary, veto over the decision of a physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent." *Bellotti II*, 443 U.S. at 643; *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 74 (1976).

The *Bellotti II* court set forth the following requirements:

> A pregnant minor is entitled in such a proceeding to show either: (1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests. The proceeding in which this showing is made must assure that a resolution of the issue, and any appeals that may follow, will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained.

443 U.S. at 643-44. A statute that fails to provide such an alternative to a consent or notification requirement imposes an undue burden upon the exercise by minors of the right to seek an abortion. *Id.*, at 647.

Without the judicial bypass option of subdivision 6, Minn. Stat. § 144.343(2) would unduly burden the exercise by minors of the right to seek an abortion. There are parents who would obstruct, and perhaps altogether prevent, the minor's efforts to exercise the right. *Bellotti*, 443 U.S. at 647. Young, pregnant minors, especially those living at home, are particularly vulnerable to their parent's efforts to obstruct an abortion. *Id.*; *Indiana Planned Parenthood Affiliates Ass'n, Inc. v. Pearson*, 716 F.2d 1127, 1132 (7th Cir. 1983). The interests of the State and of these parents, must give way to the constitutional right of a mature minor or of an immature minor whose best interests are contrary to parental involvement. *See, e.g., Akron*, 428 n. 10. Therefore, the court concludes that it must permanently enjoin defendants from enforcing Minn. Stat. § 144.343(2) as unmodified by subdivision 6.

III. *Constitutionality of Minnesota's Parental Notification Law*

Plaintiffs contend that Minn. Stat. § 144.343(2)-(7) is unconstitutional as applied because it interferes with and burdens minors in the exercise of their constitutional rights and defendants have failed to demonstrate that the statute is necessary, narrowly drawn, and that it is accomplishing significant state interests. Defendants respond that plaintiffs' position improperly asks this court to disregard controlling Supreme Court precedent. In view of the fact that the relevant legal standards governing the constitutionality of parental notification requirements are not in dispute, *see Akron*, 462 U.AS. at 439, defendants contend that the scope of this court's inquiry properly is restricted to determining whether the statute complies with the guidelines set forth by the *Bellotti II* plurality and subsequently approved by majority of the the Supreme Court in *Planned Parenthood Ass'n of Kansas City v. Ashcroft*, 462 U.S. 476 (1983).

Plainly, it is within neither the power nor the desire of this court to overrule Supreme Court precedent. *E.g., Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983); *Jaffree v. Board of School Commissioners*, 459 U.S. 1314, 1316 (Powell, Circuit Justice 1983). Nevertheless, the court is mindful that:

> Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry . . . and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist.

United States v. Carolene Products Co., 304 U.S. 144, 153 (1938) (Citations omitted); *see New Jersey Citizen Action v. Edison Township*, 797 F.2d 1250, 1260 (3d Cir. 1986). *Compare Wisconsin Action Coalition v. City of Kenosha*, 767 F.2d 1248 (7th Cir. 1985) (ordinance limiting hours of solicitation held invalid) *with City of Watseka v. Illinois Public Action Council*, 796 F.2d 1547 (7th Cir. 1986) (conducting *de novo* analysis of validity of similar ordinance). If the court properly may inquire into whether a change has occurred in the factual basis upon which the constitutionality of a statute depends, then surely an inquiry into the existence of a particular state of facts assumed but never demonstrated is at least equally proper. To this court's knowledge, it is the first ever to examine a parental notification or consent substitute statute in actual operation. *See, e.g., Akron* 462 U.S. 425 (enforcement of ordinance enjoined

before its effective date); *Planned Parenthood Ass'n of Kansas City v. Ashcroft*, 483 F. Supp. 679, 683, (W.D.Mo. 1980) (statute at issue in *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476, enjoined on day after becoming effective); *Bellotti II*, 443 U.S. at 645 n. 25 (because appellees successfully sought to enjoin Massachusetts from putting statute into effect, there existed an "absence of any evidence as to the operation of judicial proceedings under § 12s."). Initiation of the factual inquiry mandated by the *Carolene Products* court lies squarely within the province of a federal district court. Therefore, this court heard testimony and has made findings of fact with respect to plaintiffs' allegation that Minn. Stat. § 144.343 (2)-(7) is not rationally related to the State's asserted interests.

Plaintiffs' as applied challenge to the constitutionality of Minn. Stat. § 144.343(2)-(7) proceeded at trial on two levels. Plaintiffs' more limited challenge attached the sufficiency of Minnesota's compliance with the *Bellotti II* guidelines for establishing an alternative procedure whereby authorization for the abortion can be obtained. *See Bellotti II*, 443 U.S. at 643-44. Plaintiffs' broader challenge attacked the assumption, implicit in the *Bellotti II* and *Ashcroft* decisions, that a notification or consent requirement imposed in conjunction with an appropriate alternative bypass procedure would serve the State's interest in protecting pregnant minors without unduly burdening the right of mature or best interests minors to obtain an abortion.

The bulk of the testimony at trial related to whether requiring pregnant minors either to notify their parents of their desire to terminate their pregnancies or to go to court to obtain a waiver of the notification requirement actually furthers the State's interest in protecting pregnant minors. The court heard testimony of at least 37 witnesses who spoke to this issue. Only two of these witnesses related facts and expressed opinions from which a court could draw a reasonable inference that the statute does young women more good than harm. Neither of these witnesses, Dr. Vincent Rue or Dr. Richard T.F. Schmidt, has any direct contact with minors affected by Minn. Stat. § 144.343(2)-(7). Neither witness counsels minors on a regular basis concerning the decision whether to terminate a pregnancy, neither

witness performs abortions, and neither witness sees minors who have had abortions on a regular basis.

Of the remaining witnesses who spoke to the issue whether Minn. Stat. § 144.343 effectuates the State's interest in protecting pregnant minors, all but four of these are personally involved in the statute's implementation in Minnesota. They are judges, public defenders, guardians ad litem, and clinic counselors. None of these witnesses testified that the statute has a beneficial effect upon the minors whom it affects. Some testified the law has a negligible effect upon intra-family communication and upon the minors' decision-making process. Others testified the statute has a deleterious effect on the well-being of the minors to whom it applies because it increases the stress attendant to the abortion decision without creating any corresponding benefit. Thus five weeks of trial have produced no factual basis upon which this court can find that Minn. Stat. § 144.343(2)-(7) on the whole furthers in any meaningful way the state's interest in protecting pregnant minors or assuring family integrity.

The court has considered the possibility that the statute's existence encourages immature, non-best interest minors to tell their parents, and that this intangible effect is not amenable to proof at trial. The court does not believe this to be the case. First, several witnesses who testified at trial were involved in providing abortions to minors both before and after the enactment of Minn. Stat. § 144.343(2)-(7). These witnesses could have testified as to a change in the level of parental participation occurring at about the time of the statute's effective date. Although these and other witnesses testified that a sizable proportion of minors seeking an abortion in Minnesota voluntarily notify at least one parent of their intention, none testified that this proportion changed at or around the effective date of the Minnesota parental notification law.

Furthermore, the testimony indicates that the sort of independent self-assessment by the minor of her own maturity suggested by this scenario actually does not occur as a result of the statute. Although the major abortion providers in Minnesota inquire into a minor's maturity in the course of the informed consent process, abortion providers to not decline to assist

minors because of their immaturity with any frequency. To the contrary, the testimony revealed the major providers tend to resolve any doubts as to a minor's maturity by referring her to the judicial bypass system. These minors are almost universally successful in obtaining judicial waivers. Thus there appears to be little self-selection among those minors who come to the clinics initially without both parents. Instead, any self-selection as to maturity occurring among pregnant minors appears to be a result of the natural maturation process, rather than an effect of Minn. Stat. § 144.343(2)-(7). As described in finding of fact number 65, the desire on the part of minors to retain their privacy with respect to the abortion decision is, at least in part, a result of the maturation process. Therefore, it does not appear Minn. Stat. § 144.343(2)-(7) has any greater beneficial effect upon immature minors than it does upon mature minors and minors whose best interests are not served by notification.

In view of the foregoing, the court finds as a matter of fact that Minn. Stat. § 144.343(2)-(7) fails to serve the State's asserted interest in fostering intra-family communication and protecting pregnant minors. This is not a case in which the State merely has failed to demonstrate that the challenged statute employs the alternative means of effectuating its interest that is least burdensome upon the rights of the affected individuals. *See Indiana Planned Parenthood Affiliates Ass'n, Inc. v. Pearson*, 716 F.2d 1127, 1134 (7th Cir. 1983) (state is not constitutionally required to provide the least burdensome alternative to notification.). Similarly, this is not a case in which the legislature has utilized a yardstick that is imprecise or even unjust in particular cases. *See H.L. v. Matheson*, 450 U.S 398, 425 (1981) (Stevens, J., concurring) (over-inclusiveness of parental-notice requirement does not undercut its validity). Instead, Minn. Stat. § 144.1343(2)-(7) imposes the substantial burden of obtaining a judicial waiver of the parental notification requirement upon a group of minors composed almost entirely of either mature minors or minors whose best interests are not served by notification. This substantial burden is not justified by the state's interests in encouraging intra-family communication and protecting immature minors because Minn. Stat. § 144.343(2)-(7) fails to further either of those interests in any

meaningful way. When, as here, the state's asserted interest fails to justify the burden imposed upon pregnant minors by an abortion regulation, the Supreme Court has invalidated such regulations as unduly burdensome upon the rights of pregnant minors. *Bellotti II* 443 U.S. 622, 651 (1979); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 75 (1976).

This court does not, however, write on a clean slate in determining the constitutionality of Minnesota's parental notification statute. The Supreme Court carefully delineated the elements of the alternative procedure states must employ if they wish to require parental consent or notification prior to abortion. *Bellotti II*, 443 U.S. at 643-44. Although the Court's discussion of the necessary alternative procedure appears in a plurality opinion and at least arguably was unnecessary to the decision in the *Bellotti II* case, the Supreme Court left no doubt as to its commitment to the *Bellotti II* procedure in *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983). Noting its statement in *Akron* that the relevant legal standards with respect to parental-consent requirements are not in dispute, 462 U.S. at 439, the Court treated a challenge to the constitutionality of Missouri's consent/bypass statute as an issue purely of statutory construction. *Ashcroft*, 462 U.S. at 491. Because the Missouri statute at issue could fairly be construed to comply with the *Bellotti II* requirements, it avoided any constitutional infirmities. *Id.* at 493.

Because no court has had occasion to consider the actual effect of a consent/bypass or notification/bypass statute in operation, plaintiffs contend the issue now before this court is far more complex than the statutory interpretation issue addressed by the *Ashcroft* court. Indeed, it appears to this court that the prophecy with which Mr. Justice Stevens closed his concurrence in *Bellotti II* is fulfilled.[1] Nevertheless, this court is

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1 In arguing that the *Bellotti II* case presented the Supreme Court no occasion to render an advisory opinion on the constitutionality of the alternative procedure recommended in Justice Powell's plurality opinion, Justice Stevens predicted "a real statute—rather than a mere outline of a possible statute—and a real case or controversy may well present questions that appear quite different from the hypothetical questions Justice Powell has elected to address." 433 U.S. at 656 n.4 (Stevens, J., concurring).

bound by applicable Supreme Court precedent. *E.g. Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 534 (1983); *Jaffree v. Board of School Commissioners*, 459 U.S. 1314 (Powell, Circuit Justice 1983). This court has made factual findings as to the effect of Minnesota's parental notification law as it affected the minors to whom it applied between its effective date in 1981 and trial in 1986. Were this court writing on a clean slate, it could not uphold the constitutionality of Minn. Stat. § 144.343(2)-(7) under the intermediate scrutiny appropriate in challenges to regulations that burden the fundamental rights of minors. But it is not this court's place to determine the assumptions upon which the Supreme Court based its holdings in *Bellotti II* and *Ashcroft*. Nor is it this court's place to determine whether the facts actually demonstrated at trial comport or conflict with any assumptions the Supreme Court may have made. The Supreme Court directs that this court's inquiry be limited instead to an issue purely of statutory construction: whether Minnesota provides a judicial alternative that is consistent with established legal standards. *Ashcroft*, 462 U.S. at 491-92.

Minnesota Statute § 144.343(2)-(7) satisfies these legal standards. The court has found that Minn. Stat. § 144.343(6) correctly directs courts hearing bypass petitions to conduct the inquiry required by the *Bellotti II* court. Although the language of the Minnesota statute with respect to maturity varies slightly from that of the *Bellotti II* decision, the requirement that the woman be "mature and capable of giving informed consent to the proposed abortion" is the functional and legal equivalent of the Supreme Court's requirement that the minor be "mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes." *See Bellotti II*, 443 U.S. at 643.

Arguably, however, the statute's requirement that the court inquire in the case of an immature minor "whether the performance of an abortion upon her without notification of her parents, guardian, or conservator would be in her best interests" differs from the Court's inquiry whether "the desired abortion would be in her best interests." *See id.* at 644. Indeed, testimony indicates that some Minnesota courts consider

whether the abortion itself is in the minor's best interests, while others examine whether avoiding parental involvement in the minor's decision, whatever it may be, is in the minor's best interests. This court, however, perceives that the former inquiry imposes the greater burden upon the minor in terms of what she must demonstrate before proceeding without involving her parents. Because the Supreme Court's language approves the imposition of this more restrictive standard, this court concludes that the practice of some Minnesota courts of interpreting Minn. Stat. § 144.343(6) to require a less intrusive and less burdensome inquiry does not violate the legal standards set forth in *Bellotti II* and approved in *Ashcroft*.

The court further finds that judges who hear the bypass petitions in Minnesota faithfully apply the standards set forth in Minn. Stat. § 144.343(6), and those judges who consider themselves unable to faithfully apply the standard have consistently refused to hear bypass petitions. Furthermore, the court finds that Minnesota courts have established procedures to assure the minors' anonymity, and to expedite both the initial hearing and any subsequent appeal. Finally, the court finds that the delays which do attend the bypass proceedings in practice, although burdensome to minor petitioners, do not reflect a systematic failure to provide a judicial bypass procedure created by Minn. Stat. § 144.343(6), as presently executed by Minnesota courts and the other offices that participate in the bypass proceedings, coplies with the procedural requirements set forth in *Bellotti II* and approved in *Ashcroft*. Therefore, the court must reject plaintiffs' challenge to Minnesota's notification/bypass requirement as a whole.

IV. *Two Parent Notification Requirement*

Subdivision 3 of Minnesota Statute § 144.343 identifies the individuals entitled to notification as "both parents of the pregnant woman if they are both living, one parent of the woman if only one is living or if the second cannot be located through reasonably diligent effort, or the guardian or conservator if the pregnant woman has one." Plaintiffs contend the statute's two parent notice requirement unduly burdens the exercise by

minors of the right to seek an abortion. The court finds that this requirement places a significant burden upon pregnant minors who do not live with both parents. Particularly in these cases, notification of an abusive, or even a disinterested, absent parent has the effect of reintroducing that parent's disruptive or unhelpful participation into the family at a time of acute stress. Similarly, the two parent notification requirement places a significant obstacle in the path of minors in two parent homes who voluntarily have consulted with one parent but not with the other out of fear of psychological, sexual, or physical abuse toward either the minor or the notified parent. In either case, the alternative of going to court to seek authorization to proceed without notifying the second parent introduces a traumatic distraction into her relationship with the parent whom the minor has notified. The anxiety attending either option tends to interfere with and burden the parent-child communication the minor voluntarily initiated with the custodial parent.

The State has the burden of demonstrating that its interest in encouraging parental consultation justifies the burden imposed upon pregnant minors by the statute's two parent notification requirement. *See, e.g., Carey v. Population Services International*, 431 U.S. 678, 696 n. 22 (1977); *Pearson*, 716 F.2d at 1133. The Supreme Court has concluded that the requirement of obtaining both parent's consent does not unconstitutionally burden a minor's right to seek an abortion "[a]t least when the parents are together and the pregnant minor is living at home." *Bellotti II*, 443 U.S. at 649. When all three live together, both the father and mother have an interest—one normally supportive—in helping to determine the course that is in the best interests of the daughter. *Id.* This court concludes, however, that a regulation requiring notification of both parents even when the nuclear family unit either has broken apart or never formed is not reasonably designed to further the State's interest in protecting pregnant minors.

To the contrary, the court finds that the regulation adversely affects communication voluntarily initiated with one parent in a large number of cases. Indeed, 20 to 25% of minors seeking judicial authorization to proceed with an abortion without parental notification are accompanied to court by one parent,

or at least have obtained the approval of one parent. In these cases the necessity either to notify the second parent despite the agreement of both the minor and the notified parent that such notification is undesirable, or to obtain a judicial waiver of the notification requirement, distracts the minor and her parent and disrupts their communication. Thus the need to notify the second parent or to make a burdensome court appearance actively interferes with the parent-child communication voluntarily initiated by the child, communication assertedly at the heart of the State's purpose in requiring notification of both parents. In these cases, requiring notification of both parents affirmatively discourages parent-child communication. Thus the court concludes that this requirement fails to further the State's interest. Because "state restrictions inhibiting privacy rights of minors are valid only if they serve any significant state interest," *Carey v. Population Services*, 431 U.S. at 693; *Danforth*, 428 U.S. at 75, the court must enjoin defendants from enforcing the two parent notification requirement of Minn. Stat.§ 144.343.

V. *Waiting Period*

Minnesota Statute § 144.343(2) prohibits performing an abortion upon an unemancipated minor until at least 48 hours after written notice of the pending operation has been delivered to the minor's parents. The notice may be delivered personally to the parent by the physician or his agent, or notice may be made by certified mail addressed to the parent at his usual place of abode, with constructive delivery occurring at 12:00 noon on the next day upon which regular mail delivery takes place, subsequent to mailing. Thus minors in Minnesota who choose to notify their parents in writing of their determination to obtain an abortion must wait at least 48 hours, and more commonly approximately 72 hours, between initiating the notification process and the abortion itself.

Lower courts have split on the issue of the constitutionality of mandatory waiting periods imposed upon minor women seeking abortion. Some courts, including this one, have found that a reasonable period of notice is permissible to allow par-

ents to aid, counsel, advise, and assist their minor daughter in connection with the determination to undergo abortion or to provide the physician with information which may be relevant to the medical judgments involved. *Akron Center for Reproductive Health v. Rosen*, 633 F. Supp. 1123, 1138-39 (N.D. Ohio 1986); *Hodgson v. Minnesota*, Civ. No. 3-81-538, slip op. at 5 (D. Minn. March 22, 1982). The *Rosen* court concluded that the notification requirement which the Supreme Court explicitly upheld for immature minors in *Matheson* would be an empty formalism with no practical effect if the abortion could proceed before parental consultation could take place. 633 F. Supp. at 1139.

The Seventh Circuit Court of Appeals has invalidated an Illinois statute requiring pregnant minors to wait 24 hours between notifying their parents and obtaining an abortion. *Zbaraz v. Hartigan*, 763 F.2d 1532 (7th Cir. 1985), *appeal docketed*, No. 85-673 (U.S. Oct. 16, 1985). The *Zbaraz* court based its decision upon its conclusion that the mandatory waiting period placed a direct and substantial burden on women who seek to obtain an abortion, and that the waiting requirement did not significantly further the State's interest in promoting consultation when combined with the notification requirement because the notification requirement itself adequately promotes the State's interest. 763 F.2d at 1537-38. The court further concluded that the statutory alternatives to the mandatory waiting period, such as having both parents accompany the minor to the place the abortion will be performed or having both parents submit signed, notarized statements indicating they have been notified, do not redeem the statute. *Id.* at 1538. The Seventh Circuit based its decision in large part upon its prior decision in *Indiana Planned Parenthood Affiliates Ass'n, Inc. v. Pearson*, 716 F.2d 1127 (7th Cir. 1983). There the court upheld a mandatory waiting period to the extent it delayed the abortion for the purpose of effective constructive notice. *Id.* at 1142-43. Requiring delay after notification has been effected, however, is impermissible. *Id.*; *see Zbaraz*, 763 F.2d at 1538.

The Eighth Circuit Court of Appeals three times has affirmed district court decisions that a mandatory 48 hour waiting period, applicable to adult and minor women alike, is unconsti-

tutional. *See Women's Services, P.C. v. Thone*, 690 F.2d 667, 668-69 (8th Cir. 1982), *vacated and remanded for further consideration sub nom. Kerrey v. Women's Services, P.C.*, 462 U.S. 1126 (1983); *Planned Parenthood Ass'n of Kansas City v. Ashcroft*, 655 F.2d 848, 866 (8th Cir. 1981), *aff'd* 462 U.S. 476 (1983); *Women's Services, P.C. v. Thone*, 636 F.2d 206, 210 (8th Cir. 1980), *vacated for further consideration sub nom. Thone v. Women's Services, P.C.*, 452 U.S. 911 (1981). The state of Missouri did not appeal the Eighth Circuit's decision in *Ashcroft* invalidating the statute's 48 hour waiting period.

This court agrees with the district court for the Northern District of Ohio that a notification requirement would be an empty formalism without practical effect if the abortion could proceed before the parental consultation could take place. *See Rosen*, 633 F. Supp. at 1139. However, the waiting period must effectuate actual consultation without unduly burdening the opportunity of pregnant minors to obtain an abortion. In view of the logistical obstacles facing Minnesota women who live in counties without a regular provider of abortion services, the court believes a 48 hour waiting period is excessively long. Travel to an abortion provider, particularly in winter from a rural area in Minnesota, can be a very burdensome undertaking. A requirement that a minor either bear this burden twice or spend up to three additional days in a city distant from her home cannot be justified by the State's interests in encouraging parental consultation, because a shorter waiting period would effectuate that interest as completely. Therefore, the court concludes that if a minor chooses to notify her parent by certified mail as provided in Minn. Stat. § 144.343(2)(b), the State properly may deem delivery to occur at 12:00 noon on the next day on which regular mail delivery takes place, subsequent to mailing. The State further may impose some reasonable waiting period subsequent to delivery of notification during which consultation may occur. Under conditions presently existing in Minnesota, however, 48 hours is an unreasonable waiting period. Therefore, the court will enjoin defendants from enforcing the 48 hour waiting period imposed by Minn. Stat. § 144.343(2).

VI. *Severability*

Defendants contend that the two parent notification requirement and the 48 hour waiting period, which the court today holds unconstitutional, should be severed from the remainder of Minn. Stat. § 144.343(2)-(7).

Subdivision 7 of Minnesota's parental notification statute provides:

> If any provision, word, phrase or clause of this action or the application thereof to any person or circumstance shall be held invalid, such invalidity shall not affect the provisions, words, phrases, clauses or application of this section which can be given effect without the invalid provision, word, phrase, clause or application, and to this end the provisions, words, phrases, and clauses of this section are declared to be severable.

This language clearly evinces the legislature's intent that any unconstitutional portions of Minnesota's parental notification statute amenable to severance should be severed.

Subdivision 7 creates a "presumption of divisibility" and places "the burden . . . on the litigant who would escape its operation." *Carter v. Carter Co.*, 298 U.S. 238, 335 (1936) (Cardozo, J.). *See Regan v. Time, Inc.*, 468 U.S. 641, 643 (1984); *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 932 (1983). Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law. *See Regan* 468 U.S. at 653; *Chadha*, 462 U.S. at 932. Severance is improp[illegible], however, if the offending language is "inseparably intertwined" within a subsection of the law. *Women's Services, P.C. v. Thone*, 636 F.2d 206, 210 (8th Cir. 1980), *vacated for further consideration on other grounds sub nom. Thone v. Women's Services P.C.*, 452 U.S. 911 (1982).

The 48 hour waiting period in Minn. Stat. § 144.343(2)-(7) is severable from the remainder of the statute. Excising the words "at least 48 hours after" from subdivision 2 does not disable the statute from reasonably effectuating the legislature's intent.

Accordingly, the court holds that this language is severable from the remainder of Minn. Stat. § 144.343. *See Zbaraz v. Hartigan*, 463 F.2d 1532, 1545 (7th Cir. 1985), *appeal docketed*, No. 85-673 (U.S. Oct. 16, 1985).

The language of subdivision 3 defining "parent" as "both parents of the pregnant woman if they are both living, one parent of the pregnant woman if only one is living or if the second cannot be located through reasonably diligent effort, or the guardian or conservator if the pregnant woman has one" is inseparably intertwined within Minn. Stat. § 144.343(2)-(7). The Minnesota legislature would not have enacted a statute requiring notification of a minor's parents prior to the abortion without identifying the individuals entitled to such notice. More importantly, the remainder of the statute cannot be given effect without the offending language. *See* Minn. Stat. § 144.343(7).

In addition, this court is ill-situated to determine what alternative definition the legislature would employ to remedy the constitutional infirmity identified in this decision. For example, the legislature may determine that requiring notice only to one parent is the functional equivalent of requiring notice to both in families enjoying healthy communication, while requiring notice only to one parent permits the notified parent in an intact but dysfunctional family to exercise his or her judgment concerning the wisdom of notifying the other parent. Alternatively, the legislature may determine that notification of both parents is appropriate when the parents are together and the pregnant minor is living at home. *See Bellotti II*, 443 U.S. at 649. Other options also may suggest themselves to the legislature. Any of these choices, however, would leave Minn. Stat. 144.343 (2)-(7) with little resemblance to the program actually intended by the Minnesota legislature. *See Thornburgh v. American College of Obstetricians and Gynecologists*, ____ U.S. ____, ____, 106 Sup. Ct. 2169, 2181 (1986); *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 472 (1983) (O'Connor, J., dissenting). Therefore, the definition of parent contained in Minn. Stat. § 144.343(3) is not severable from the remainder of the statute. The court must enjoin defendants from enforcing Minn. Stat. § 144.343(2)-(7) in its entirety.

ORDER

Upon the foregoing, the evidence presented at trial, the submissions and arguments of the parties, and the record as presently constituted,

IT IS ORDERED That Minn. Stat. § 144.343(2)-(7) be and the same hereby is declared unconstitutional.

IT IS FURTHER ORDERED That the Clerk enter judgment as follows:

> IT IS ORDERED, ADJUDGED, AND DECREED That Minn. Stat. § 144.343(2)-(7) is unconstitutional.

IT IS FURTHER ORDERED That defendants be and the same hereby are permanently enjoined from enforcing the provisions of Minn. Stat. § 144.343(2)-(7).

IT IS FINALLY ORDERED That the following injunction shall issue without security:

> IT IS ORDERED, ADJUDGED, AND DECREED That defendants are permanently enjoined from enforcing the provisions of Minn. Stat. § 144.343(2)-(7).

DATED: November 6, 1986.

Donald D. Alsop //s//
DONALD D. ALSOP
Chief U.S. District Judge

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Nos. 86-5423-MN and 86-5431-MN

Jane Hodgson, M.D.; Arthur Horowitz, M.D.; Nadine T., Janet T., Ellen Z., Heather P., Mary J., Sharon L., Kathy M., and Judy M., individually and on behalf of all other persons similarly situated; Diane P., Sarah L. and Jackie H.; Meadowbrook Women's Clinic, P.A., Planned Parenthood of Minnesota, a nonprofit Minnesota corporation; Midwest Health Center for Women, P.A., a nonprofit Minnesota corporation; Women's Health Center of Duluth, a nonprofit Minnesota corporation.

Appellees,

v.

The State of Minnesota; Rudy Perpich as Governor of the State of Minnesota; Hubert H. Humphrey, III, as Attorney General of the State of Minnesota,

Appellants.

Appeal from the United States District Court
for the District of P.A., Minnesota

Argued: June 9, 1987

Filed: August 27, 1987

Before

LAY, *Chief Judge*, Heaney, *Circuit Judge*,
and ROSENN,* *Senior Circuit Judge.*

* Max Rosenn, Senior Circuit Judge, Third Circuit Court of Appeals, sitting by designation.

ROSENN, *Circuit Judge.*

This appeal raises the constitutionality of a Minnesota statute, Minn. Stat. Ann. §§ 144.343(2)-(7) (1987), which requires those providing abortions for minors[1] to give notice of the pending abortion, when possible,[2] to both of the minor's parents at least forty-eight hours before the abortion is to occur. The statute further provides that if the notification requirement is ever restrained or enjoined, as it has been since 1981, then the minor shall have the choice of either notifying both parents forty-eight hours before the abortion or demonstrating to the court in an expedited confidential proceeding either that she is "mature and capable of giving informed consent" or that the performance of an abortion without notification of her parents would be in her best interests.

We conclude that a state may not constitutionally require a minor to notify her parents of her intent to have an abortion without providing the option of an appropriate alternative court procedure by which the minor may demonstrate either her maturity or that the performance of an abortion without notification to her parents would be in her best interests. We further conclude that even where there is the option of such an alternative court procedure, a state may not constitutionally require the minor to always notify *both* of her parents whenever possible, and that this requirement in the present statute is not severable from the remainder of the statute. Accordingly, we will affirm the district court's judgment permanently enjoining the State of Minnesota from enforcing the provisions of Minn. Stat. Ann. §§ 144.343(2)-(7).

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1 Specifically, the statute covers unemancipated minors and women for whom a conservator has been appointed pursuant to state law because of a finding of incompetency. *See* Minn. Stat. Ann. § 144.343(2) (1987) (subd. 2). The statute also contains a number of exceptions, termed "limitations," which we shall discuss further *infra*. For our purposes here, however, we will refer generically to those whom the statute covers as "minors."

2 Again, the specific statutory requisites will be discussed further, *infra*.

I.

In general, Minn. Stat. Ann. § 144.343 provides guidelines for the treatment of pregnancy, venereal disease, alcohol and drug abuse, and abortions for minors. For example, § 144.343(1) (subdivision 1), which is not at issue, provides that a "minor may give effective consent for medical, mental and other health services to determine the presence of or to treat pregnancy and conditions associated therewith, venereal disease, alcohol and other drug abuse, and the consent of no other person is required." The constitutionality of the remainder of the statute, which deals with abortion treatment for minors, is at issue.

Subdivision 2 (Subd. 2) is a notification provision, and has been under temporary restraint (and later preliminary injunction) since July 31, 1981, the day before it was to go into effect. The measure states that no abortion may be performed "upon an unemancipated minor or upon a woman for whom a guardian or conservator has been appointed . . . until at least 48 hours after written notice of the pending operation has been delivered . . ." to her "parent." It also provides for the mechanics of effecting notice. Subd. 2(a) provides for personal notice by the physician or his agent. In the alternative, subd. 2(b) provides that notice may also be effected "by certified mail addressed to the parent at the usual place of abode of the parent with return receipt requested and restricted delivery to the addressee . . . ." If notice is mailed, "[t]ime of delivery [is] deemed to occur at 12 o'clock noon on the next day on which regular mail takes place, subsequent to mailing." Thus, when notice is mailed, as a practical matter the waiting period may become 72 hours. Further, the district court found that in many cases "scheduling factors" may cause the effective length of the delay to reach "a week or more." *Hodgson v. Minnesota*, 648 F. Supp. 756, 765 (D. Minn. 1986).

Parent is defined in subd. 3 as "both parents of the pregnant woman if they are both living, one parent of the pregnant woman if only one is living or if the second one cannot be located through reasonably diligent effort, or the guardian or conservator if the pregnant woman has one." Subd. 4 provides

that no notice is required if: (a) the attending physician certifies that the abortion is necessary to prevent the woman's death and there is insufficient time to provide the required notice; or (b) the abortion is authorized in writing by the person or persons who are entitled to notice; or (c) the pregnant minor declares that she is a victim of sexual abuse, neglect, or physical abuse as defined in the statute. In the latter case, notice of abuse is to be made to the proper authorities. Although not required, it appears that most or all "abortion providers" require a prior report of abuse before dispensing with notice under subd. 4(c).

Subd. 5 is a penalty provision and subjects anyone performing an abortion in violation of the statute to criminal penalties, and civil liability to any person wrongfully denied notification. Subd. 6 provides that if the notification provision of subd. 2 is ever enjoined by judicial order, as it has been since before its effective date, then during those periods of restraint a pregnant minor has the choice of either providing notice as set forth in subd. 2, or submitting to a "court bypass" procedure. Under the court bypass, a judge after an expedited confidential hearing, may authorize an abortion without parental notice after determining "that the pregnant woman is mature and capable of giving informed consent to the proposed abortion," or that the performance of an abortion without notification would be in her best interests.

The district court made a variety of factual findings with respect to the operation over the past five years of the court bypass procedure contained in subdivision 6. According to the court, confidentiality has generally been maintained. *See Hodgson*, 648 F. Supp. at 763. Further, proceedings have generally been expedited, so that minors have only had to wait two or three days between their first contact with the court and the hearing on their petitions. *Id.* at 762-763. Thus, as with the notification delay, total delay (including scheduling problems) has been "a week or more." *Id.* at 763. This can increase both the cost and risk of an abortion. Further, the system frequently requires the pregnant minor to make two or three trips of often great distances, *see id.* at 761, which may in part be because by the time the court proceeding is over, it is too late in the day to still have the abortion. Judges have almost never denied a

minor a requested abortion; there were only nine instances, several of which were apparently justified (e.g., minor didn't really want an abortion/changed her mind), and one of which was reversed on appeal. *See id.* at 765. The district court also found that the whole process produced a great deal of stress, and concluded that were the court writing on a clean slate it would have found the burdens greater than the benefits, of which the court found none. *See id.* at 775-76. The asserted benefit or purpose of the statute, as in part expressed at oral argument before this court, is to foster intra-family communication and to protect pregnant minors, by promoting parental involvement in the minor daughter's abortion decision.

The final provision in the statute, subd. 7, is a severability provision. It provides that if any part of the statute is held invalid, such invalidity should not affect any portion of the statute which can be given effect without the invalid portion.

The statute was to become effective on August 1, 1981. On July 30, 1981, however, the plaintiffs, class action minors, a parent, four clinics, and two physicians, brought suit seeking a declaratory judgment and an injunction. The plaintiffs alleged: (1) that the statute violated due process on its face and as applied; (2) that the statute violated equal protection; (3) that as applied to estranged families the statute violated the due process and first amendment rights of custodial parents; and (4) that the statute violated various provisions of the Minnesota constitution.

On July 31, 1981, the district court temporarily restrained enforcement of subd. 2 of the statute (the pure notice provision), but not subd. 6. On March 2, 1982, the court issued a preliminary injunction against enforcement of subd. 2.

On January 23, 1985, the district court granted partial summary judgment in the defendant's favor on the plaintiffs' state constitutional, equal protection, and facial due process claims against continued enforcement of the "notice/bypass" procedure, and accordingly dismissed those claims. Then, on November 6, 1986, after a lengthy trial, the court held, *inter alia*, that: (1) the notification requirement, standing alone, was facially invalid; (2) the notice/bypass requirement was facially invalid to the extent it required a 48 hour waiting period instead of

some shorter period, and notification of both parents; (3) the 48 hour waiting period requirement was severable; (4) the two-parent notification requirement was not severable; (5) an "as applied" analysis of the notice/bypass procedure was barred by Supreme Court precedent; and (5) if an "as applied" analysis had not been barred, the district court would have found the statute unconstitutional as applied because it failed to serve the state's asserted interests. Both sides appeal.

II.

Plaintiffs first seek to keep permanent the current injunciton against the enforcement of subd. 2. They argue that subd. 2 is unconstitutional on its face, becuase it fails to afford mature minors and minors whose best interests are contrary to parental involvement, with an opportunity to obtain a judicial or administrative waiver of the notification requirement. We agree.

It is by now well established that, in general, any regulation restrictive of a woman's right to choose an abortion must be justified by a "compelling" state interest; *See Thornburgh v. American College of Obstetricians and Gynecologists*, 54 U.S.L.W. 4618, 4621 (U.S. June 11, 1986); *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 427 (1982); *Roe v. Wade*, 410 U.S. 113, 155 (1972). Where minors are involved, however, the State has somewhat broader authority to regulate, and thus need only demonstrate a "significant" state interest. *See Akron*, 462 U.S. at 427-28 n.10; *Carey v. Population Serv. Int'l*, 431 U.S. 678, 693 & n.15 (1976); *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 74-75 (1975). Accordingly, the Supreme Court has repeatedly held that states may, in certain circumstances, permissibly encourage parental involvement in a minor's decision to have an abortion. *See Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476, 490-91 (1982) (plurality portion of opinion); *Akron*, 462 U.S. at 427-28 n.10, 439; *H.L. v. Matheson*, 450 U.S. 398, 409 (1980); *Bellotti v. Baird*, 443 U.S. 622, 640, 648 (1978) (plurality opinion) (*Bellotti II*); *Danforth*, 428 U.S. at 75.

Nevertheless, the State's right to regulate the activities of minors is not absolute. *See Danforth*, 428 U.S. at 74; *Wynn v. Carey*, 582 F.2d 1375, 1386 (7th Cir. 1978). *See also Bellotti II*, 443 U.S. at 642 (The potentially severe detriment facing a pregnant woman is not mitigated by her minority. "Indeed, considering her probable education, employment skills, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor."). For example, the Supreme Court has squarely held that "the State may not impose a blanket provision . . . requiring the consent of a parent or person *in loco parentis* as a condition for abortion of an unmarried minor during the first 12 weeks of pregnancy." *Danforth*, 428 U.S. at 74. Rather, at least in consent cases, "[i]t is clear . . . that 'the State must provide an alternative procedure whereby a pregnant minor may demonstrate that she is sufficiently mature to make the abortion decision herself or that, despite her immaturity, an abortion would be in her best interests.' " *Ashcroft*, 462 U.S. at 491 (quoting *Akron*, 462 U.S. at 439-40). *See Bellotti II*, 443 U.S. at 643-44, 647-48. The rationale for requiring this alternative procedure is clear: the State's "significant" interest in encouraging parental involvement in a minor's abortion decision "must give way to the constitutional right of a mature minor or of an immature minor whose best interests are contrary to parental involvement." *Akron*, 462 U.S. at 428 n.10.

In *Bellotti II, supra*, the Supreme Court's plurality opinion specifically reached the question of notice (as opposed to consent) in the context of a statute which required that an unmarried minor's parents be notified whenever the minor child, as an alternative to obtaining her parents' consent, sought court permission to have an abortion. The Supreme Court struck down the notice requirement, stating that such a requirement "would impose an undue burden upon the exercise by minors of the right to seek an abortion." *Id.* at 647. According to the Court, there are parents who would obstruct, and perhaps altogether prevent, the minor's right to go to court.

> There is no reason to believe that this would be so in the majority of cases where consent is withheld. But many

parents hold strong views on the subject of abortion, and young pregnant minors, especially those living at home, are particularly vulnerable to their parents' efforts to obstruct both an abortion and their access to court. It would be unrealistic, therefore, to assume that the mere existence of a legal right to seek relief in superior court provides an effective avenue of relief for some of those who need it the most.

We conclude, therefore, that under state regulation such as that undertaken by Massachusetts, every minor must have the opportunity—if she so desires—to go directly to a court without first consulting *or notifying* her parents. If she satisfies the court that she is mature and well enough informed to make intelligently the abortion decision on her own, the court must authorize her to act *without parental consultation* or consent. If she fails to satisfy the court that she is competent to make this decision independently, she must be permitted to show that an abortion nevertheless would be in her best interests. If the court is persuaded that it is, the court must authorize the abortion.

Id. at 647-48 (emphasis added). *See Zbaraz v. Hartigan*, 763 F.2d 1532, 1539 (7th Cir. 1985), *review granted*, 55 U.S.L.W. 3247 (U.S. Oct. 14, 1986); *Indiana Planned Parenthood Affiliates Ass'n v. Pearson*, 716 F.2d 1127, 1132 (7th Cir. 1983); *Planned Parenthood of Rhode Island v. Board of Medical Review*, 598 F. Supp. 625, 634 (D.R.I. 1984). *Cf. H.L. v. Matheson*, 450 U.S. at 406-07 (As applied to an unemancipated minor girl living with and dependent upon her parents, and making no claim or showing as to her maturity or as to her relationship with her parents, parental notification requirement is constitutional); *American College of Obstetricians v. Thornburgh*, 656 F. Supp. 879, 882-84 (E.D. Pa. 1987) (distinguishing statute which gives parents with notice right to observe judicial proceedings from statute which would give parents notice) (judgment on remand from Supreme Court).

Despite the above Supreme Court rulings, none of which has ever sanctioned either a blanket consent or a blanket notice requirement, the defendants urge that no Supreme Court

majority opinion has ever squarely extended the blanket consent proscription to a blanket notice requirement.[3] According to the defendants, a notice requirement is less burdensome than a consent requirement, and is therefore a constitutional means of furthering the State's significant interest in encouraging parental involvement in a minor's abortion decision. We disagree.

We believe that both parental consent and notice requirements are burdensome to a pregnant minor. Although a notice requirement does not, as in a consent statute, enable the parent to exercise an absolute and unilateral veto regardless of the best interests of the minor, it does add to the minor's burdens at a time when she is confronted with a major personal decision of "grave and indelible consequences." *Bellotti II*, 443 U.S. at 642. First, there is the waiting period that is required until the blanket statutory notice is given. "[T]he abortion decision is one that simply cannot be postponed, or it will be made by default with far-reaching consequences." *Id.* at 643. Second, such a blanket requirement, particularly when the minor is mature and in situations where notice to her parents would not be in her best interests, may do more to fractionalize the family integrity than preserve it, and may be adverse to the best interests of the pregnant minor. There is no reason to believe that parents who refuse to consent to an abortion will be less obstructive to such a medical procedure or to the minor's access to the court bypass procedure when they are merely notified of the pending abortion, regardless of the maturity of the minor or her ability to make an intelligent assessment of her circumstances with the advice of her physician. *See Bellotti II*, 443 U.S. at 647.

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3 *Bellotti II* was only a plurality opinion. However, the four concurring members of the Court would have gone further than the plurality and held any veto power over a minor's abortion decision to be unconstitutional. *See Bellotti II*, 443 U.S. at 652-56 (Stevens, J., concurring). H.L. v. Matheson, though a majority opinion, technically never reached the question of whether it would be constitutional to apply a notice requirement to mature, emancipated, or "non-best interest" minors. *Ashcroft*, *Akron*, and *Danforth* each dealt with a requirement that minors obtain parental consent; none dealt with a notification requirement.

Testimony by experts whom the trial court evaluated as credible and of unquestionably high standing in their respective fields agreed that although family relationships benefit from voluntary and open communication, compelling parental notice has an opposite effect. It is almost always disastrous. Clinic counselors with extensive experience counseling minors in Minnesota supported this view. There was evidence that the law did not promote family integrity or communication; on the contrary, it disrupted and damaged family relationships. The district court found that the defendants offered no persuasive testimony to the contrary. *Hodgson v. State of Minnesota*, 648 F. Supp. at 768. Accordingly, we hold that Minnesota may not constitutionally require a minor to notify her parents of her intent to have an abortion without providing the option of an alternative court procedure by which the minor may demonstrate either her maturity or that the performance of an abortion interests.

III.

A.

Minn. Stat. Ann. § 144.343(3) (1987) (subd. 3) defines "parent" as "both parents of the pregnant woman if they are both living, one parent of the pregnant woman if only one is living or if the second one cannot be located through reasonably diligent effort, or the guardian or conservator of the pregnant woman has one." The plaintiffs claim that this provision is unconstitutional because, at least where the minor does not live with both parents, the statute unduly burdens the minor's exercise of her right to seek an abortion. The defendants, on the other hand, claim that the two-parent notification requirement is constitutional, and that even if it were not, the statute as a whole is constitutional because under subdivision 6 the pregnant minor retains the option of having her abortion authorized by the court. It is to these opposing claims which we now turn.

1.

In *Bellotti II*, the Supreme Court's plurality opinion upheld a requirement that a pregnant minor seeking an abortion obtain both parents' consent, but explicitly left open the question of whether such a requirement would be constitutional where both parents were not residing together and living at home with the minor. According to the Court plurality:

> We are not persuaded that, as a general rule, the requirement of obtaining both parents' consent unconstitutionally burdens a minor's right to seek an abortion. The abortion decision has implications far broader than those associated with most other kinds of medical treatment. *At least when the parents are together and the pregnant minor is living at home*, both the father and mother have an interest—one normally supportive—in helping to determine the course that is in the best interests of a daughter. Consent and involvement by parents in important decisions by minors long have been recognized as protective of their immaturity.

Id. at 649 (emphasis added). Our task is to determine whether these same interests are served by a requirement that a pregnant minor seeking an abortion notify even a non-custodial parent who is no longer, and perhaps never was, living at home as a part of the "family unit."[4]

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4 By phrasing the issue in this way, we do not mean to suggest that it would be constitutional to carve out of a two-parent notification requirement only non-custodial parents not living at home. Rather, we discuss such parents here because subd. 3 requires that they be notified, and because we conclude that this is unconstitutional. It is conceivable to us that a requirement that others be notified, such as parents with joint custody who do not live with the minor most of the time or at the time she learns of her pregnancy, might be unconstitutional as well. We do not, however, decide this issue. Further, we note in passing that Justice Powell's plurality opinion in *Bellotti II* is the only Supreme Court decision to reach the two-parent requirement, and that the plurality's discussion on this point does not appear to have been necessary to its decision. *See Bellotti II*, 443 U.S. at 656 n.4. ("A real statute—rather than a mere outline of a possible statute—and a real case or

In making his findings of fact, Judge Alsop, in a careful and thorough opinion, specifically discussed the high incidence of divorce, and the effect this often has on family communication. According to the district court, approximately 50% of all marriages in Minnesota end in divorce, and approximately 42% of all minors in Minnesota do not live with both biological parents. *Hodgson*, 648 F. Supp. at 768. Further, the district court found that many minors in Minnesota who are victims of dysfunctional families "live in fear of violence by family members." Parental notification of a pending abortion can only add to the magnitude of the problem of family violence which in turn intensifies the distress and anxieties of the abortion decision confronting the pregnant minor. *Id.* at 768-69.[5] Most particularly, the court noted:

> Divorce or separation usually impairs family communication severely. The non-custodial parent often has very little communication with the child. In addition, communication between divorced or separated spouses frequently is marked with the kind of hostility and angry vindictiveness that characterized the divorce or separation.
>
> The effect of compelling an adolescent to share information about her pregnancy and abortion decision with both parents in a divorced or separated situation can be harmful. The non-custodial parent often will reintegrate with the family in a disruptive manner. The adolescent may be perplexed as to why the non-custodial parent should become an important factor in her life at this point, especially when the parent previously has paid her little attention and offered little support. Moreover, the testi-

controversy may well present questions that appear quite different from the hypothetical questions MR. JUSTICE POWELL has elected to address.") (Stevens, J., concurring). Accordingly, in view of our disposition of this appeal, we decline to rule definitively on the constitutionality of requiring that both parents be notified when the parents reside together and the minor is living at home.

5 The district court also noted that the incidence of violence in dysfunctional families is severely underreported. *Hodgson*, 648 F. Supp. at 768-69.

> mony revealed no instances in which beneficial relations between a minor and an absent parent were reestablished following required notification . . . .
>
> Involuntary involvement of the second biological parent is especially detrimental when the minor comes from an abusive, dysfunctional family. Notification of the minor's pregnancy and abortion decision can provoke violence, even where the parents are divorced or separated. Studies have shown that violence and harassment may continue well beyond the divorce, especially when children are involved.

Id. at 769.[6] Finally, the court found that of the twenty to twenty-five percent of minors going to court who voluntarily notified one but not both parents, "the vast majority" told divorced or separated mothers who had not seen their spouses in years, and that minors who ordinarily would notify one parent might be dissuaded from doing so by the two-parent requirement. *Id.* We conclude that these findings are supported by the record and are not clearly erroneous.

Based on the above findings of fact, the district court concluded that "the need to notify the second parent or to make a burdensome court appearance actively interferes with the parent-child communication voluntarily initiated by the child, communication assertedly at the heart of the State's purpose in requiring notification of both parents. In these cases, requiring notification of both parents affirmatively discourages parent-

6 For example, in one instance a non-custodial father called the Meadowbrook Clinic on the morning of his daughter's proposed abortion, and told the Clinic's administrator that he was anti-abortion and planned to stop the abortion from happening. The administrator told him he could not stop the abortion, but then told the mother, who was there at the time, that the clinic could not perform the abortion until things "calmed down." The mother responded that the clinic should not worry because she would "take care of it," and then proceeded to drive to the father's house and shoot a bullet from her gun through his door. Afterwards, the mother returned to the clinic stating, "he will not bother you again." Dr. Lenore Walker, one of the plaintiffs' expert witnesses, testified that pregnancy of a daughter or of a wife triggers violent reactions in abusive dysfunctional families "like a red cape to a bull."

child communication." *Id.* at 778. Thus, held the court, "this requirement fails to further the State's interest." We agree.

As extensively detailed by the district court and noted above, the effect of notifying an absent non-custodial parent of his or her minor daughter's decision to have an abortion is frequently negative for all concerned. Indeed, the problems which inevitably arise when two divorced parents both attempt to raise and influence the same minor child are often a primary reason that courts decline to award joint custody.[7] Thus, unless some other arrangement is made, where the court awards sole custody to one parent, that parent

> has the right to make decisions about the child's education, religious training, residence, and medical treatment. Generally, this parent also has "physical" or "actual" custody which entitles her to control the child's daily activities such as sleeping, eating, and recreation. *The rights and obligations of the non-custodial parent are a good deal more limited. Typically, that parent loses all power with respect to major decisions.* The non-custodial parent's influence over day-to-day childrearing activities is limited to the period of visitation, and visitation itself is frequently confined to a brief time.

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7 *See, e.g.*, Chapman v. Chapman, 352 N.W.2d 437 (Minn. App. 1984), in which the Minnesota trial court had granted joint legal custody in the hope that it would encourage the parents to cooperate. The court of appeals rejected this rationale for awarding joint custody, stating:

> Instead of granting joint custody because the parties *can* cooperate and amicably settle disputes about the children, the judge granted joint custody because they *cannot*. Although ideally the parents should make major decisions concerning their children jointly, joint legal custody should not be used as a "legal baseball bat" to coerce cooperation, as advocated by the father's attorney.
>
> The record shows that the parents have basic differences concerning the health care, religious training and general upbringing of their children. They have not been able to communicate or cooperate in resolving their differences. Joint custody would only exacerbate the problem by dividing authority and increasing opportunities for conflict.

Id. at 441 (emphasis in original).

Wexler, *Rethinking the Modification of Child Custody Decrees*, 94 Yale L. J. 757, 808 (1985) (emphasis added; footnote omitted). *See* J. Goldstein, A. Freud & A. Solnit, *Beyond the Bests Interests of the Child* 38 (1973).

To be sure, in some instances the absent non-custodial parent's advice may be important, helpful, and desirable, and a two-parent notification requirement does, in those cases, further the state's significant interest in promoting intra-family communication. The problem, however, is that the occasions on which the State's interests are furthered are simply too infrequent to justify the burden imposed—particularly where the court has explicitly awarded custody to one parent instead of another. Indeed, one of the prerogatives of being the custodial parent is deciding, in conjunction with the child, when and whether to tell the non-custodial parent about decisions which may affect the child's well-being. *See* Wexler, *supra*; J. Goldstein, A. Freud & A. Solnit, *supra*. Further, even in the absence of a two-parent notification requirement there is certainly nothing to prevent a custodial parent from consulting, or encouraging the minor to consult, the non-custodial parent. *See* J. Goldstein, A. Freud & A. Solnit, *supra*. Accordingly, we conclude that because it frequently does more harm than good, on balance the present statute fails to further the State's asserted interests and is therefore unconstitutional.

2.

We now turn to the question of whether, notwithstanding our conclusion that it is unconstitutional to require absent non-custodial parents to be notified of their minor daughter's abortion decision, the present statute is nevertheless saved by the presence in the statute of an alternative court bypass procedure. In this respect, we note initially that after the plurality in *Bellotti II* suggested it would approve two-parent notification requirements where the parents are together and the minor is living at home, the plurality stated that, "[a]s every pregnant minor is entitled in the first instance to go directly to the court for a judicial determination without prior parental notice, consultation, or consent, the general rule with respect to parental

consent does not unduly burden the constitutional right."[8] *Bellotti II*, 443 U.S. at 649. Nevertheless, we conclude that where, as in this case, the underlying notification requirement impermissibly burdens the minor's abortion decision, that requirement cannot be saved by the presence in the statute of an alternative court bypass procedure.

Our reasons for this conclusion are twofold. The first and most fundamental reason for our conclusion is that the court bypass procedure itself constitutes a burden on the minor's exercise of her right to have an abortion. *See Harris v. McRae*, 448 U.S. 297, 316 (1980) (impliedly recognizing that any state regulation which places an obstacle, absolute or otherwise, in the path of a woman's fundamental right to proceed with an abortion, is a burden); *Maher v. Roe*, 432 U.S. 464, 472-74 (1977) (same). *See also Danforth*, 428 U.S. at 74 ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."). Where the bypass procedure is instituted as an alternative to an otherwise valid parental notification or consent requirement, this burden is justified by the state's significant interest in fostering intra-family communication and protecting minors through parental involvement in the abortion decision. Indeed, where a state chooses to impose an otherwise valid consent or notification requirement upon minors, it *must* also provide an alternative court procedure. *Ashcroft*, *supra*; *Akron*, *supra*; *Bellotti II*, *supra*. Where the underlying notification provision is unconstitutional because with respect to children of broken families it fails to further the state's significant interests, however, a mature minor or minor whose best interests are contrary to notifying the non-custodial parent is forced to either suffer the unconstitutional requirement or submit to the burdensome court bypass procedure.

8 Indeed, in a footnote the plurality recognized that "[t]here will be cases where the pregnant minor has received approval of the abortion decision by one parent." According to the plurality, "[i]n that event, the parent can support the daughter's request for a prompt judicial determination, and the parent's support should be given great, if not dispositive weight." See *Bellotti II*, 443 U.S. at 649 n.29.

Such a Hobson's choice fails to further any significant interest. Just as there must be a constitutional judicial alternative to a notice requirement, so there must be a constitutional notice or consent alternative to the court bypass.[9]

The second reason for our conclusion that the court bypass procedure does not save the two-parent notification requirement is that where the parents are divorced, the minor and/or custodial parent, and not a court, is in the best position to determine whether notifying the non-custodial parent would be in the child's best interests. *See* J. Goldstein, A. Freud & A. Solnit, *supra*. In situations where the minor has a good relationship with the non-custodial parent but the custodial parent does not, there is nothing to prevent the minor from consulting with the non-custodial parent if she so desires. The minor and custodial parent, however, by virtue of their major interest and superior position, should alone have the opportunity to decide to whom, if anyone, notice of the minor's abortion decision should be given. *See id*. Accordingly, we conclude that the unconstitutional notice provisions in Minn. Stat. Ann. §§ 144.343(2)-(7) are not saved by the presence in the statute of an alternative court bypass procedure.

B.

Finally, we must reach the question of whether the two-parent notification provision is severable from the remainder of the statute. In this regard, we recall that subd. 7 provides for severability where the valid portions of the statute "can be given effect without the invalid provision," and therefore creates a presumption of severability. "Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Alaska Airlines, Inc. v. Brock*, 55 U.S.L.W. 4396, 4398 (U.S. March 25, 1987) (quoting *Buckley v. Valeo*, 424 U.S. 1, 108

9 Indeed, the defendants conceded at oral argument before this court that they could not constitutionally strip Minn. Stat. Ann. §§ 144.343(2)-(7) of all but the court bypass procedure. This concession is flatly inconsistent with the defendant's claim that the statute's unconstitutional notification requirement is saved by the court bypass procedure.

(1976) (per curiam), and *Champlin Refining Co. v. Corporation Comm'n of Oklahoma*, 286 U.S. 210, 234 (1932)). *Accord Regan v. Time, Inc.*, 468 U.S. 641, 653 (1984) (plurality opinion). Severance is improper if the offending language is "inseparably intertwined within a subsection of the law." *Women's Services, P.C. v. Thone*, 636 F.2d 206, 210 (8th Cir. 1980), *vacated for further consideration sub nom. Thone v. Women's Services, P.C.*, 452 U.S. 911 (1981).

In the case of the present statute, the defendants urge us to sever the two-parent notification requirement in such a way as to make it a single parent notification requirement. In particular, they urge us to make singular the few references to the word "parent" which are in the plural, and to modify by excision the definition of parent in subd. 3 by removing the phrases, "both parents of the pregnant woman if they are both living," and "if only one is living or if the second one cannot be located through reasonably diligent effort." So modified, "parent" would be defined as "one parent of the pregnant woman or the guardian or conservator if the pregnant woman has one."

The problem with the defendants' suggestion is that even so modified portions of the statute cannot be given meaning. For example, subd. 5 provides that "[p]erformance of an abortion in violation of this section . . . shall be grounds for a civil action by a person wrongfully denied notification." If the statute were modified to require notification of only one parent, then it would be impossible to determine which of the two parents would have a cause of action. This would be particularly difficult where both parents are residing together and the pregnant minor is living at home.

Further, such a "radical dissection" would leave Minn. Stat. Ann. §§ 144,341(2)-(7) "with little resemblance to that intended," *Thornburgh*, 54 U.S.L.W. at 4623, by the Minnesota legislature. *See Akron*, 462 U.S. at 446 n.37. As the course of this litigation demonstrates, the Minnesota legislature clearly intended to require notification of both parents whenever possible and constitutional. Indeed, Senator Waldorf, one of the authors of the bill, specifically stated during a hearing before the Minnesota Legislative Committee on Health, Welfare and Corrections that "parent" was intended to mean both parents

even when the parents were divorced and that he believed it would be constitutional to go this far.[10] If, however, as *Bellotti II* suggests, requiring notification of both parents is constitutional where both parents are residing together and the pregnant minor is living at home, then the modification which the defendants suggest would be far more drastic than necessary to make the statute constitutional. As the district court noted, "this court is ill-suited to determine what alternative definition the legislature would employ to remedy the constitutional infirmity in this decision." *Hodgson*, 648 F. Supp. at 780-81. The job of rewriting Minn. Stat. Ann. §§ 144.343(2)-(7) must, therefore, fall to the Legislature, and not to the courts. Accordingly, we conclude that the two-parent notification requirement cannot be severed.

IV.

In summary, we hold that a State may not constitutionally require a minor to notify her parents of her intent to have an abortion without providing the option of an appropriate alternative court procedure by which the minor may demonstrate either her maturity or that the performance of an abortion without notification to her parents would be in her best interests. We further hold that even where there is the option of such an alternative court procedure, a State may not constitutionally require the minor to always notify *both* of her parents whenever possible, and that this requirement in the present statute is not severable from the remainder of the statute. Accordingly, the district court's judgment permanently enjoining the State of Minnesota from enforcing the provisions of Minn. Stat. Ann. § 144.343(2)-(7) will be affirmed.

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10 According to Senator Waldorf, "what we're trying to do is to make the bill constitutional. I am not aware of any [C]ourt decisions, [S]upreme [C]ourt decisions that would not give status to the natural parent who is divorced."

HEANEY, Circuit Judge, concurring.

I concur in the opinion insofar as it holds unconstitutional the Minnesota statute which requires a pregnant minor seeking an abortion to notify a noncustodial parent who is no longer living at home at least forty-eight hours before the abortion. I do so for the reason noted by Judge Alsop in his opinion and quoted on pages 16 and 17 of this opinion. I also agree that the "two parent" requirement cannot be saved by the presence in the statute of the court bypass procedure. Finally, I agree that we cannot sever the two-point notification in such a way as to make it a single parent notification requirement. It is for the legislature to make that change.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 86-5423 and 86-5431

Jane Hodgson, et al.,

Appellees,

v.

The State of Minnesota, et al.,

Appellants.

On Petition for Rehearing En Banc
Filed: December 31, 1987

The panel's order of November 13, 1987, vacating the judgment and opinion in the above-entitled case is hereby rescinded. The panel reinstates the opinion and judgment of the court.

The petition for rehearing by the court en banc is granted; the panel opinion and judgment entered thereon are vacated. The case shall be argued to the court of appeals en banc and submitted on original briefs and record on February 12 at 9:00 a.m. in St. Paul, Minnesota, in the court of appeals Courtroom No. 1, 584 Federal Courts Building, 316 North Robert Street. Each side will be given 30 minutes for oral argument. Additional citations may be submitted to the court under Fed. R. App. P. 28 (j).

A true copy.

Attest:

/s/ ROBERT D. ST. VRAIN

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-5423
No. 86-5431

Jane Hodgson, M.D.; Arthur Horowitz, M.D.; Nadine T., Janet T., Ellen Z., Heather P., Mary J., Sharon L., Kathy M., and Judy M. individually and on behalf of all other persons similarly situated; Diane P., Sarah L. and Jackie H.; Meadowbrook Women's Clinic, P.A., Planned Parenthood of Minnesota, a nonprofit Minnesota corporation; Midwest Health Center for Women, P.A., a nonprofit Minnesota corporation; Women's Health Center of Duluth, P.A., a nonprofit Minnesota corporation,

Appellees,

v.

The State of Minnesota; Rudy Perpich as Governor of the State of Minnesota; Hubert H. Humphrey, III, as Attorney General of the State of Minnesota,

Appellants.

Appeals from the United States District Court
for the District of Minnesota.

Submitted: February 12, 1988 Filed: August 8, 1988

Before

LAY, Chief Judge, HEANEY, MCMILLAN, ARNOLD, JOHN R. GIBSON, FAGG, BOWMAN, WOLLMAN, MAGILL and BEAM, Circuit Judges, En Banc.

JOHN R. GIBSON, Circuit Judge.

The issue before us is the constitutionality of a Minnesota statute which requires a pregnant minor to notify her parents of her desire to obtain an abortion or to seek judicial bypass. The statute, Minn. Stat. Ann. §§ 144.343(2)-(7) (1987), requires a minor to notify both parents at least forty-eight hours before a planned abortion or demonstrate to a court in an expedited confidential proceeding either that she is "mature and capable of giving informed consent" or that the performance of an abortion without such notification would be in her "best interests." The district court held that the notice/bypass statute was unconstitutional because the two-parent notice requirement failed to serve the state's interest in protecting pregnant minors or promoting family communication and that the 48-hour waiting period requirement was unreasonable under conditions existing in Minnesota. A panel of this court affirmed the judgment of the district court and we granted rehearing en banc. We now reverse and remand with directions that the district court enter judgment that the notice/bypass statute is constitutional.

In 1981, the Minnesota legislature enacted Minn. Stat. Ann. § 144.343, which deals generally with minor's consent to treatment for pregnancy, venereal disease, and alcohol and drug abuse.[1] Subd. 2 provides that no abortion may be performed upon an unemancipated minor until at least 48 hours after written notice to her parent[2] and provides the mechanics for effecting notice.[3] Subd. 6 provides that if the notification provision

1 Only the constitutionality of the portion of the statute dealing with abortions for minors is at issue.

2 Subd. (2) provides:

> [N]o abortion operation shall be performed upon an unemancipated minor • • • until at least 48 hours after written notice of the pending operation has been delivered in the manner specified in subdivisions 2 to 4.

3 Subd. (2)(a) provides for personal notice by the physician or his agent. In the alternative, subd. 2(b) provides that notice may also be effected by "certified mail addressed to the parent at the usual place of abode of the

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-5423
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Jane Hodgson, M.D.; Arthur Horowitz, M.D.; Nadine T., Janet T., Ellen Z., Heather P., Mary J., Sharon L., Kathy M., and Judy M. individually and on behalf of all other persons similarly situated; Diane P., Sarah L. and Jackie H.; Meadowbrook Women's Clinic, P.A., Planned Parenthood of Minnesota, a nonprofit Minnesota corporation; Midwest Health Center for Women, P.A., a nonprofit Minnesota corporation; Women's Health Center of Duluth, P.A., a nonprofit Minnesota corporation,

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Submitted: February 12, 1988 Filed: August 8, 1988

Before

LAY, Chief Judge, HEANEY, MCMILLAN, ARNOLD, JOHN R. GIBSON, FAGG, BOWMAN, WOLLMAN, MAGILL and BEAM, Circuit Judges, En Banc.

JOHN R. GIBSON, Circuit Judge.

The issue before us is the constitutionality of a Minnesota statute which requires a pregnant minor to notify her parents of her desire to obtain an abortion or to seek judicial bypass. The statute, Minn. Stat. Ann. §§ 144.343(2)-(7) (1987), requires a minor to notify both parents at least forty-eight hours before a planned abortion or demonstrate to a court in an expedited confidential proceeding either that she is "mature and capable of giving informed consent" or that the performance of an abortion without such notification would be in her "best interests." The district court held that the notice/bypass statute was unconstitutional because the two-parent notice requirement failed to serve the state's interest in protecting pregnant minors or promoting family communication and that the 48-hour waiting period requirement was unreasonable under conditions existing in Minnesota. A panel of this court affirmed the judgment of the district court and we granted rehearing en banc. We now reverse and remand with directions that the district court enter judgment that the notice/bypass statute is constitutional.

In 1981, the Minnesota legislature enacted Minn. Stat. Ann. § 144.343, which deals generally with minor's consent to treatment for pregnancy, venereal disease, and alcohol and drug abuse.[1] Subd. 2 provides that no abortion may be performed upon an unemancipated minor until at least 48 hours after written notice to her parent[2] and provides the mechanics for effecting notice.[3] Subd. 6 provides that if the notification provision

1 Only the constitutionality of the portion of the statute dealing with abortions for minors is at issue.

2 Subd. (2) provides:

> [N]o abortion operation shall be performed upon an unemancipated minor * * * until at least 48 hours after written notice of the pending operation has been delivered in the manner specified in subdivisions 2 to 4.

3 Subd. (2)(a) provides for personal notice by the physician or his agent. In the alternative, subd. 2(b) provides that notice may also be effected by "certified mail addressed to the parent at the usual place of abode of the

of subd. 2 is restrained by judicial order, which as we will discuss occurred here, then a pregnant minor has the choice of either providing notice as set forth in subd. 2, or submitting to a "court bypass" procedure.[4] Under the court bypass, a judge, after an expedited confidential hearing, may authorize an abortion without parental notice after determining "that the pregnant woman is mature and capable of giving informed consent," or that the performance of an abortion without notification would be in her "best interests." "Parent" is defined

parent with return receipt requested and restricted delivery to the addressee * * *." If notice is mailed, "[t]ime of delivery [is] deemed to occur at 12 o'clock noon on the next day on which regular mail delivery takes place, subsequent to mailing."

4 Subd. 6 provides:

If subdivision 2 of this law is ever temporarily or permanently restrained or enjoined by judicial order, subdivision 2 shall be enforced as though the following paragraph were incorporated as paragraph (c) of that subdivision; provided, however, that if such temporary or permanent restraining order or injunction is ever stayed or dissolved, or otherwise ceases to have effect, subdivision 2 shall have full force and effect, without being modified by the addition of the following substitute paragraph which shall have no force or effect until or unless an injunction or restraining order is again in effect.

(c)(i) If such a pregnant woman elects not to allow the notification of one or both of her parents or guardian or conservator, any judge of a court of competent jurisdiction shall, upon petition, or motion, and after an appropriate hearing, authorize a physician to perform the abortion if said judge determines that the pregnant woman is mature and capable of giving informed consent to the proposed abortion. If said judge determines that the pregnant woman is not mature, or if the pregnant woman does not claim to be mature, the judge shall determine whether the performance of an abortion upon her without notification of her parents, guardian or conservator would be in her best interests and shall authorize a physician to perform the abortion without such notification if said judge concludes that the pregnant woman's best interests would be served thereby.

(ii) Such a pregnant woman may participate in proceedings in the court on her own behalf, and the court may appoint a guardian ad litem for her. The court shall, however, advise her that she has a right to court appointed counsel, and shall, upon her request, provide her with such counsel.

(iii) Proceedings in the court under this section shall be confidential and shall be given such precedence over other pending matters so that the court may reach a decision promptly and without delay so as to serve the

in subd. 3 as "both parents of the pregnant woman if they are both living, one parent of the pregnant woman if only one is living or if the second one cannot be located through reasonably diligent effort, or the guardian or conservator if the pregnant woman has one." Subd. 5 is a penalty provision and subjects anyone performing an abortion in violation of the statute to criminal penalties and civil liability. The statute also provides exceptions to the notice requirement[5] as well as a severability provision.[6]

The statute was to become effective on August 1, 1981. On July 30, 1981, this action seeking declaratory and injunctive relief was brought by a group including: six class-action minors seeking abortions who claimed to be mature and that notification of one or both of their parents of their desire to have an

best interests of the pregnant woman. A judge of the court who conducts proceedings under this section shall make in writing specific factual findings and legal conclusions supporting the decision and shall order a record of the evidence to be maintained including the judge's own findings and conclusions.

(iv) An expedited confidential appeal shall be available to any such pregnant woman for whom the court denies an order authorizing an abortion without notification. An order authorizing an abortion without notification shall not be subject to appeal. No filing fees shall be required of any such pregnant woman at either the trial or the appellate level. Access to the trial court for the purposes of such a petition or motion, and access to the appellate courts for purposes of making an appeal from denial of the same, shall be afforded such a pregnant woman 24 hours a day, seven days a week.

5 Subd. 4 provides that no notice is required if:

(a) The attending physician certifies in the pregnant woman's medical record that the abortion is necessary to prevent the woman's death and there is insufficient time to provide the required notice; or

(b) The abortion is authorized in writing by the person or persons who are entitled to notice; or

(c) The pregnant minor woman declares that she is a victim of sexual abuse, neglect, or physical abuse as defined in section 626.556. Notice of that declaration shall be made to the proper authorities as provided in section 626.556, subdivision 3.

6 Subd. 7 provides that if any [part of the statute] is held invalid, such invalidity should not affect any portion of the statute which can be given effect without the invalid portion.

abortion would not be in their best interests; a mother of one of the minor plaintiffs alleging that notification of the father was not in the minor's best interests; and four clinics and two physicians performing abortions in Minnesota.

The district court temporarily restrained enforcement of subd. 2 of the statute (the pure notice provision) on July 31, 1981, but denied injunctive relief as to subd. 6 (the notice/bypass provision).[7] Later, the district court granted partial summary judgment for the defendants by dismissing the plaintiffs' state constitutional claims and by ruling that, on its face, the judicial bypass procedure in subd. 6 did not violate the equal protection and due process rights of pregnant minors. The court concluded, however, that plaintiffs should have the opportunity of a trial to prove their allegations that subd. 6 was being applied unconstitutionally.

After a trial lasting five weeks, the district court held that the notification requirement of subd. 2 without judicial bypass was unconstitutional. *Hodgson v. Minnesota*, 648 F. Supp. 756, 773 (D. Minn. 1986), *cert. denied*, 107 S. Ct. 1333 (1987). While the court found that the notice/bypass requirement, as a whole, was not supported by factual findings that it furthered in any meaningful way the state's interest in protecting pregnant minors or assuring family integrity, the court concluded that it complied both on its face and in actual practice with standards established by the Supreme Court. *Id.* at 773-77. The district court then considered in isolation the two-parent notification and the 48-hour waiting period requirement and found both to be unconstitutional. *Id.* at 777-780. While the 48-hour waiting period requirement was held severable, the two-parent notification requirement was held to be not severable and, accordingly, required that the entire notice-bypass procedure be enjoined in its entirety. *Id.* at 780-81. Both sides appeal.

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7 On March 2, 1982, the court issued a preliminary injunction against enforcement of subd. 2.

I.

The principles governing the constitutionality of the states' regulation of abortion have been set forth by the Supreme Court and bind this court. In *Roe v. Wade*, 410 U.S. 113 (1973), the Supreme Court held that the due process clause of the fourteenth amendment forbids the states from interfering with a pregnant woman's choice, with competent medical advice, to terminate her pregnancy. The right to choose abortion is, however, limited; state regulation is permissible to foster "compelling state interests" by "narrowly drawn" legislation. *Id.* at 155. Moreover, in view of the unique status of children under the law, states have a "significant" interest in supporting certain abortion regulations aimed at protecting children that is not present when the state seeks to regulate adults. *City of Akron v. Akron Center for Reproductive Health* (*Akron*), 462 U.S. 416, 427 n.10 (1983) (citing *Planned Parenthood v. Danforth*, 428 U.S. 52, 74-75 (1976)). Because of the "peculiar vulnerability of children; their inability to make mature decisions in an informed, mature manner; and the importance of the parental role in child rearing," the Court has recognized that states have a significant interest in promoting parental involvement with a minor who is seeking an abortion. *See H.L. v. Matheson*, 450 U.S. 398 (1981) (parental notice); *Bellotti v. Baird (Bellotti II)*, 443 U.S. 622, 633-39, 648 (1979) (plurality opinion) (parental consent).

A majority of the Court, however, has indicated that these state and parental interests must give way to the constitutional right of a mature minor, or of an immature minor whose best interests are contrary to parental involvement, to obtain an abortion without consulting or notifying her parents. *Akron*, 462 U.S. at 427 n.10; *see e.g.*, *Matheson*, 450 U.S. at 414-420 (Powell, J., concurring); *id.* at 450-54 (Marshall, J., dissenting); *Bellotti II*, 443 U.S. at 643-44 (Powell, J.); *id.* at 653-56 (Stevens, J., concurring). In view of the unique nature and consequences of the abortion decision, states do not have the constitutional authority "to give a third party an absolute, and possibly arbitrary, veto" over the minor's abortion decision. *Bellotti II*, 443 U.S. 643 (Powell, J.); *id.* at 653-56 (Stevens, J.,

concurring); *Danforth*, 428 U.S. at 74-75. Thus, a state choosing to encourage parental involvement must provide an alternative procedure through which a minor may demonstrate that she is mature enough to make her own decision or that the abortion is in her best interest. *Akron*, 462 U.S. at 427 n.10; *see Bellotti II*, 443 U.S. at 643-44 (plurality); *Ind. Planned Parenthood v. Pearson*, 716 F.2d 1127, 1132 (7th Cir. 1983).

Justice Powell has described the nature and purpose of the required bypass proceeding:

> A pregnant minor is entitled in such a proceeding to show either: (1) that she is mature and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests. The proceeding in which this showing is made must assure that a resolution of the issue, and any appeals that may follow, will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained. In sum, the procedure must ensure that the provision requiring parental consent does not in fact amount to the "absolute, and possibly arbitrary, veto" that was found impermissible in *Danforth*.

Bellotti II, 443 U.S. at 643-44 (footnote and citation omitted). The judicial bypass procedure outlined by Justice Powell in *Bellotti II* was subsequently endorsed by a majority of the Court in *Planned Parenthood v. Ashcroft*, 462 U.S. 476, 490-93 (1983), *id.* (upholding consent/bypass statute) and *Akron*, 462 U.S. at 438-40.

A.

Based on these principles, the district court held subd. 2, the notification provision without judicial bypass, unconstitutional. The court concluded that Minnesota may not require a minor to notify her parents of her intent to have an abortion without providing an alternative court procedure. *Hodgson*, 648 F. Supp. at 773.

Although *Bellotti II* considered the constitutionality of a parental consent rather than parental notice statute, the plurality opinion indicated that a state is required to make the alternative bypass procedure available under both types of statutes. *Id.* at 647. *See Akron*, 462 U.S. at 441 n.31; *Matheson*, 450 U.S. at 420 and n.9 (Powell, J., concurring) (stating that the rationale for requiring a state to provide a judicial bypass to a consent requirement is applicable to notification statues); *id.* at 428 n.3 (Marshall, J., dissenting); *see also Zbaraz v. Hartigan*, 763 F.2d 1532, 1539 (7th Cir. 1985), *aff'd without op.*, 108 S. Ct. 479 (1987); *Pearson*, 716 F.2d at 1132. *Cf. Matheson*, 450 U.S. at 409 (Constitution is not violated by statute requiring notice to the parents of an immature dependent minor seeking an abortion).[8] The state argues in its brief that the notification requirement without the judicial bypass option is constitutional, but did not press this position at oral argument. We conclude that the district court did not err in ruling that a bypass procedure is constitutionally required by the several Supreme Court decisions cited above as an alternative to parental notification.

B.

The district court then examined the constitutionality of the notice/bypass provision. The court made a variety of factual findings with respect to the operation of the court bypass procedure over the past five years. It outlined in detail the availability of abortion services in Minnesota, underscoring the fact that virtually all of Minnesota's abortion providers are located in the two major metropolitan areas of the state: Duluth and

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8 The Court's primary holding in *Matheson* was that the pregnant minor challenging Utah's abortion notice requirement on the ground that it impermissibly applied to mature or emancipated minors lacked standing to raise that argument since she had not alleged that she or any member of her class was mature or emancipated. *Id.* at 406. The majority opinion did not decide whether a pure notice requirement would be constitutional as applied to emancipated or mature minors. Five justices, however, expressed the view that it would be unconstitutional to apply a notice requirement to minors who could demonstrate their maturity. *Id.* at 420 (Powell, J., concurring); *id.* at 428 n.3 (Marshall, J., dissenting).

Minneapolis-St. Paul. Many women had to travel long distances to obtain an abortion and the court recognized transportation problems facing women seeking an abortion, particularly during the winter. Women from outside the metropolitan areas tended to have abortions later in their pregnancy than women from other parts of the United States. *Hodgson*, 648 F. Supp. at 761.

The court also found that the experience of going to court for judicial authorization subjected the minors to a great deal of stress and that some considered the court proceedings more difficult than the abortion itself. The court found that the two-parent notice requirement affected many minors living in single-parent homes who had notified the custodial parent and minors living in two-parent homes who voluntarily consulted with one parent. These minors either had to notify the second parent or go through the court bypass procedure. The court found that either option was emotionally traumatic and interfered with the communication voluntarily initiated by the minor. The court noted that these instances were not uncommon and were supported by the fact that approximately 20-25% of minors who went to court were accompanied by, or indicated that they had consulted with, one parent. *Id.* at 763-64.

Many of the judges who heard bypass petitions testified that they felt the procedure was traumatic for the minors and did little good. Dr. Hodgson, one of the plaintiffs, testified that there was no benefit whatsoever to the law and that the law had created "nothing but problems" for her teenage patients. There was testimony that the law did not enhance parent-child communication or improve family relations. *Id.* at 766-68.

Against these considerations, the court assessed the strength of the state's interests and the extent to which the statute furthered these interests. The court found that the statutory goal is to foster intra-family communication and to protect the well-being of pregnant minors by encouraging them to discuss with their parents the decision whether to have an abortion. The statute was designed to enable parents to provide support and guidance and prevent their daughters from making irrational and emotional decisions. Parents might also be able to provide medical history of which the minor may be unaware, help with post-

abortion care, and support the child psychologically. The court found that the legislature also wanted to deter and dissuade minors from choosing abortion. *Id.* at 765-66.

The court found the two-parent notice requirement placed a substantial burden of obtaining a judicial waiver upon a group of minors composed almost entirely of either mature minors or minors whose best interests were not served by notification. It ultimately concluded that this burden was not justified by the state's interest in encouraging intra-family communication and protecting immature minors because the statute did not further either of these interests in any meaningful way.[9] The court rejected the possibility that the statute's existence encouraged immature, non-best interest pregnant minors to notify their parents and that this intangible effect was not amenable to proof at trial. *Id.* at 775-76.

Despite these factual findings, the district court concluded that *Bellotti II* required its holding that the notice/bypass procedure as a whole was constitutional. The court recognized that it was "not writing on a clean slate" in determining the constitutionality of Minnesota's parental notification statute and that the Supreme Court has limited its inquiry to an issue of statutory construction: specifically, whether Minnesota provides a judicial alternative to notification that is consistent with established legal standards. *Hodgson*, 648 F. Supp. at 776-77 (citing *Ashcroft*, 462 U.S. at 491-92). The court found that the "maturity" and "best interest" standards articulated in the Minnesota statute complied with those in *Bellotti II* and that the

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9 We note that according to the testimony of Paula Wendt, co-director of the Meadowbrook Clinic, parental notification under the statute has increased. Prior to the statute, Wendt testified that approximately 25% of the pregnant minors she counseled told one or both parents of their pregnancy and intended abortion. Since the law has been in effect Wendt testified that about 50% of the minor patients comply with the statute under the court bypass procedure. Since very few minors have been excused under the emancipation or abuse/neglect exceptions, it follows that there has been a marked increase in parental notification. Because the state did not offer any evidence concerning the effects of this notification, we observe only that since the statute has been in place, the percentage of parents notified of their daughters' intended abortion has increased.

Minnesota courts have applied these standards in hearing bypass petitions. *Id.* at 777.

The court then determined that the judicial bypass procedure, in actual operation, was being applied constitutionally. The court found that judges had almost never denied a minor's petition to proceed with the abortion without notifying her parents; there were only nine instances.[10] It found that the Minnesota courts have established procedures to assure the minor's anonymity and to expedite both the initial hearing and any subsequent appeal. The delays, although burdensome to minor petitioners, did not reflect a "systemic failure to provide a judicial bypass option in the most expeditious, practical manner." *Id.* The court concluded that the judicial bypass procedure, as presently executed by the Minnesota courts and other offices that participate in the bypass proceedings, complied with the legal standards set forth in *Bellotti II* and approved in *Ashcroft*. Therefore the court rejected the plaintiffs' challenge to Minnesota's notice/bypass requirement as a whole. *Id.*

The Hodgson group (the class-action minors, physicians, clinics and parent) argues that the district court erred in limiting its inquiry to an issue of pure statutory construction, because no court has considered the actual effect of a consent/bypass or notice/bypass statute in operation. They argue that the state failed to meet its burden of proving that the statute in actual operation serves significant state interests without unduly burdening minors' constitutional rights. They attack the assumptions implicit in *Bellotti II* and *Ashcroft* that a notice or consent requirement imposed in conjunction with an appropriate alternative bypass procedure serves significant state interests without unduly burdening the right of a mature or best interest minor to obtain an abortion. The state, on the other hand,

10 Bypass petitions had been filed in 3,573 cases and granted in 3,558 of them. Six petitions were withdrawn, nine petitions were denied and one had been appealed. Of the nine denied petitions, some were apparently justified (e.g., minor didn't really want an abortion/changed her mind), and one was reversed on appeal. The court found that the courts outside the metropolitan areas were more likely to deny the petitions, some being due to the court's unfamiliarity with the system and several involving rather unusual circumstances. *Id.* at 765.

urges that its authority to require parental notification with a court bypass has been established as a matter of law.[11]

We recognize that a statute may be facially valid, yet upon full development of a factual record be considered unconstitutional in operation.[12] We are satisfied, however, that the Supreme Court has considered the issues factually before the district court,[13] and that approval given to similar statutory plans mandates approval in this case. *See Ashcroft*, 462 U.S. at 490-93; *Matheson*, 450 U.S. at 409.

To be sure, the district court's detailed factual findings concerning the general difficulties of obtaining an abortion in Minnesota and the trauma of the bypass procedure, compared to its effectiveness, raise considerable questions about the practical wisdom of this statute. Nevertheless, we believe these are questions for the legislature. The minor's pregnancy itself is trau-

11 *See Akron*, 462 U.S. at 427 n.10; *Ashcroft*, 462 U.S. at 490-93; *Matheson*, 450 U.S. at 407-12, 419-25; *Bellotti II*, 443 U.S. at 633-40. *See also Zbaraz*, 763 F.2d at 1532; *Pearson*, 716 F.2d at 1133 (7th Cir. 1983).

12 *See, e.g., Buckley v. Valeo*, 424 U.S. 1 (1976); *Storer v. Brown*, 415 U.S. 724 (1974); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Elbe v. Yankton Indep. School Dist.*, 714 F.2d 848 (8th Cir. 1983).

13 As stated by Justice Stevens:

> If there is no parental-[notice] requirement many minors will submit to the abortion procedure without ever informing their parents. An assumption that the parental reaction will be hostile, disparaging, or violent no doubt persuades many children to bypass parental counsel which would in fact be loving, supportive, and, indeed, for some indispensable. It is unrealistic, in my judgment to assume that every parent-child relationship is either (a) so perfect that communication and accord will take place routinely or (b) so imperfect that the absence of communication reflects the child's correct prediction that the parent will . . . [act] arbitrarily to further a selfish interest rather than the child's interest. A state legislature may conclude that most parents will be primarily interested in the welfare of their children, and further, that the imposition of a parental-[notice] requirement is an appropriate method of giving the parents an opportunity to foster that welfare by helping a pregnant distressed child to make and implement a correct decision.

Danforth, 428 U.S. at 103-104 (Stevens, J., concurring in part and dissenting in part); *see also Matheson*, 450 U.S. at 419-20 (Powell, J., concurring); *id.* at 424 (Stevens, J., concurring).

matic and if she considers abortion, complex issues arise involving numerous competing interests. These interests have been fully recognized by the Supreme Court. A minor's decision to obtain an abortion may not be unconstitutionally burdened, *Matheson*, 450 U.S. at 418-19 (citations omitted), but "the peculiar vulnerability of children; their inability to make mature decisions in an informed, mature manner; and the importance of the parental role in child-rearing," *Bellotti II*, 443 U.S. at 634 (plurality), provides the states with a strong interest in promoting parental involvement. *Akron*, 462 U.S. at 427 n.10. The Supreme Court has considered these competing interests and recognized as a matter of law that parental notice or consent requirements do not unconstitutionally burden a minor's abortion right when an appropriate judicial bypass is in place. *See Ashcroft*, 462 U.S. at 490-94 (challenge to the constitutionality of Missouri's consent/bypass statute treated purely as an issue of statutory construction). *See also Akron*, 462 U.S. at 438-40 (same); *Zbaraz*, 763 F.2d at 1539-45 (same); *Pearson*, 716 F.2d at 1133 (same). We therefore reject the Hodgson group's arguments to the contrary.

Careful study of *Bellotti II*, *Ashcroft*, and *Matheson* reveal the significant state interests which justify Minnesota's notice/bypass statute. Notwithstanding the district court's factual findings, it recognized that the Supreme Court has assumed and recognized certain interests as a matter of law. In *Bellotti II*, a plurality of the Court identified the significant state and parental interests at stake when a minor faces the decision of whether to have an abortion. The special importance and consequences of the abortion decision for the minor are recognized as a sufficient justification for reasonable state efforts to ensure that the decision be wisely made:

> "[Plaintiffs] suggest . . . that the mere requirement of parental notice [unduly burdens the right to seek an abortion]. * * * [H]owever, parental notice and consent are qualifications that typically may be imposed by the State on a minor's right to make important decisions. As immature minors often lack the ability to make fully informed choices that take account of both immediate and long-

> range consequences, a State reasonably may determine that parental consultation often is desirable and in the best interest of the minor. It may further determine, as a general proposition, that such consultation is particularly desirable with respect to the abortion decision—one that for some people raises profound moral and religious concerns . . . .
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> "There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child. That is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support. It seems unlikely that she will obtain adequate counsel and support from the attending physician at an abortion clinic, where abortions for pregnant minors frequently take place.' "

Bellotti II, 443 U.S. 640-641 (plurality) (footnotes omitted) (quoting *Danforth*, 428 U.S. at 91 (concurring opinion)). *See also Bellotti II*, 443 U.S. at 657 (dissenting opinion); *Matheson*, 450 U.S. at 409-10; *id.*, at 422-23 (concurring opinion).

In addition, the state has an interest in the family itself, the institution in which "we inculcate and pass down many of our most cherished values, moral and cultural." *Matheson*, 450 U.S. at 419 (concurring opinion) (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503-04 (1977)). Parents have a traditional and substantial interest in, as well as a responsibility for, the rearing and welfare of their children. In *Matheson*, the Court stated:

> [C]onstitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society:
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> We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected. "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include prepara-

> tion for obligations the state can neither supply nor hinder"
>
> We have recognized that parents have an important "guiding role" to play in the upbringing of their children, which presumptively includes counseling them on important decisions.

450 U.S. at 410 (citations omitted).[14]

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14 The "guiding role" parents have in bringing up their children is explained by Justice Powell:

> [T]he guiding role of parents in the upbringing of their children justifies limitations on the freedoms of minors. The State commonly protects its youth from adverse governmental action and from their own immaturity by requiring parental consent to or involvement in important decisions by minors. But an additional and more important justification for state deference to parental control over children is that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." "The duty to prepare the child for 'additional obligations' . . . must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship." This affirmative process of teaching, guiding, and inspiring by precept and example is essential to the growth of young people into mature, socially responsible citizens.
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> We have believed in this country that this process, in large part, is beyond the competence of impersonal political institutions. Indeed, affirmative sponsorship of particular, ethical, religious, or political beliefs is something we expect the State *not* to attempt in a society constitutionally committed to the ideal of individual liberty and freedom of choice. Thus, "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include *preparation for obligations the state can neither supply nor hinder*."
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> Unquestionably, there are many competing theories about the most effective way for parents to fulfill their central role in assisting their children on the way to responsible adulthood. While we do not pretend any special wisdom on this subject, we cannot ignore that central to many of these theories, and deeply rooted in our nation's history and tradition, is the belief that the parental role implies a substantial measure of authority over one's children. Indeed, "constitutional interpretation has consistently recognized that the parents' claim to authority

Finally, the Supreme Court has recognized the significant state interest in providing an opportunity for parents to supply essential medical and other information to a physician:

> The medical, emotional, and psychological consequences of an abortion are serious and can be lasting; this is particularly so when the patient is immature. An adequate medical and psychological case history is important to the physician. Parents can provide medical and psychological data, refer the physician to other sources of medical history such as family physicians, and authorize family physicians to give relevant data.

Matheson, 450 U.S. at 411.

Because of these interests, a plurality of the Court in *Bellotti II* concluded that a parental consent statute, when an alternative bypass mechanism is in place, does not unconstitutionally burden a minor's abortion right. *Bellotti II*, 443 U.S. at 649. *See also Ashcroft*, 462 U.S. at 490-93. and *Matheson*, 450 U.S. at 411-14; *id.* at 418-20, 423-25 (Powell, J. concurring) (dealing with a notice requirement). Certainly, the evidence demonstrates that these interests and principles apply differently in individual child-parent relationships. The child living in a no-parent or one-parent household may face different considerations than a child living in a two-parent home, as do the mature minor and the immature minor. But to allow specific

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> in their own household to direct the rearing of their children is basic in the structure of our society."
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> Properly understood, then, the tradition of parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter. Legal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding. Under the Constitution, the State can "properly conclude that parents and others, teachers for example, who have [the] primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility."

Bellotti II, 443 U.S. at 637-639 (plurality) (citations and footnotes omitted) (emphasis added).

factual findings with reference to the mature minor or the minor from no- and one-parent households to invalidate the notice/bypass procedure would defeat the recognized parental interests, particularly with respect to the immature and vulnerable child. *See Matheson*, 450 U.S. at 420 (Powell, J., concurring) ("The circumstances relevant to the abortion decision by a minor can and do vary so substantially that absolute rules—requiring parental notice in all cases or in none—would create an inflexibility that often would allow for no consideration of the rights and interests [we have] identified"). If there is to be any regulation, and the Supreme Court has clearly upheld regulation with respect to two-parent families and immature minors, it must apply to all. The Minnesota statute does not require parental notice in all cases. *Cf. Danforth*, 428 U.S. at 74-75. The statute provides exceptions for emancipated minors, minors who are the victims of abuse, and for abortions necessary in an emergency. Most importantly, the statute provides for judicial bypass of the notification requirement for all minors if the minor is mature enough to make the abortion decision independently or if notification would not be in her best interests.[15] *See Bellotti II*, 443 U.S. at 643-44 (plurality); *Ashcroft*, 462 U.S. at 490-93. The bypass procedure provides an effective and independent method for analyzing the situation of the individual pregnant minor—her maturity or immaturity; her no-parent, two-parent or one-parent background; and for determining if it is in her best interests that both parents not be notified. We conclude that the statute complies with the standards set forth in *Bellotti II* and that the Supreme Court's approval of similar plans mandates approval here. *Ashcroft*, 462 U.S. at 490-93; *Matheson*, 450 U.S. at 413. The district

15 In *Bellotti II*, Justice Stevens joined by three other justices concluded that the Massachusetts statute before the Court was unconstitutional because under the statute, as written and construed by the Massachusetts Supreme Court, no minor, no matter how mature and capable of informed decision-making, could receive an abortion without the consent of either both parents or a superior court judge, thus making the minor's abortion decision subject in every instance to an absolute third-party veto. *Id.* at 652-56. In comparison, the statute here gives neither a judge nor parents veto power over the minor's abortion decision.

court did not err in concluding that the statute, as a whole, is constitutional.

C.

After confirming the constitutionality of the statute as a whole, the court considered in isolation Minnesota's two-parent notice requirement. The court discussed the high incidence of divorce and the effect this often has on family communication. According to the court, approximately 50% of all marriages in Minnesota end in divorce, and approximately 42% of all minors in Minnesota do not live with both biological parents. Further, the court found that many minors in Minnesota "live in fear of violence by family members," and that the incidence of family violence is dramatically underreported. The court found that parental notification can only add to the magnitude of the problem of family violence which, in turn, intensifies the distress and anxiety of the minor's abortion decision. The court noted that divorce and separation usually impair family communication, with the non-custodial parent often having little communication with the child. The court also stated that the effect of compelling a minor in this situation to share information about her pregnancy and abortion decision with both parents can be harmful, particularly when the minor comes from an abusive, dysfunctional family. The court found that 20-25% of minors who went to court notified one parent voluntarily and that minors who ordinarily would notify one parent might be dissuaded from doing so by the two-parent requirement. *Hodgson*, 648 F. Supp. 768-69.

Based on these findings, the court concluded that "the need to notify the second parent or to make a burdensome court appearance actively interferes with the parent-child communication voluntarily initiated by the child, communication assertedly at the heart of the state's purpose in requiring notification of both parents. In these cases, requiring notification of both parents affirmatively discourages parent-child communication." *Id.* at 777-78. Thus, the court concluded that the two-parent notice requirement failed to further the state's interests in protecting pregnant minors and promoting family communi-

cation and was therefore invalid. *Id.* at 778 (citing *Carey v. Population Services Int'l*, 431 U.S. 678, 693 (1977); *Danforth*, 428 U.S. at 75). The court rejected the argument that the two-parent notice requirement could be severed. *Hodgson*, 648 F. Supp. at 780.

The Hodgson group argues that the district court's findings of fact are not clearly erroneous and that under *Andersen v. Bessemer City*, 470 U.S. 564 (1985), affirmance of the district court is mandated. The state in response does not attack the findings of the district court, but argues with some force that once the district court determined that the procedure as a whole was constitutional as a matter of statutory interpretation, its inquiry should have ended. We confess some confusion as to why the district court examined the two-parent notice and the 48-hour delay requirements in isolation and applied its conclusions to invalidate the entire statutory procedure it had just approved. Possibly it felt required to do so by the limitation of the holdings in *Belotti II*, 443 U.S. at 649 (plurality) (minors living at home with both parents), and *Matheson*, 450 U.S. at 411 (immature and dependent minors). Certainly, the Supreme Court limited its holdings to such minors. Nevertheless, the limitations of the holdings do not prevent the application of the principles announced by the Supreme Court to both the no-parent and one-parent households as well as the mature minor. We are satisfied that the issue here then is not the district court's factual findings, but its failure to take full account of these recognized principles.

In particular, as applied to all pregnant minors, regardless of their family circumstances, the district court did not consider whether parental and family interests (as distinguished from the interests of the minor alone) justified the two-parent notice requirement. As discussed in Part B, *supra*, the Supreme Court has recognized the significant interests of parents in the rearing and welfare of their children and that these interests justify parental involvement in the minor's abortion decision. The Supreme Court has never indicated that these interests are contingent upon the parent having custody of the child.

The district court's conclusion that the two-parent notice requirement failed to further the state's interests was based primarily on its factual findings regarding the burden imposed on minors in family units that have either "broken apart or never formed."[16] *Hodgson*, 648 F. Supp. at 778. The statutory plan before us demonstrates the difficulty of designing an overall plan which must apply to all pregnant minors regardless of their family circumstances. Certainly, the application of such a general statute will result in greater burdens for some individuals. Indeed, this is the very reason the Supreme Court has concluded that a judicial bypass is imperative; the alternative bypass procedure would be unnecessary unless some burden resulted from the generality of the statute. Any added burden the two-parent notification requirement imposes in individual cases is negated by the judicial bypass mechanism, which enables a mature or "best interests" minor to go directly to court without consulting or notifying both parents. *See Bellotti II*, 443 U.S. at 649 (plurality); *Matheson*, 450 U.S. at 420 (Powell, J., concurring). Similarly, the statute may not be invalidated because it does not correspond perfectly in all cases to the state's asserted interests. *See Akron*, 462 U.S. at 438.

In *Belotti II*, a plurality of the Court indicated that the requirement of obtaining both parents' consent, when an alternative judicial bypass is in place, does not unconstitutionally burden a minor's abortion right:

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16 This conclusion is based on somewhat limited factual findings concerning primarily the statute's burden on the minor living in a one-parent household who notified only her custodial parent. The district court also made a finding concerning the minor living in a two-parent home who may have consulted with one parent but, because of fear, not the other. *Hodgson*, 648 F. Supp. at 764 (finding 49). The court concluded only that instances in which the two-parent notice requirement burdened parent-child communications voluntarily initiated by the minor were "not uncommon." *Id.* (finding 50). This finding was later characterized as a significant obstacle. *Id.* at 778. A careful reading of the groups of related findings clearly indicates, however, that the court was primarily considering the impact of the statute on the minor living in a one-parent household who must notify the non-custodial parent. *Id.* at 764, 768-69 (findings 45-50; 68-72). The court's further discussion underscores this conclusion. *Id.* at 778.

We are not persuaded that, as a general rule, the requirement of obtaining both parents' consent unconstitutionally burdens a minor's right to seek an abortion. The abortion decision has implications far broader than those associated with most other kinds of medical treatment. At least when the parents are together and the pregnant minor is living at home, both the father and mother have an interest—one normally supportive—in helping to determine the course that is in the best interests of a daughter. Consent and involvement by parents in important decisions by minors long have been recognized as protective of their immaturity. In the case of the abortion decision, for reasons we have stated, the focus of the parents' inquiry should be the best interests of their daughter. As every pregnant minor is entitled in the first instance to go directly to the court for a judicial determination without prior parental notice, consultation, or consent, the general rule with respect to parental consent does not unduly burden the constitutional right. Moreover, where the pregnant minor goes to her parents and consent is denied, she still must have recourse to a prompt judicial determination of her maturity or best interests.

443 U.S. at 649.

Moreover, unlike the statute in *Bellotti II* which required the *consent* of both parents, the Minnesota statute requires only notification. Although we recognize that a notice requirement without judicial bypass would be unduly burdensome, at least as applied to mature minors, *cf. Matheson*, 450 U.S. at 409 (two parent notice requirement constitutional as applied to immature, dependent minors), we are satisfied that a notification requirement is substantially less burdensome than a consent requirement. Consent requires not only notification but also the affirmative agreement of one or both parents to the abortion. This can be expected to cause considerably more conflict, delay and ill effects than notification alone.

Although some parents may be abusive, or at best unhelpful to their minor child faced with the decision whether to have an abortion, that is hardly a reason to discard the pages of experience teaching that parents generally do act in their child's best interests.[17] *Parham v. JR*, 442 U.S. 584, 602-03 (1979). While the district court found that the non-custodial parent often has little communication with the child, this does not mandate completely casting aside the principles enunciated by the Supreme Court as to the parental role, which apply to non-custodial parents as well as custodial parents. By providing for judicial bypass, the statute safeguards those minors for whom parental involvement may not be in their best interests, while at the same time encouraging parental involvement for those minors who may be greatly assisted at a difficult time. We cannot conclude the two-parent notice requirement imposed in conjunction with a bypass option unduly burdens the right of a mature or best interests minor to obtain an abortion. *See Bellotti II*, 443 U.S. at 649 (plurality); *Matheson*, 450 U.S. at 420 (Powell, J., concurring).

The district court enjoined the entire statute because of the impact of the two-parent notice requirement primarily upon one group of pregnant minors, without considering the effect of the bypass, or the parental and family interests which have been recognized by the Supreme Court. In concentrating upon the impact of the statute on the pregnant minor not living with both parents, and on the mature or non best-interest pregnant minor, the district court gave only limited consideration to the 50% or more pregnant minors who live with both parents and to pregnant minors who are immature and whose best interests may require parental involvement. The district court's determination that an undue burden on the one group renders the statute unconstitutional for all is contrary to the Supreme Court's decision that a notice-consent/bypass procedure plainly serves important state interests and is narrowly drawn to protect only those interests. It does not violate any guarantees of the Constitution. *Matheson*, 450 U.S. at 413. We are convinced that the

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17 The Court has recognized two categories of pregnant minors. First, minors who are mature and capable of making an informed decision without parental involvement, the category in which the minor appellees in this case by their pleadings bring themselves, and second, minors who are immature not sufficiently capable of making such decisions; in both categories the best interest of the minor must be considered.

statute must be considered, as the Supreme Court has considered the statutes in its numerous decisions and as the district court originally did, as a whole: the two-parent notification, the 48-hour waiting period, and judicial bypass. Considering the statute as a whole and as applied to all pregnant minors, the two-parent notice requirement does not unconstitutionally burden the minor's abortion right. *Matheson*, 450 U.S. at 413. The statute complies with the constitutional requirements set forth in *Bellotti II*, and approved in *Ashcroft* and *Matheson*. We conclude that the court erred in enjoining the statute because of its isolated consideration of the two-parent notice requirement.

D.

Similar considerations apply to the district court's treatment of the 48-hour delay requirement. The court found that minors who notified their parents in writing must wait 48 hours after actual or constructive delivery of the notice. Constructive delivery of mail notice occurs at noon on the next day upon which regular mail delivery takes place. Thus, minors who notified their parents in writing commonly waited 72 hours between initiating the notification process and the abortion itself. The court found that this delay was compounded by the weather, scheduling factors, and transportation requirements and that in many cases the delay reached a week or more. Delay of any length in performing an abortion increased the statistical risk of mortality. *Hodgson*, 648 F. Supp. at 764-65.

In considering the plan as a whole, the court acknowledged that some period of delay from the time of notice until the abortion would "reasonably effectuate the state's interests in protecting pregnant minors" and that a "waiting period may allow parents to aid, counsel, and advise * * * minors in determining whether to undergo an abortion or to provide the physician with information which may be relevant to the medical judgments involved." The court concluded, however, that the interest could be effectuated as completely by a shorter waiting period. *Id.* at 769. The court held that the 48-hour waiting

period was severable from the remainder of the statute. *Id.* at 780.

Considering the statute as a whole, the 48-hour delay requirement is not a significant burden upon the minor's abortion right. The district court's finding regarding possible delays of a week or more is based upon facts relating to the relative inaccessibility of abortion providers in Minnesota, not the 48-hour delay requirement. The court failed to recognize that the 48-hour delay requirement may run concurrently with the scheduling of the appointment to perform the abortion. Testimony at trial revealed that typically, when a pregnant minor telephones an abortion clinic to schedule an abortion, the abortion is not scheduled for two to three days.[18] More importantly, mandatory delay results only when the minor complies with the statute by providing written notice to her parents; the bypass option imposes no mandatory delay. *Cf. Ashcroft*, 483 F. Supp. 679, 694-96 (W.D. Mo. 1980) (physician must provide woman information specified in statute 48 hours before she may consent to the abortion). We cannot conclude that the delay requirement as a part of the overall statutory scheme is a significant burden in light of Minnesota's interest in ensuring that notification results in parental involvement.[19] *See Matheson*, 450 U.S. at 446 (Marshall, J., dissenting).

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18 The district court found that the 48-hour delay requirement required a minor, living in a city without an abortion provider, to either travel to a city with an abortion provider twice or spend up to three additional days in the city. The parties do not specify and we are unsure of the evidence in the record to support this statement. According to the manual of Meadowbrook Women's Clinic, when a minor calls seeking information about an abortion she is asked her age and advised of the parental notice law. An abortion may be scheduled over the telephone and at that time, minors are asked how they plan to comply with the statute. If the minor wishes to comply by written notice, the clinic may send the appropriate notice immediately.

19 *Akron*, 462 U.S. at 449-51 (twenty-four-hour waiting period unconstitutional as applied to all women seeking abortions; *See also Zbaraz*, 763 F.2d at 1537-38 (twenty-four hour waiting period held unconstitutional); *Pearson*, 716 F.2d 1142-43 (same).

II.

The Hodgson group contends that the district court erred in holding that the statute does not violate the equal protection clause. First, they argue that the statute deprives minors who choose abortion of equal protection of the law because it singles out abortion as the only pregnancy-related medical procedure requiring third-party notification and because the statute impermissibly discriminates between those minors who are able to notify both their parents and those who cannot. The Hodgson group failed to raise the latter challenge at trial, and therefore we need not address it here. *Stafford v. Ford Motor Co.*, 790 F.2d 702, 706 (8th Cir. 1986). As to the first issue, a similar challenge was rejected by the Court in *Matheson*, 450 U.S. at 412-13, and the Court has rejected challenges to abortion statutes based on different treatment in other contexts. *Harris v. McRae*, 448 U.S. 297, 325 (1980) (abortion funding); *Maher v. Roe*, 432 U.S. 464, 469-71 (1977) (abortion funding); *Danforth*, 428 U.S. at 66-67 (written consent to abortion). Moreover, as discussed in Part I, *supra*, a state may regulate a minor's exercise of her constitutional rights in a manner that would not be permissible in the case of an adult. *Akron*, 462 U.S. at 427 n.10. Based on the interests discussed, states may rationally conclude that the decision to have an abortion poses risks to the physical, mental or emotional well-being of minors which are greater than those associated with other health care services. *Bellotti II*, 443 U.S. at 640-41, 648-49 (plurality). "If the pregnant girl elects to carry her child to term, the *medical* decisions to be made entail few—perhaps none—of the potentially grave emotional and psychological consequences of the decision to abort." *Matheson*, 450 U.S. at 412-13. Thus, we cannot say the district court erred in concluding the statute does not violate the equal protection clause.

We conclude that the Minnesota statutory plan, including judicial bypass, is constitutional and complies with the principles announced in *Bellotti II*, *Ashcroft* and *Matheson*. Accordingly, we reverse the judgment of the district court and remand with instructions that the district court enter judgment that Minn. Stat. Ann. § 144.343 (2)-(7) is constitutional.

LAY, Chief Judge, with whom MCMILLIAN, Circuit Judge, joins, dissenting.

I respectfully dissent.[1] I would adhere to the well-reasoned panel opinion written by Judge Rosenn.*

The majority's analysis is seriously flawed in several respects:

(1) it fails to focus on the issue involved, which is whether a two-parent notification statute with a judicial bypass provision is constitutional;

(2) it completely ignores the evidence amassed in a five-week trial and the district court's findings of fact as irrelevant to the constitutional issue;

(3) without legal support, it relies upon the judicial bypass provision to uphold an unconstitutional two-parent notification requirement;

(4) it has created a new right, apparently of constitutional dimension, for non-custodial parents to receive notice of their minor children's activities; and

(5) its upholding of the 48-hour waiting period is contrary to nearly every other court decision on this issue.

It is important to recognize the limited issue before this court: may a state constitutionally enact a statute that requires a minor to notify both parents before she may obtain an abortion, even though one parent may have deserted her or has no custodial rights over her. The majority spends most of its discussion reciting the reasoning of cases in which the Supreme Court examined the facial constitutionality of various parental consent or

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1 I concur in section IA. of the majority's opinion, which holds that Minn. Stat. § 144.343(2) is unconstitutional because Minnesota may not require a minor to notify her parents of her intent to have an abortion without providing an alternative court procedure. *See Bellotti v. Baird*, 443 U.S. 622, 647 (1979) (*Bellotti II*).

* The Honorable Max Rosenn, Senior United States Circuit Judge for the Third Circuit Court of Appeals, sitting by designation.

notification statutes.[2] Its discussion, however, avoids the fundamental issue of this case, which is the effects of the application in Minnesota of the two-parent notice rule. Minnesota is the only state in the union that requires two-parent notification without exception for divorce, separation, or other comparable situations. A statute of this type has never been reviewed by the Supreme Court.

Our duty therefore should be to examine the two-parent notification requirement to determine whether the statute "plainly serves important state interests [and] is narrowly drawn to protect only those interests * * * ." *H.L. v. Matheson*, 450 U.S. 398, 413 (1981). The state bears the burden to show that the statute is tailored to achieve a significant state policy. The district court found as a matter of fact that the statute not only fails to *serve* the state's asserted interests, but that it actually *undermines* those interests. *Hodgson v. Minnesota*, 648 F. Supp. 756, 768 (D. Minn. 1986).

The majority simply ignores the district court's factual findings. I respectfully submit that in doing so it abdicates its judicial responsibility. Judge Gibson, writing for the majority, states: "[T]he district court's detailed factual findings * * * raise considerable questions about the practical wisdom of this statute. Nevertheless, we believe these are questions for the legislature." Slip op. at 14. Thus, and because it never directly states that the district court's factual findings are clearly erroneous, the majority rejects the established principle that states must *demonstrate* that their infringements of constitutional rights are closely related to achieving important interests. Nowhere does the majority point to evidence offered by the state to show the relationship between the ends sought and the means utilized. Instead, the majority apparently relies on two

2 On cross-appeal plaintiffs urge that as applied the notice/bypass statute as a whole imposes an unconstitutional burden on minors seeking abortions. They challenge the relevance of the Supreme Court's holdings in *H.L. v. Matheson*, 450 U.S. 398 (1981), and *Bellotti II*, which involved facial attacks on parental consent or notification statutes. But in the interest of judicial restraint the dissent does not need to discuss this issue. It is far better that the Supreme Court make that determination in light of the record. We need to focus only on the two-parent notice Minnesota statute before us.

factors to support its cavalier treatment of the district court's factual findings.

The first factor relied upon is "the pages of experience teaching that parents generally do act in their child's best interests." Slip op. at 24. The second basis for the majority's action is its misplaced theory that the Supreme Court has decided as a matter of law "that a notice-consent/bypass procedure plainly serves important state interests and is narrowly drawn to protect only those interests." Slip op. at 25. Neither of these assertions can justify the result today.

Our societal presumption that parents generally act in their children's best interests is not at issue here. The relevant question is whether requiring two-parent notification without exception for cases of divorce, separation, desertion, or other comparable familial situations imposes undue burdens on the minor's exercise of her constitutional rights. Plaintiffs introduced largely unrebutted factual evidence that persuaded the district court that the requirement is unduly burdensome. We cannot ignore this evidence based on an irrelevant societal presumption. *Cf.* Bikle, *Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action*, 38 Harv.L.Rev. 6, 6 (1924):

> [N]o court can undertake to decide upon the validity of legislation * * * [without] first be[ing] informed as to the truth of some question of fact which the statute postulates or with reference to which it is to be applied; and the validity of the legislation depends on the conclusions reached by the court with reference to this question of fact.

Similarly, the majority's theory that the Supreme Court has held that all notice/bypass procedures are constitutional as a matter of law is insupportable. The Court has never examined the validity of a statute like Minnesota's; the statute is unparalleled in this country. Furthermore, the Court has never examined a notification requirement in operation, because all of the cases in which it examined such statutes involved facial challenges. It is impossible for the Court to have declared as a matter of law that all notice/bypass procedures are "narrowly

drawn to protect only [important state] interests" when the statutory provisions can contain as many variations as there are statutes.

The majority reasons that although the two-parent notification requirement imposes a burden on the minor, this burden is negated by the judicial bypass provision. This analysis is egregiously wrong. The mere presence of an alternative bypass procedure cannot salvage the two-parent notification requirement.

The majority's analysis fails to recognize that a judicial bypass procedure has been required not for the purpose of making an unconstitutional notice provision constitutional, but because even a valid notice requirement may be imposed only on minors who are immature or whose best interests would not be served by making the abortion decision without parental involvement. *See City of Akron v. Akron Center for Reproductive Health, Inc.* 462 U.S. 416, 427-28 n.10 (1983); *Bellotti v. Baird*, 443 U.S. 622, 647-48 (1979) (plurality) (*Bellotti II*). There is an entire class—immature, non-best interests minors—that can never use the judicial bypass procedure. The court therefore must examine the notification requirement in isolation because as to these minors there is absolutely no alternative to parental notification, even with the statutory provision of a bypass procedure.

The second reason the bypass provision does not purge the statute of its unconstitutionality has to do with the combined effect of requiring either two-parent notification or submission to a judicial procedure. As the district court found:

> Twenty to twenty-five percent of the minors who go to court either are accompanied by one parent who knows and consents to the abortion or have already told one parent of their intent to terminate their pregnancy. The vast majority of these voluntarily informed parents are women who are divorced or separated from spouses whom they have not seen in years. Going to court to avoid notifying the other parent burdens the privacy of both the minor and the accompanying parent. The custodial parents are angry that their consent is not sufficient and fear that notification will bring the absent parent back into the family in an intrusive and abusive way.
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> Minors who ordinarily would notify one parent may be dissuaded from doing so by the two-parent requirement. A minor who must go to court for authorization in any event may elect not to tell either parent. In these instances, the requirement that minors notify both biological parents actually reduces parent-child communication.

648 F. Supp. at 769. Thus, a two-parent notification requirement, combined with the alternative bypass provision, actually *reduces* parent-child communications. The combination also completely negates the interest of certain minors—those twenty to twenty-five percent who go to court accompanied by a parent—in avoiding disclosure of personal matters. *See Whalen v. Roe*, 429 U.S. 589, 599 (1977) (right of privacy protects interest in avoiding disclosure of personal matters as well as interest in independent decisionmaking). These minors voluntarily inform one parent of their intent to obtain an abortion; the district court found that these parents generally are divorced or separated. Yet these minors must still go through the burdensome court procedure and the public disclosure of intensely personal facts that the procedure entails.[3] Coercing public

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3 The district court found:

> The experience of going to court for a judicial authorization produces fear and tension in many minors. Minors are apprehensive about the prospect of facing an authority figure who holds in his hands the power to veto their decision to proceed without notifying one or both parents. Many minors are angry and resentful at being required to justify their decision before complete strangers. Despite the confidentiality of the proceeding, many minors resent having to reveal intimate details of their personal and family lives to these strangers. Finally, minors are left feeling guilty and ashamed about their lifestyle and their decision to terminate their pregnancy. Some mature minors and some minors in whose best interests it is to proceed without notifying their parents are so daunted by the judicial proceeding that they forego the bypass option and either notify their parents or carry to term.
>
> Some minors are so upset by the bypass proceeding that they consider it more difficult than the medical procedure itself. Indeed, the anxiety resulting from the bypass proceeding may linger until the time of the medical procedure and thus render the latter more difficult than necessary.

648 F. Supp. at 763.

disclosure when one divorced or separated parent has already been informed of the minor's decision cannot serve any significant state interest; if it does, the state did not offer any persuasive proof of that fact.

Finally, if courts do not separately examine the notification portions of these statutes, states could formulate irrational and burdensome requirements, all in the guise of protecting "family integrity." Suppose, for instance, that in addition to requiring parental notification, a state required notice to all living grandparents. Based on the majority's reasoning, this requirement, although perhaps burdensome to some minors, would be constitutional as long as combined with an alternative expeditious and confidential bypass procedure. Yet at some point a state's notification requirements could become so burdensome as to force *all* minors to go to court. As the state conceded at oral argument, however, a bypass provision could not pass constitutional scrutiny by itself. Moreover, the majority acknowledges that "[t]he circumstances relevant to the abortion decision by a minor can and do vary so substantially that absolute rules * * * would create an inflexibility that often would allow for no consideration of the rights and interests [we have] identified." *Matheson*, 450 U.S. at 420 (Powell, J., concurring), *quoted in* slip op. at 19. To avoid these types of absolute rules, states must provide alternatives for the minor, none of which can be so burdensome as to amount to a denial of constitutional rights. If one "alternative" is unconstitutional, minors effectively are governed by absolute rules. Courts therefore must examine *each* of the alternatives the states devise. The majority's failure to recognize or accept this principle is inexplicable.

An equally inexplicable thread running through the court's opinion is its solicitious concern for the rights of non-custodial parents.[4] The court's emphasis on the interest of non-custodial parents in being informed of their minor children's activities elevates that interest so as to outweigh the recognized constitu-

4 *See, e.g.*, slip op. at 22 ("The Supreme Court has never indicated that [the interests of parents in the rearing and welfare of their children] are contingent upon the parent having custody of the child."); *id.* at 24 ("[T]he principles enunciated by the Supreme Court as to the parental role [apply] to non-custodial parents as well as custodial parents.").

tional rights of minors. It does so based on a misunderstanding of the reasons the Supreme Court has approved of parental notification laws and of the nature of child custody laws.

The Supreme Court has never declared that parents (much less non-custodial parents) have an absolute, independent right to be informed when their minor children seek to have an abortion. Rather, the Court has approved of such requirements primarily as a means of furthering the state's interest *in protecting the minor* by assuring that she makes a well-informed decision. *See, e.g., City of Akron*, 462 U.S. at 439 ("In [*Bellotti II*,] a majority of the Court indicated that a State's interest *in protecting immature minors* will sustain a requirement of a consent substitute, either parental or judicial.") (emphasis added); *Matheson*, 450 U.S. at 412 ("The [parental notification] statute is reasonably calculated *to protect minors* * * * by enhancing the potential for parental consultation concerning a decision that has potentially traumatic and permanent consequences.") (emphasis added); *id.* at 419 ("The State * * * has an interest in fostering such consultation as will assist the minor in making her decision as wisely as possible.") (Powell, J., concurring); *Bellotti II*, 443 U.S. at 638 ("Legal restrictions on minors, especially those supportive of the parental role, may be important *to the child's chances* for the full growth and maturity that make eventual participation in a free society meaningful and rewarding.") (plurality) (emphasis added; footnote omitted).[5]

There is more than a little irony in the majority's assumption that the state promotes "family integrity" by forcing minor

5 In equating the rights of non-custodial parents with those of custodial parents, the majority ignores basic principles of child custody law. The fact is that the legal rights of non-custodial parents are indeed inferior to those of custodial parents:

> [T]he parent with "legal custody" has the right to make decisions about the child's education, religious training, residence, and medical treatment. Generally, this parent also has "physical" or "actual" custody which entitles her to control the child's daily activities such as sleeping, eating, and recreation. The rights and obligations of the non-custodial parent are a good deal more limited. Typically, *that parent loses all power with respect to major decisions.*

Wexler, *Rethinking the Modification of Child Custody Decrees*, 94 Yale L.J. 757, 808 (1985) (emphasis added; footnote omitted).

children to locate and inform non-custodial parents of this decision. Approximately 42% of all minors in Minnesota do not live with both biological parents. *Hodgson*, 648 F. Supp. at 768. For all of these minors, the "family" does not consist of the traditionally accepted unit, because of voluntary relinquishment of parental control, legal separation of parent and child, or other reasons. Yet the state of Minnesota declares that in this one instance only (a suspect indication in itself) the "family" must conform to state-mandated principles of what a family should be like.[6] Far from promoting the integrity and independence of the family unit, the state is interfering in familial communications in a way that would be unimaginable in any other context. To justify this interference based on the purported rights of non-custodial parents is specious.

I turn now to the majority's upholding of the 48-hour delay rule. The majority's conclusion that the delay requirement is constitutional is based not upon logical analysis, but rather upon three assertions:

> (1) prolonged delay due to the inaccessibility of abortions in Minnesota is irrelevant;
>
> (2) the 48-hour delay requirement may run concurrently with the scheduling of the appointment to perform an abortion; and
>
> (3) the delay results only when the minor actually complies with the notification requirement rather than using the bypass procedure.

Slip op. at 27.

The first assertion ignores the reasoning of many courts that have considered other factors peculiar to the region in assessing

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6 The Supreme Court itself has recognized that concerns for the integrity of the family may be far different when that family no longer conforms to the customary structure. *See Bellotti II*, 443 U.S. at 649 ("*At least when the parents are together and the pregnant minor is living at home*, both the father and the mother have an interest—one normally supportive—in helping to determine the course that is in the best interests of a daughter.") (plurality) (emphasis added).

the constitutionality of waiting periods.[7] The second assertion ignores the possibility that abortion providers could schedule abortions for minors far more quickly absent the delay require-

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7 The Seventh Circuit recently summarized this reasoning:

> These cases hold that a waiting period places a direct and substantial burden on women who seek to obtain an abortion. This burden is the same for minors as for adults, *Bellotti II*, 443 U.S. at 642, 99 S.Ct. at 3047; *Charles v. Carey*, 627 F.2d [772, 785 (7th Cir. 1980)], and therefore "the same objections to the waiting periods for adults listed in *City of Akron* apply to waiting periods for minors." [*Indiana Planned Parenthood v.*]*Pearson*, 716 F.2d [1127, 1143 (7th Cir. 1983)]. The burden imposed by a waiting period has been reiterated with little variation in these cases. The District Court of Rhode Island cogently discussed several factors which it considered part of this burden in *Women's Medical Center of Providence, Inc. v. Roberts*, [530 F. Supp. 1136 (D.R.I. 1982)], stating
>
> > Although a mere twenty-four hour delay by itself may not increase the risk of an abortion to a statistically significant degree, the record in this litigation shows that the mandatory wait may combine with other scheduling factors such as doctor availability, work commitments, or sick leave availability, to increase the actual waiting period to a week or more . . . . [I]t is uncontested that delays of a week or more do indeed increase the risk of abortion to a statistically significant degree . . . . Furthermore, a delay of even twenty-four hours may push a woman into the second trimester, thus requiring that the operation be performed in a hospital, and significantly increasing the procedure's cost, inconvenience, and, of course, risk.
>
> 530 F. Supp. at 1146.
>
> Courts have also noted that difficulties in scheduling may be complicated by the distance which a woman may have to travel in order to obtain an abortion. An extreme example of this was before the District Court of North Dakota in *Leigh v. Olson*, [497 F. Supp. 1340 (D.N.D. 1980)], in which the district court found that only one doctor in the entire state performed abortions and that women in certain parts of the state would have to drive some 400 miles in order to obtain an abortion. 497 F. Supp. at 1347. Finally, the cases cited above have noted that a waiting period may result in additional mental anguish for a significant number of women seeking abortions . . *See, e.g.*, [*id.*] at 1347 n. 8 and accompanying text.

Zbaraz v. Hartigan, 763 F.2d 1532, 1537 (7th Cir. 1985) (footnote omitted), *aff'd per curiam by an equally divided court*, 108 S. Ct. 479 (1987). The *Zbaraz* court also listed the "plethora" of cases striking down waiting periods. *Id.* at 1536.

ment. The court's final assertion—that there is no delay if the minor uses the bypass procedure—is utterly irrelevant to the issue at hand: whether a 48-hour waiting period, *applied to those minors who choose to notify their parents of their decision*, imposes an undue burden on the minor's exercise of her constitutional rights.

What is most astonishing about the court's discussion of this issue is its complete disregard of pertinent precedent both in this court and the Supreme Court. Specifically, in *City of Akron* the Supreme Court invalidated a 24-hour waiting period imposed after a woman gave her consent to the abortion *and*, if a minor, obtained the requisite parental consent. *City of Akron*, 462 U.S. at 451.[8] The Court gave no indication that the statute's waiting period would be constitutional as applied to a minor. Similarly, this court has held a 48-hour waiting period applicable to all women unconstitutional, a holding that the state of Missouri did not appeal. *Planned Parenthood Ass'n of Ashcroft*, 655 F.2d 848, 866 (8th Cir. 1981), *aff'd in part and rev'd in part on other grounds*, 462 U.S. 476 (1983). Although these cases did not address the precise statute at issue here, the court fails to explain why their principles should not be controlling here. *Cf. Indiana Planned Parenthood Affiliates Ass'n, Inc. v. Pearson*, 716 F.2d 1127, 1143 (7th Cir. 1983) ("[T]he same objections to the waiting periods for adults listed in *City of Akron* apply to waiting periods for minors.").

As long as the Constitution protects the right of a woman to choose to have an abortion, we are under a judicial mandate to evaluate state regulations in terms of whether they impose undue burdens on the exercise of that right. The majority opinion slights this mandate. Here, in dealing with minors, the court

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8 The ordinance at issue in *City of Akron* provided:

"No physician shall perform or induce an abortion upon a pregnant woman until twenty-four (24) hours have elapsed from the time the pregnant woman, *and one of her parents or her legal guardian whose consent is required in accordance with Section 1870.05(B) of this Chapter*, have signed the consent form required by Section 1870.06 of this Chapter, and the physician so certifies in writing that such time has elapsed."

Id. at 424 n.6 (emphasis added).

should also consider whether the state's interest in protecting minors is furthered by the state regulation. The majority slights this concern as well. The majority has proffered no analysis of whether these interests have been served by the two-parent notification rule. The district court's findings remain unrebutted. The judgment of the district court should be affirmed.

HEANEY, Circuit Judge, with whom MCMILLIAN, Circuit Judge, joins, dissenting.

I respectfully dissent. I agree with the district court that the two-parent notification requirement does not serve the state asserted interests. Indeed, it undermines those interests. The statute does not provide an exception for cases of divorce, separation, desertion or other comparable situations. It thus opens the door to creating intolerable tensions for the minor child at a time when he or she least needs additional stress. I also agree that the two-parent notification requirement cannot be saved by the court bypass procedure.

In my view, a single-parent notification requirement would withstand constitutional challenge. It would be a simple matter for the Minnesota legislature to adopt that requirement if it truly believes that a minor will benefit from the counsel of a parent.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-5423
No. 86-5431

Jane Hodgson, M.D., et al.,

Appellees,

—v.—

The State of Minnesota, et al.,

Appellants.

Appeal From the United States District Court
For the District of Minnesota.

Filed: October 7, 1988

Judge John R. Gibson:
Order entered pursuant to your directions of 10/7/88.
Linda L. Penberthy: eh
cc: All Active Judges

Before

LAY, Chief Judge, and HEANEY, MCMILLIAN, ARNOLD, JOHN R. GIBSON, FAGG, BOWMAN, WOLLMAN, MAGILL and BEAM, Circuit Judges, en banc.

ORDER

The issuance of mandate is stayed pending the filing of a petition for writ of certiorari with the United States Supreme Court. If the petition is filed, the stay shall continue until such time as the Supreme Court has acted on the case. If the Supreme Court denies the writ or if the time for filing the petition expires without such petition having been filed, the stay will automatically terminate. Judges Bowman, Fagg and Wollman would deny the stay.

A true copy.

Attest:

ROBERT D. ST. VRAIN
CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

EXCERPTS FROM TRIAL TESTIMONY

DR. EDWARD EHLINGER

* * *

*[2025] Q. Can you describe to us what it means that the birth rate for 15 to 17-year-olds is steadily increasing since 1980 while the abortion rate is declining?

A. Well, what that means is that a greater percentage of 15 to 17-year-old women are carrying their babies to delivery and fewer are opting for an abortion.

* * *

[2030] A. Many of the other factors that would affect the birth rate and the abortion rate would affect both the 15 to 17-year-old cohort and the 18 and 19-year-old cohort fairly equally. Looking for things that would affect those two population groups unequally the parental notification law stands out as something that would affect the 15 to 17-year-olds more than it would affect the 18 to 19-year-olds.

Q. In fact, the parental—is it true—isn't it true that the parental notification law afects—does not affect 18 to 19-year-olds at all?

A. Well, the law, as stated, will affect the 15 to 17-year-olds. . . .

PAUL G. GARRITY

* * *

[1321] Q. About how many minor petitions did you hear of the Massachusetts statute since 1980?

A. I have given that some thought. Over 100 and probably less than 200 or almost 200.

* * *

[1325] Q. So in some 200 cases you heard you found maturity in every instance?

A. There was never any question, it wasn't even a close call.

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* Numbers appearing in brackets in text indicate page numbers of original stenographic transcript of the testimony at trial.

* * *

[1328] Q. Did you ever see any minors who had first approached their parents but couldn't have parental consent or were these minors who came because they didn't want to make the initial contact in the first place?

A. I can't recall of a minor who had approached a parent and didn't get consent. There may have been but I can't recall any.

* * *

Q. Do you have any opinion as to what the law is accomplishing in Massachusetts?

Q. It just gives these kids a rough time. I can't think it accomplishes a darn thing. I think it basically erects another barrier to abortion and if abortion is legal, it doesn't seem to me to make any sense to go throught [sic] this barrier which my sense is. . . .

DR. PAUL DUANE GUNDERSON

* * *

[2454] Q. So if nationally 9.5 percent of all women get abortions in the second trimester compared with minors in Minnesota, 23 percent getting abortions in the second trimester, there is a public health problem in Minnesota, is there not?

A. Yes, it is a problem, yes.

Q. And if you look at that first line, 1978 to 1983, the problem for minors is not decreasing, is it?

A. No, there is a slight increase there.

Q. Yes. And the trend, and if you are not familiar please tell me, the trend in the United States, is, as a whole, not Minnesota, is for women to be getting abortions earlier, isn't that true, if you have been reading the CDC?

[2455] A. Yes, overall that is the case, yes.

Q. But Minnesota minors are not participating in that national health trend, are they?

A. Not given the data you have quoted.

Q. Well, it is your data.

A. Uh-huh.

Q. They are not participating in this national public health beneficial trend, are they?

A. That is right.

Q. And that is a public health concern, isn't it?

A. Yes, it is.

JUDGE ELDON J. HALL

[1732] Q. What was the young woman's reason?

A. The young woman's reasoning was extremely mature; she had a keen understanding of her father's emotional makeup and her feeling was if she were to give this information to him it would hurt him terribly, it would crush him, and I believe she loved her father very much and I believe she had a fairly good understanding of what made him tick and felt in this particular situation it would be extreme punishment to him to have this information.

Q. And you believed and accepted the young woman's testimony?

A. After listening to her explanation as to why she formed that conclusion yes, sir, I did.

* * *

[1733] Q. Okay. Do you recall what her reasons were for not wantin to give notice to her parents?

A. Well, I guess the reasons she had for not wanting to give notice to her parents was that in effect she did not have parents to give notice to. The child had been physically abused, physically ejected by both the parents and the brother who was still residing within the home and in fact had been physically and permanently ejected from the home some six to eight months earlier and had had no contact since that time.

* * *

HEATHER P.

* * *

[41] Q. Do you remember after your mom called the clinic how long it was between that time and the time you got an appointment to go into the clinic for an abortion or for the court process?

A. Probably about two weeks.

Q. Do you have any idea why it was that long?

A. Gosh, it could have been because of my mom's job or, you see, I have been through—I have helped my friends, a couple of my friends through abortions and I have also gone through Meadowbrook and I found that court dates, you know, in getting to court you have to kind of wait, you know, you can't just jump in any day you plan to go and have an abortion. You have to wait until that day and so they only take a certain amount of kids because I have called a couple of times to court to help my friends out and you do have to wait a couple of days, you know, in order to get in there, maybe a week or so. So that is maybe why.

DR. STANLEY HENSHAW

* * *

[40] THE WITNESS: This shows that if—if the minors had had the same trends in birth rate compared to the 18 to 19-year-olds as occurred in other states their birth rate would in fact—would have gone down about three more percentage points than it did. So the suggestion is if the law had any effect it appears more likely that the effect was to slow down the decline in the birth rate rather than to encourage a decline in the birth rate of the minors.

[43] Yes. We at the Alan Guttmacher Institute have tried to estimate the number of women who need abortions in each part of the country. The purpose is to assess the adequacy of abortion services. By "need" what we mean is the number of women who would obtain an abortion if services were readily available to her.

Q. And can you make any statement about Minnesota's abortion need and its performance in meeting that need?

A. Yes. We have estimated that the need for abortion services in Minnesota in a year, say 1982, is something over 30,000 women. Now we might want to deflate that a little bit **[44]** because Minnesota is quite a rural state. Rural states more than average anyway a non-metropolitan state. So maybe a little under 30,000 would be my estimate of the number of women in Minnesota who we would estimate have an unintended pregnancy in a year—well, in 1982—and if services were readily available would obtain an abortion.

The number of abortions that actually occurred was on the order of 19,000 in 1982. Our conclusion is that there is a significant amount of unmet need for abortion services in the state.

JACKIE HINES

* * *

[1524] Q. Did she also voluntarily come to you about her pregnancy?

A. Yes.

Q. And could you describe the nature of that communication and what steps you took to comply with the law and how you felt about it?

A. When she came to me and her boyfriend was going to be gone because it was something that he didn't want his parents to know about so he didn't even want to be in town when she went to the clinic. So she had come and asked me if I would go with her and she had already called the clinic and talked to them and found out that she had to have consent by a parent and—which I assumed to mean that she had to have my consent since I was the custodial parent—so we went under the assumption that my consent was all she needed and that is so—since I was going to be going with her I could sign a consent when I got there. Then it wasn't until after we got there and she was already through the counseling and through all the other films and everything else that she was told that she had—where was the consent from her father, which of course we didn't have because, well, I was the one who didn't think that that would be necessary since I had legal custody of her and I didn't have to have his permission for anything else, when I had her tonsils out or anything like that.

* * *

[1526] Q. How did you feel about having to go to court?

A. I was very upset because of the fact that I was—I, of course, being a mother an dfeeling really this is a daughter of mine, and I felt responsible because I had been the one who said my permission is all you need because I am your custodial parent, so I felt as if I was responsible, partly responsible for this extra hassle that she had to go through and the tears, and really she was more afraid of the court than she was of the clinic.

She had no fear at all of the procedure but she was scared to death to go to court because, "What if they say no, what if they make me call dad," that is what the trauma was, not the procedure at all.

* * *

[1527] Q. And so you had to relate the story of your divorce to the judge?

A. Well, I didn't because I didn't want my daughter to hear it, what the gory details were. He accepted the fact that my divorce was based on physical abuse and I didn't have to tell him all about that.

Q. But you had to relate that in front of your daughter this day that she was getting her abortion?

A. Yeah.

Q. How did you feel about having to bring up those details on that day?

A. Well, I didn't think the whole thing was necessary so I was very angry about having to bring up all of this other stuff in addition to what she was there for.

DR. JANE HODGSON*

* * *

[V.I, 54] Q. When you were Medical Director and sought to engage the services of doctors to do abortions at the various abortion clinics, did you have conversations with doctors to become employed at those clinics, after which conversation the doctor refused?

A. Oh, yes, very many. Particularly, this was the case in opening the clinic in Duluth. It was impossible to get local Duluth physicians. It still is. We are—we have to import physicians from Hibbing and Bemidji and—I can't think. It's a town near Grand Rapids. Anyway, small communities some distance from Duluth, all of whom I have trained personally.

* * *

[75] Q. Is it correct to say, then, that your testimony is you tend to use—you consider laminaria medically advisable more often with teenage patients because of the condition of their cervixes than with adult patients?

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* Dr. Hodgson's testimony was given on two days and transcribed as two volumes. The volume number is indicated in the brackets.

A. Oh, very definitely.

* * *

[111] Q. At the Women's Health Center in Duluth where you were Medical Director, what kind of abortions were done?

A. We limited our procedures to 16 weeks. We did not go beyond that.

Q. What would happen to patients who would come in who were over 16 weeks?

A. They were referred to—had to go to Minneapolis.

* * *

[132] Q. Have you had any patients who do not know who their father is?

A. Yes . . . . And there was a two-week delay for one minor simply because when they notified the so-called natural father, he refused to acknowledge his paternity . . .

* * *

[V.II, 11] Q. After this—after August 1st, 1981, how did your medical practice vis-a-vis your minor patients, change?

A. Well, it—it was just one—the law resulted in just one more hurdle that the—the patient had to overcome. There was—it's a very complicated process for a teenager to go through and many of them were bewildered, they—many questions, they didn't understand.

The court—court process was something that was totally unknown to them . . . .

* * *

[V. II, 14] A. Well, it entailed many problems because we had to—because of the—the use of laminaria in the teenagers, for example. It is considered medically advisable in the young, immature patient with a tight, narrow cervix to insert laminaria.

* * *

So the court process added to this meant that there was really much more than could ever be done in a—in one day, particu-

larly where patients had come a long distance, get up early in the morning and drive **[V. II, 15]** to a clinic. They—and it's necessary, according to the court system in—in use at the present time, they have to have a precounseling exam and a—a session and examination and be instructed—given informed consent and go to court; and then come back, get the laminaria, wait four to six hours as a minimum, and have a procedure, nd then to go home a few hundred miles. You see, it's—it's an impossible situation.

So what happens is that in many of the clinics, the laminaria is omitted and the tendency is to—to—for the sake of the patient; otherwise she's not going to get the procedure done at all. So just from the standpoint of time, it made it very difficult.

* * *

[V. II, 23] Q. Have you observed minor patients of yours when they've come back from the court process?

A. Yes, and some of them are wringing wet with perspiration. They're markedly relieved, many of them. The—they dread the court procedure often more than the actual abortion procedure. And it—it's frequently necessary to give them a sedative of some kind beforehand.

* * *

[V. II, 56] A. . . . And I've seen many of the teenagers that hitchhike when I've been working here in the Twin City area, as well as in Duluth. And they will hitchhike in extreme kinds of weather which is another hazard, the sub-zero weather in the winter and the hot weather in the summer, and so—

* * *

[V. II, 59] Q. If a teenager is from a family in Minnesota that receives Medicaid for their medical services,does such Medicaid pay for the teenager's abortion?

A. No. There is—there are no subsidies granted a patient—a teenager who chooses to terminate her pregnancy.

KATHY M.

* * *

[124] Q. That is the way you felt. Were you also worried about time?

A. Yes, because it was—it seems to me like I had one week before the first trimester was over and so that was a lot of stress too, I mean.

Q. What did you and your mom decide to do?

A. We ended up going to Mason City, that is what I decided to do; we ended up going to Mason City which was two days in Mason City, Iowa, excuse me, which was two days, and it was probably $200 more.

MARY J.

* * *

[637] Q. Do you remember any of the things you were thinking while you were sitting there waiting? What did you think?

A. I was very nervous. I was wondering if the judge would even give me permission to do this, which made me very nervous and very scared, just anticipating the procedure, having to wait to go through all of this before I could finally go back to the clinic.

I was worried about if I would say something wrong to influence the judge's decision, to maybe say no to my case, for whatever reasons he may have thought, I don't know.

JUDGE GERALD C. MARTIN

[412] Q. Now I believe you testified earlier that some of the minors come to court accompanied by a parent, is that correct?

A. That is right.

Q. And how many would you say would come so accompanied?

A. About one in ten have their mothers at the hearing.

Q. How about minors who bring another adult with them, does that happen?

A. Yes. There is some times you will see a petitioner with a grandmother or an aunt or with an adult friend that she has consulted with.

Q. What kind of reasons do the minors give for not wanting to notify their parents?

A. It is almost always a case of a very unhealthy family situation. It is frequently a physically and emotionally abusiv father, usually; alcoholic parents; it might be a parent that physically abuses the petitioner, or would blab all over town **[413]** about the situation and we have a lot of small towns around that area. There is often—you see a case where one of the parents is extremely ill, heart condition, or in some sort of nervous situation, receiving treatment for a very nervous disorder, and it is felt if that parent learned about the pregnancy it would be detrimental or even life-threatening for that person.

You often see a case where one of the parents has had very little contact with the child for years after a divorce, maybe they see that parent once a year for the last five years, and never discusses anything important with that parent and doesn't want to have to consult that parent about this.

Those are the most common cases.

Q. Can you give any specific examples of these kinds of situations?

A. Well, the ones that would stick out in your mind are the abusive situations and it is probably the most common type one. In one case about a week or two before the hearing the father had broken the petitioner's mothers wrist and had frequently physically abused both the mother and the petitioner. Another case that I can recall from the range, the father frequently beat the petitioner and she had no doubt in her mind that the same would occur if she notified the father about her pregnancy.

Other than that there is no individual cases that stand out, but that, I think, is a very common situation.

Q. And when the petitioners tell you that they are afraid of **[414]** abuse from their parents, do you believe them?

A. Oh, yes. For sixteen years I have seen a great deal of that and there is no reason for me not to believe that.

JUDGE OLEISKY

[25] Q. You ask the teenagers why they can't tell their parents?

A. Many times I do.

Q. What responses do you get?

A. Oh, numerous. Some—a number of them have told their parent, one of their parents. Others will say that they have been told if they ever get pregnant they will be told to leave the house. Many will be told that there is a lot of strife and stress in their family situation and by telling them that they are pregnant it will just add and accumulate to it.

Others will tell us that there has been an older sister who had an abortion or a baby and it brought all kinds of **[26]** chaotic experiences. Others will tell us that physical and mental harassment by a father, in some cases some have told us they have been sexually molested by a member of the home or the stepfather or the father and that may be the reason that they are pregnant.

Others will tell us that it would create real problems in school, in the community, just a multitude of reasons.

JUDGE GEORGE PETERSEN

[1297] A. . . . That is a number of young women come in and describe a close, trusting, loving, innocent relationship between themselves and their parents that they want to retain. They don't want it damaged, they don't want their parents to lose faith, lost trust, lose respect for them so they ask me not to require them to notify their parents . . . .

Young women would say their parent is against abortion and would make her keep the child under threat of something or other; or against abortion, would kick her out of the home, have said so in the past, have done it with a sibling or have remarked about a relative.

Adding to problems at home would be a parent with a severe heart condition or severe health condition or a father who has just lost his job or a parent who is in the process of getting divorced and this would simply add to their problems and the child feels some responsibility not to do that.

Parent not a part of her life is relatively confined almost exclusively to a situation where parents are divorced and that is in reference to the noncustodial parent and the others are pretty self-explanatory, prior abuse, fear of alcoholic parents or the child has been raped.

* * *

JUDGE NEIL RILEY

[2008] Q. Were some of the minors that you saw accompanied by at least one parent?

A. Yes. Not infrequently the mother would accompany them.

Q. When the mother did, did you allow the minor to come [2009] into your chambers with the mother when you held these hearings?

A. Always.

Q. Did you ever question the mother as to the circumstances as to why she was there?

A. It was always pretty self-evident. Quite universally the explanation was that the father would beat up the child and raise unshirted hell if he were to know about it.

Q. Did you believe the mother?

A. I thought she was in the best position to know, yes.

SHARON L.

* * *

[725] Q. Do you remember anything about how long you waited for a court appointment, like between the time you called the clinic?

A. I would say about a week, week and a half.

SUSANNE SMITH

* * *

[35] Q. Based on your experience with the abuse field, do you think that child abuse is generally unreported?

A. Yes, that is what all the people in the field strongly believe.

Q. And you personally believe that?

A. Yes, I do.

Q. So it is your testimony, is it not, that those teenagers who are in a situation where there has been family abuse are not able or do not avail themselves of that exception in the statute?

A. With the teenagers we have seen in court, that is true.

* * *

Q. Do you have an opinion as to whether you believe going through the court process and seeing the guardian—now you have interviewed the teenagers personally—is difficult for teenagers?

A. It appears to be very difficult for them, yes.

Q. What is the basis for your opinion?

A. The teenagers that we see in the guardian's office are very nervous, very scared. Some of them are terrified about court processes. They are often exhausted, particularly if they have been driving around Minneapolis looking for the building . . . .

* * *

[36] I had a teenager tell me last week when I was describing to her the location of the building, when I said the word Juvenile Justice Center she said I feel like a criminal and I think that is pretty typical of the reaction that the kids have when they find out they have to go to court.

JUDGE WILLIAM R. SWEENEY

[1037] Q. What kind of reasons do the minors that you have seen give for not wishing to notify their parents?

A. I don't have a very great sample, but the cases I have heard, there seems to be a fairly common thread among probably among the majority of the cases where there is some form of either religious or philosophical opposition to abortion per se, coupled with, and this is what is so strange, I don't understand it, coupled with the threat to punish the child for becoming pregnant.

They say they are opposed to abortion, consider it murder, but they say my parents tell me if I get pregnant I am going to disown you, throw you out of the house; I will never see you again, those kind of things. In one case the adoptive daughter of the parents that she wished not to notify was also her physical means of support. She worked for the parents in a business and she was afraid that she would be canned and that would be the end of whatever support she could raise for herself to pay for a college education.

[1038] Anyway, that seems to be a very common thread. There is in some cases physical abuse on the child, in some cases in those cases there has also been spousal abuse. In some cases there is a problem with alcohol. But the common thread seems to be, and even a more common thread perhaps, and I should have mentioned this, even a more common thread seems to be an inability to communicate with parents. It seems to be a common thread to all of the cases.

Q. And when the minors tell you these reasons for not wanting to notify their parents, do you believe them?

A. Yes. I am trying to think of one that I thought was trying to pull the wool over my eyes and I always worry about that because of the very high pressure situation they find themselves in; I did not get that feeling or have that—form that opinion about any of them.

THOMAS P. WEBBER

* * *

[619] THE WITNESS: The organizations before the Senate included Minnesota Citizen Concerned For Life. Before the Senate and the House organization it tended to be quite similar

and Minnesota Citizens Concerned For Life, the Minnesota Catholic Conference and Health Care facilities, the St. Paul—Minneapolis-St. Paul Archdiocesan Council of Catholic Women, the Human Life Alliance, Citizens for Community Action, Minnesota—I can explain who these groups were if they mean anything to you, Citizens for Community Action is a group that opposes Planned Parenthood's provision of abortion care.

Minnesota Citizens Concerned For Life is the largest antiabortion organization in the state.

The Human Life Alliance is much smaller but somewhat more strident antiabortion organization. All of them testified. In . . .

* * *

[619] . . . addition to them a group, Minnesota Legal Forum, which at that time, 1981 was Minnesota's local affiliate of Phyllis Shafley's group organized to oppose—

THE COURT: ERA? Minnesota Equal Rights?

THE WITNESS: The Minnesota Eagle, the bird, forum, the Minnesota Eagle Forum; CALM, the acronym stands for Citizen Alert for Liberty and Morality; a group organized by the pastor of the Fundamentalist Church in St. Paul, initially . . .

* * *

[621] Q. Would you—I am still in the offer of proof—would you please tell us who testified against the bill in either the House, Senate or both?

A. The organizations testifying against both of the bills included the Minnesota Medical Association, the Minnesota Public Health Association, the Minnesota Nurses Association, Planned Parenthood of Minnesota, the Division of Adolescent Medicine at the University of Minnesota, the St. Louis County Health Department, the American Association of University Women, which introduced a very understanding study into testimony; the Lutheran Social Services—the list went on, it was

quite a lengthy list of all of those organizations who did in fact testify along with some individuals.

* * *

[674] THE COURT: Before you leave that, who does provide second trimester, Ramsey County?

THE WITNESS: Second trimester abortion services are available through the Fertility Control Clinic at the St. Paul Ramsey Medical Center. There are other proprietary providers in Hennepin County as well. To our knowledge the only one in Ramsey County, which is where our clinic is located, is the Fertility Control Center at the hospital.

BY MR. PENTELOVITCH:

Q. And no private providers?

[675] A. No, none of the private providers. Meadowbrook Womens Clinic in St. Louis Park, which is a proprietary provider does provide second trimester abortion services as to [sic] some individual physicians, but none on a not-for-profit basis.

KATHRINE REICHE WELSH

* * *

[137] Q. What is the timing involved for minors when you send out notifications, taking into considerations your varying clinic schedules?

A. Sometimes that is a problem because we have to send it out like 48 hours before, so if a woman would call us on Monday and want to get in on a Wednesday, if she called after 12:00 on Monday there would be no way that we could get her in on the Wednesday clinic because we would have had to have mailed the letter before noon and so then we could, you know, we would have to put her on like a Friday clinic or a Saturday clinic.

Q. But isn't it true sometimes you don't have a Friday or Saturday clinic?

A. That is true. The Wednesday clinic is the only clinic that I know that we are always going to have, our Wednesday clinic.

Q. So if a minor calls on Monday morning you might not be able to see her until the next week?

A. If we don't have a clinic, that is true; if she chooses the mail notification.

* * *

[165] Q. Are any of these physically ill?

A. I have had two or three that have vomited, yes.

Q. In the courthouse?

A. Yes.

Q. Have you had any minors who have had medical problems but have had to go through the court?

A. Yes, we did, and that was in Judge Oswald's chambers. I had to bring a nurse with us and Judge Oswald heard her and the mother was with her and what we were worried about is that even though she was electing to have an abortion when we got there we found out she had some physical problems and that she was starting to spontaneously abort and yet we could not do the procedure until we took her to court.

* * *

[219] Q. How did she comply with the law?

A. The mother came with her and we required a death certificate of the father.

Q. Do you know where the father died?

A. In Massachusetts.

Q. And did they have a death certificate in Minnesota or did they have to get it from Massachusetts?

A. They had to obtain it from Massachusetts.

* * *

[220] Q. Was there a delay in the abortion because of the time to get the death certificate?

A. Yes, there was.

PAULA WENDT

* * *

[21] Q. So the two-day D&E procedures get the laminaria and stay in the Minneapolis area?

A. Right.
Q. Overnight?
A. Right.
Q. How much does an abortion cost at Meadowbrook?
A. If she is under 12 weeks the cost is $225. From 12 to 14 weeks it is $275.

THE COURT: Now you break it at 14 weeks?

THE WITNESS: We have two different fee categories.

THE COURT: All right.

THE WITNESS: A lot of people wouldn't do it all exactly the same way but we do. 14 to 16, $395; 16 to 18, $450; 18 to 19, $550; and 19 to 21, $650.

* * *

[23] Q. What percent of your adult women get second trimester abortions?
A. About 10 percent of our adult women.
Q. What percent of your minor patients get second trimester abortions?
A. About 25 to 28 percent of our minors do.
Q. Referring to the time period between October and December 1985, the last three months of 1985, do you remember how many minors you saw?
A. We saw 200.
Q. Do you know what percent were in the second trimester?
A. Let's see, it was over 30 percent.

* * *

[27] . . . We are also somewhat unusual in that we do a lot of second trimester abortions so we will see a fair number of women who have gone somewhere else for an abortion and turned out to be too far along for that particular clinic or doctor and then will be referred to us.

BY MS. BENSHOOF:
Q. For example, where?
A. Oh, Fargo, Duluth, Sioux Falls.
Q. You mean the doctors there will refer patients that they already have?

A. Right.
Q. Down to Meadowbrook?
A. Right, right; which fits in another delay for these patients.

* * *

[61] A. . . . We don't have the kind of time to spend with her talking about her relationship with her parents, her relationship with her boyfriend, how she feels about sexually active at 16, what are her thoughts about contraception. We still do it all but we used to have more time to it before. I think that we used to establish more of a relationship with her.

I think that part of what we do is we are sort of role models and teachers for them because they are young women who are sexually active and they got pregnant and they are having an abortion and some of them aren't very good contraceptors yet and they are good medical consumers yet so we try to do a lot of them with our young women and the law makes it a lot harder for us, makes it a lot harder for her to get what she needs.

Q. When you counsel a minor at 7:30 in the morning, who mght have been up driving for two hours, are her concerns in counseling on the abortion or the court?
A. Her concerns are not on the abortion until she comes back. It is like they put it on hold until they come back. They will go to court and be very determined about that but they are very afraid they are going to denied and they always want to know what the judge is going to ask me and is he going to let. . .

* * *

[99] Q. Could you explain the circumstances of that case?
A. It was a very young woman; she was 13, who came in with her boyfriend and they went to court alone and she was terrified of court and she wouldn't talk to anybody. So they would not sign the petition.
Q. You mean literally not talk?
A. Literally not talk. So she came back to me and this was a pretty bad situation because she lived with her father and there

were a lot of problems in the family and it was important that she obtain an abortion.

* * *

[106] Q. Can teenagers get one-day D&E procedures when they have to go to court?

A. They cannot.

Q. Why not?

A. Because they have to be in court at 10:30 in the morning. We insert all the laminaria between 9:30 and 10:00 o'clock in the morning. Once you put the laminaria in the cervix the abortion has begun and we can't insert laminaria and send them downtown to go to court because their petitions have not been approved yet. So for the teenager women who go to court what would be a one-day process for her will become a two-day process.

* * *

[108] A. . . . [T]hey don't have the same sort of freedoms that I do, they don't have the money, the time, the privacy. They will come, it is not infrequent, to have Methodist security tell me that they found some of my patients sleeping in their cars in the parking lot or they spent the night in the hospital lobby. I forget they sometimes don't have money for food and motel, you know, so they will do anything to get these arrangements taken care of.

CYNTHIA J.

* * *

[35] Q. And had you not had to secure the court permission and go through all that resulted in that and was involved with that, would you have been able to secure your abortion in the period of one day?

A. Yes.

Q. Would you have been able to secure the abortion at Planned Parenthood, a first trimester abortion?

A. Yes.

BONNIE L.

* * *

[7] A. She told me to call Hennepin County and tell them how far along I was and that it was really necessary that I get in within the week because if I didn't get in within the week it would probably be too late for me to get an abortion at Planned Parenthood.

Q. Within the week, you mean by the end of that [8] particular week?

A. Well, she had kind of, she had emphasized on Thursday. That was the next day. And so she was just hoping on Friday by the latest, so—

Q. So you were talking to her on Wednesday now?

A. Yes.

Q. She was hoping you will get a court hearing on Thursday?

A. Yes.

Q. Did you call the number that she gave you?

A. Yes, I did.

Q. When did you call?

A. I called Wednesday. Right after I talked to Sherry.

Q. And did you get somebody down in Hennepin County Court?

A. Yes, I did. I talked to a lady and told her my situation and she said she didn't have an opening until Monday morning. And I told her that that would be too late, and asked if she had any other openings. And she said she didn't. I called back Sherry and told her that. Sherry tried contacting them.

* * *

[9] Q. Now, then you called Sherry back you said?

A. Yes.

Q. And you explained to her what happened, I take it?

A. Uh-huh.

Q. Then what happened next?

A. She called them to try to get an appointment and she didn't. She must not have had any luck. She called me back and gave me the Ramsey number or the courthouse.

* * *

A. Yes. She said she didn't have any luck either. Then I called Ramsey and I told them the exact same thing I told Hennepin County and they said they could get me at on Friday at 2:30.

Q. They couldn't do it any earlier that that?

[10] A. No. Friday was the earliest they could do it.

Q. All right. What did you do? Now that is still on Wednesday?

A. Yes, this is.

Q. So then what happened?

A. So after I got everything situated with Ramsey, I called Sherry back and told her everything was fine, you know, with them. Thursday I had to go to counselling.

* * *

[14] Q. Now, did you have an appointment at Planned Parenthood to go ahead and have the abortion procedure?

A. Yes. I did on Monday.

Q. Go ahead and tell us what time the appointment was for?

A. The appointment was for 9:30 and I went in and had a little more counselling. I had a checkup and just their basic exam and I went in there to get it and Dr. Hanson sized me again, sized me and said I was too far along and I wouldn't be able to have it at Planned Parenthood.

Q. What do you mean by too far along?

A. I was over the 14 week Planned Parenthood would do. They do up to 14 weeks pregnancy.

* * *

[19] Q. Bonnie, if you had been able to get a court appointment when you first called Hennepin County within, let's say, the next day, do you know whether or not you would have been able to have the abortion procedure either Thursday or Friday of that week?

A. I probably would have had it Thursday.

PERCENT ABORTIONS IN SECOND TRIMESTER
MINNESOTA RESIDENTS

Age	Year					
	1978	1979	1980	1981	1982	1983
< 17	18.4	18.7	21.9	20.1	20.6	23.0
18-19	14.7	14.0	16.6	15.1	15.2	16.0
20-24	10.0	10.4	11.2	10.3	10.6	11.0
25 +	7.8	7.5	8.5	7.5	8.0	7.9
Total	11.7	11.6	13.1	11.5	11.5	4.4

LIVE BIRTHS AND INDUCED ABORTIONS TO WOMEN AGE 15-19

MINNEAPOLIS, 1980-1984

AGE 15-17

Year	Population[1]	Live Birth #	Live Birth Rate[3]	Abortions[2] #	Abortions[2] Rate[3]	Pregnancy Rate[3]
1980	6,759	264	39.1	296	43.8	82.9
1981	6,548	270	41.2	253	38.6	79.8
1982	5,877	251	42.7	202	34.4	77.1
1983	5,289	250	47.3	N/A	N/A	N/A
1984	4,933	267	54.1	N/A	N/A	N/A

[1] 1971-1979 population estimates are derived using linear interpolation from the 1970 and 1980 census. Estimates from 1981-1984 are from the Hennepin County of Planning & Development

[2] Reported abortions are from the Minnesota Abortion Surveillance System developed in 1974 by the Minnesota Center for Health Statistics

[3] Rates are per 1000 population. The pregnancy rate is the sum of live birth rate and the abortion rate.

Health Statistics & Management Information
Minneapolis Health Department
January 16, 1986

LIVE BIRTHS AND INDUCED ABORTIONS TO WOMEN AGE 15-19

MINNEAPOLIS, 1980-1984

AGE 18-19

Year	Population[1]	Live Birth #	Live Birth Rate[3]	Abortions[2] #	Abortions[2] Rate[3]	Pregnancy Rate[3]
1980	7,628	480	62.9	585	76.7	139.6
1981	6,783	441	65.0	537	79.2	144.2
1982	6,749	445	65.9	458	67.9	133.8
1983	6,744	392	58.1	N/A	N/A	N/A
1984	6,248	394	63.1	N/A	N/A	N/A

[1] 1971-1979 population estimates are derived using linear interpolation from the 1970 and 1980 census. Estimates from 1981-1984 are from the Hennepin County of Planning & Development

[2] Reported abortions are from the Minnesota Abortion Surveillance System developed in 1974 by the Minnesota Center for Health Statistics

[3] Rates are per 1000 population. The pregnancy rate is the sum of live birth rate and the abortion rate.

Health Statistics & Management Information
Minneapolis Health Department
January 16, 1986

HENRY DAVID

[13] Q Are there any studies in the United States comparing only adolescents who give birth, or who have abortions, in a controlled study, for example in one particular hospital?

A Well, there was a study done in the State of Hawaii which is the only study which comes close to that and that was a study done by Dr. Patricia Steinhoff (ph) from the University of Hawaii, and it was published very recently. I have an advance [14] copy of the paper and they found, they checked their records for the years 1978, 1980, and found 313 abortion cases and 393 controls—by controls being women who delivered.

Q These are only adolescents?

A Yes. Well, they are young women, which means they may go up to age 24. I will be glad to mention some of the conclusions if you wish.

Q Yes, please.

A I will read: "The data provides striking evidence that women who utilized abortions were able to realize their family goals. They avoided subsequent unwanted pregnancys, subsequent births were overwhelmingly intended and wanted, and occurred in a positive emotional atmosphere. Among the very young women"—this would be women 15 to 17—"the use of induced abortions leads to postponement of the first birth well beyond the second birth of the women in the control group." In other words, those women who delivered had a second child fairly rapidly after the first; whereas the woman who had the abortion was able to delay it longer. And it raised the social, educational, and economic level of the household and the subsequent family.

That is the only study ever done in the United States with control groups, and it was possible to do so in Hawaii because it was possible to follow people up; and they were all recorded in this one hospital and it was done by the University of Hawaii.

[19] Q Based on your original research what are the developmental effects of carrying an unwanted pregnancy to term?

A That is a very difficult topic also because there are very many different opinions; but the only actual control study that has ever been published and repeatedly, and we are working on

a book on it now, is this twenty year follow-up study of children who were born to women twice denied abortion for the same pregnancy.

Q I want to say that we were very careful in matching the process. A research person devoted a whole year to matching the children and every one of our study children as we call them is matched by a control child whose mother did not request abortion, who was preferably in the same classroom or the same school, same sex, same age, same birth order, same number of siblings; the mothers matched for socioeconomic status, and the father present in the home. We have followed these children very extensively, psychologically, medically and every other way.

THE COURT: This is in Czechoslovakia?

THE WITNESS: In Czechoslovakia and again, because Czechoslovakia has a population register it is very easy to see which of our children came to the attention of school authorities, which children went to jail, which children were picked up or later when they became young adults were picked up for [20] alcoholism and all these things and the most significant finding is, in a nut shell, that many of the differences which were not statistically significant at age nine, subsequently became statistically significant.

It is also of interest that not one of the study children was ever selected as best friends by any other child in the classroom. We had psychiatrists and psychologists and public health people interview the teachers, the children, both sets of parents, and I might add here that this study is known in Czechoslovakia as a child development study, no one knows that there is any connection for abortion, and in fact 35 percent of the women who originally twice asked for abortion, the very last question of the interview always was did you ever ask for an abortion and 35 percent of the mothers subsequently denied it, which is quite normal, of course.

In a nut shell the summaries indicate that statistically significantly fewer children went to second school too.

Q Step back one minute. You mean fewer of those whose mothers had unwanted pregnancies?

A Correct, went on to secondary education. And they believe today that their position in life is worth far more high in actual psychiatric attention. This was already evident in the early years when a significantly larger number came to the attention of the Prague psychological clinics.

Let me just say, to make this short, that we cannot **[21]** predict in advance which child will get into psychological or psychosocial difficulties, who will go to jail, become alcoholic or such, but in the aggregate there was a statistically significant difference and the conclusion of the study, and I will be glad to provide further details, was that a woman's request for abortion needs to be taken seriously and that the chances of adverse developmental effects are pretty, pretty strong.

DR. LENORE WALKER

[308] Q Would you say that adolescence, as compared to other stages of childhood, is a particularly vunerable point insofar as a battering home?

A It is really a very vunerable point, one, because there is a great deal of sexual abuse and a lot of sexual jealousy for the batterer, so just the very being of at that time adolescent sex such as dating, a prom, they don't want their wifes to go out and certainly not their children. They want to keep everybody inside that home and that causes a great deal of violence and conflict in those homes.

In addition, I find that in the violent homes adolescence increases the amount of physical abuse; that when you study families over the life span you find two specific times when violence is the highest. One is in pregnancy and the very early stages of a child's life, the first few months; and the second is at adolescence, two points, and we don't really understand all the causation, but if you plot that all out on charts thatis what it shows.

Q Have you or others studied any correlation between pregnancy and violence?

[309] A I have studied some in my research program and we found about one third of our subjects were submitted to terrible

violent battering incidents during pregnancy. Richard Gillis (ph) another researcher from Rhode Island also studied it and found a very high rate of violence that increased during the period of pregnancy.

Q You are talking in terms of pregnancy of the wife?

A That is correct.

Q What about pregnancy of the teenage daughter?

A There has been very little research that I have seen about pregnancy during—of an adolescent daughter. However, the theoretical implication would be that it would be very high were we to study it and that would be part of the high figures of child abuse and general high levels of violence that increases when children are adolescents.

Q What would you expect the effect of notice of a daughter's pregnancy to have on a batterer?

A I think it would absolutely enrage him. It would be much like showing a red cape to a bull. That kind of information just plays right into his worst fears and his most vunerable spots.

The sexual jealousy, his dislike of his daughter going out with anybody else, would make him very angry and would probably create severe abuse as well as long term communication difficulties. In some cases the man may not react impulsively **[310]** and may hold on to that kind of information. But during the next fight it would certainly be used as a weapon and would continue to be used for years.

DR. JANE HODGSON

[82] Q In evaluating pregnant teenagers, could you explain the risks of—what the particular risks are with continuing the pregnancy and going through childbirth for a teenager, as opposed to being able to obtain an abortion?

I think you could start out your answer to that question by just what are the risks to the health of a teenager who is carrying through a pregnancy and childbirth.

A Well, the risks to a teenager are greater, of course, than they are for an adult simply because nature didn't intend it that

way, even though women—even though teenagers are achieving menarche at an earlier age now than they did a few decades ago.

It's been estimated that the age of menarche is decreasing about four-tenths of a year every decade. And at the beginning of the century, women didn't begin menstruation until they were over 15. The average age was about 15.6 years, I believe. And now it's down to 12, a little over 12, just in the—within this last century.

But they're,—when you see some of these children, it's obvious that they can't go through a pregnancy without having considerable distortion, from a physical point of view.

They're—they're apt to develop varicose veins. They develop abdominal changes in their—their **[83]** physique; muscle changes, abdominal changes. They lose the elasticity of their skin, the muscle—the elastic fibers are ruptured. They develop cardiovascular problems. They can have severe toxemia, which is based upon stress, which, of course, is always greater in the teenage pregnancy because of the social aspects. They may develop molar pregnancies.

I recall very vividly one of my first patients in Saint Paul was a 16-year-old that came in with a blood pressure of 200 and she had—as it turned out, we diagnosed a molar pregnancy.

Q Which is what?

A Which is a—it's a overgrowth of the afterbirth which destroys the—the fetus, per se, but the pregnancy continues and it's very—can be very dangerous. And this girl was really very seriously ill until we emptied her uterus of the molar pregnancy and she later recovered, but she was running a very dangerously high blood pressure and she could have had a cardiovasular accident and had a stroke or—or any number of complications; heart failure.

Q And do you think that the chances of developing such a pregnancy are higher in teenagers than adult women?

A The incidence of toxemia is definitely higher in the teenager. And the—

[84] Q Is molar pregnancy related to toxemia?

A Molar pregnancy causes—will cause toxemia. Yes, they can be related. They—

Q Are there differences in mortality rates for teenagers or for younger teenagers compared to the general adult woman population?

MR. GALUS: Excuse me. What kind of mortality rates?

MS. BENSHOOF: Death.

MR. GALUS: Abortion or birth or—

THE WITNESS: Maternal.

MS. BENSHOOF: Maternal.

MR. GALUS: Thank you.

A Maternal mortality rates do run higher for the—for the teenager and—very slightly, however. And it has been argued that this is due to the fact that they don't have good prenatal care. And in—with select groups, they have been given special attention and watched very carefully through their prenatal period and the results are supposedly the same.

But it's just the nature of the teenager that they're not going to seek prenatal care early. They're not going to watch their diet. They tend to be very careless about **[85]** nutrition and dental care and observing all the rules of good prenatal care. And it's pretty difficult to make them all conform to this pattern.

Obviously, with an unwanted pregnancy, a patient is not motivated nearly as much to take care of themselves as an adult who is very much seeking that pregnancy.

So we see that—that teenagers are—are careless. They don't eat properly. They don't seek—they don't go to the doctor. They wait until the very last minute, if they have any prenatal care at all, and so the results are that the morbidity and the mortality rate is slightly higher in this group.

Q Do you have any idea about how much higher the risk of death is for teenagers under the age 15 compared to adult women?

MR. GALUS: Excuse me. What is—what is meant by adult women in that question?

MS. BENSHOOF: Women 20 to 24.

A Well, according to the statistics from the National Center for Health, from teenage—no, this is from "Teenage Pregnancy in Minnesota," actually. It's a—it's a—

[86] Q State.

A —publication—

Q From the State.

A From the State, in nineteen—1982. "Teenage Pregnancy in Minnesota." And they point out and these figures were originally obtained, I'm—I think from the National Center for Health Statistics and CDC. The children that—that the adolescent female is three and a half times more likely to die from toxemia of pregnancy than—than pregnant females in their twenties.

Q Excuse me. How many times?

A Three and a half times.

Q Isn't that one and a half (indicating)?

A. Well, that's—I'm sorry, I read—yeah, it is one and a half.

Q Right.

MR. GALUS: Excuse me, counsel. What exhibit are we referring to?

MS. BENSHOOF: This is not an exhibit.

MR. GALUS: Could—could I please see what the witness is referring to?

MS. BENSHOOF: Sure.

MR. GALUS: Just to get it identified.

MS. BENSHOOF: She identified it as a page from—

[87] THE WITNESS: Page 42 from—

MS. BENSHOOF: —"Teenage Pregnancy in Minnesota," which is one of the defendants' exhibits.

MR. GALUS: Thank you.

MS. BENSHOOF: If you want to put it in, you can.

MR. GALUS: No, I'm—I'm just trying to follow the testimony.

A The pregnant female is one and a half times more likely to die from toxemia. She's three and a half times more likely to die—the female under 15 is three and a half more times likely to die from toxemia. Those from 15 to 19 are one and a half times. I'm sorry to get that confused. They're 1.3 times more likely to develop anemia; and, of course, their nutritional reserves are depleted.

Q And is there a general maternal mortality figure for women under 15 compared to women 20 to 24?

A Well, this report claims that the maternal mortality is 60 percent higher for women under 15, and 13 percent higher for women 15 to 19 than for women 20 to 24.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

THIRD DIVISION

3-81 CIV 538

JANE HODGSON, M.D.; GORDON DITMANSON, M.D.; ARTHUR HOROWITZ, M.D.; MICHELLE ROE; ALICE ROE; DIANA ROE; NADINE T., JANET T., and ELLEN Z., individually and on behalf of all other persons similarly situated; LAUREN Z.; MEADOWBROOK WOMEN'S CLINIC, P.A.; PLANNED PARENTHOOD OF MINNESOTA, a non-profit Minnesota corporation; MIDWEST HEALTH CENTER FOR WOMEN, P.A., a non-profit Minnesota corporation; and WOMEN'S HEALTH CENTER OF DULUTH, P.A., a non-profit Minnesota corporation,

Plaintiffs,

v.

THE STATE OF MINNESOTA; RUDY PERPICH, as Governor of the State of Minnesota; HUBERT H. HUMPHREY, III, as Attorney General of the State of Minnesota,

Defendants.

American Civil Liberties Union Foundation, by JANET BENSHOOF, Esq. and DELSIA MARSHALL, Esq., New York, New York; Minnesota Civil Liberties Union, by LINDA OJALA, Esq., Minneapolis, Minnesota; and Mackall, Crounse & Moore, by FRANZ P. JEVNE, III, Esq., Minneapolis, Minnesota, appeared for plaintiffs.

Hubert H. Humphrey, III, Attorney General, State of Minnesota, by JOHN GALUS and PETER M. ACKERBERG, Special Assistant Attorneys General, St. Paul, Minnesota, appeared for defendants.

MEMORANDUM ORDER

This matter comes before the court upon defendants' motion for partial summary judgment as to all of plaintiffs' claims concerning the parental notification/judicial bypass procedure of 1981 Minn. Laws ch. 228 (codified at Minn. Stat. § 144.343 subd. 6). Subdivision 6 requires, before an unemancipated minor can obtain an abortion in Minnesota, that either both parents be notified or, alternatively, that a state court judge determine that the pregnant woman is mature and capable of giving informed consent to the proposed abortion, or, if the woman is not mature, that an abortion without notification of her parents would be in her best interests.

Plaintiffs, a class of minor women seeking abortions, a parent of a minor, four clinics, and three doctors who perform abortions, commenced this action on July 30, 1981, seeking injunctive and declaratory relief. On July 31, 1981, this court temporarily restrained enforcement of subdivision 2 of Minn. Stat. § 144.343, which would have required written notice to both parents before an abortion could be performed upon an unemancipated minor. Thus, on August 1, 1981, subdivision 6 of Minn. Stat. § 144.343, which requires that a minor obtain either parental notice or judicial approval prior to having an abortion, went into effect and has remained in effect since that date. On March 22, 1982, this court preliminarily enjoined subdivision 2 but denied a preliminary injunction of subdivision 6.

Plaintiffs raise three claims concerning the notification/judicial bypass procedure. First, plaintiffs allege that the notification/judicial bypass procedure deprives them of liberty without due process of law in violation of the fourteenth amendment, both on its face and as applied. Amended complaint ¶ 50. Second, plaintiffs allege that the notification/judicial bypass procedure deprives them of equal protection of the laws in violation of the fourteenth amendment. *Id.* ¶ 51(a), (b). Finally, plaintiffs allege that the notification/judicial bypass procedure violates various provisions of the Minnesota Constitution. *Id.* ¶¶ 53, 54.

I. Summary Judgment Standard

The standards governing summary judgment are well established. Under Fed. R. Civ. P. 56(c), the district court shall render summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The Eight Circuit Court of Appeals has emphasized the drastic nature of the summary judgment remedy, finding it appropriate only if "the moving party has established his right to a judgment with such clarity as to leave no room for controversy and the non-moving party is not entitled to recover under any discernible circumstances." *Camfield Lines, Inc. v. Michelin Tire Corp.*, 719 F.2d 1361, 1364 (8th Cir. 1983) (quoting *Butler v. MFA Life Insurance Co.*, 591 F.2d 448, 451 (8th Cir. 1979)). All evidence must be viewed in the light most favorable to the non-moving party. *Adickes v. S. H. Cress & Co.*, 398 U.S. 144, 158-59 (1970). The court must give the non-moving party the benefit of all reasonable inferences to be drawn from the underlying facts. *Trnka v. Elanco Products Co.*, 709 F.2d 1223, 1225 (8th Cir. 1983). However, this court recognizes the remedy's salutary purpose of avoiding useless, expensive and time-consuming trials. *Id.*; *Percival v. General Motors Corp.*, 539 F.2d 1126, 1129 (8th Cir. 1976).

II. Due Process

A. Facial Constitutionality

In addressing the facial constitutionality of Minnesota's notification/judicial bypass procedure under the due process clause, the court is presented with a legal issue which can properly be resolved on a summary judgment motion. Fed. R. Civ. P. 56(c).

In a series of recent cases, the United States Supreme Court has addressed the constitutionality of parental notice or consent requirements and alternative judicial bypass procedures as prerequisites to a minor's receiving an abortion. *See Planned Parenthood Association v. Ashcroft*, 103 S. Ct. 2517 (1983); *City*

of Akron v. Akron Center for Reproductive Health, Inc., 103 S. Ct. 2481 (1983); *H. L. v. Matheson*, 450 U.S. 398 (1981); *Bellotti v. Baird*, 443 U.S. 622 (1979) (*Bellotti II*); *Bellotti v. Baird*, 428 U.S. 132 (1976) (*Bellotti I*); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976). The relevant legal standards, in the words of the Supreme Court, "are not in dispute." *City of Akron*, *supra*, 103 S. Ct. at 2497-98.

In *Bellotti II*, the Supreme Court struck down as unconstitutional a Massachusetts statute requiring judicial approval in lieu of parental consent. The Court concluded that although the Massachusetts statute satisfied constitutional standards in large part, it fell short in two crucial respects. First, it permitted judicial authorization for an abortion to be withheld from a minor who was found by the hearing court to be mature and fully competent to make the decision independently. Second, it required parental consultation or notification in every instance, without affording the pregnant minor an opportunity to receive an independent judicial determination that she was mature enough to consent or that an abortion would be in her best interests. 443 U.S. at 651.

Justice Powell, in announcing the judgment of the court and delivering a plurality opinion joined in by three other justices, characterized his discussion of possible alternative approval procedures as an "attempt to provide some guidance as to how a State constitutionally may provide for adult involvement—either by parents or a state official such as a judge—in the abortion decisions of minors." *Id.* at 651-52 n.32. In dictum, the Powell plurality opinion sets forth these constitutional guidelines:

> We conclude, therefore, that under state regulation such as that undertaken by Massachusetts, every minor must have the opportunity—if she so desires—to go directly to a court without first consulting or notifying her parents. If she satisfies the court that she is mature and well enough informed to make intelligently the abortion decision on her own, the court must authorize her to act without parental consultation or consent. If she fails to satisfy the court that she is competent to make this decision indepen-

> dently, she must be permitted to show that an abortion nevertheless would be in her best interests. If the court is persuaded that it is, the court must authorize the abortion. If, however, the court is not persuaded by the minor that she is mature or that the abortion would be in her best interests, it may decline to sanction the operation.

Id. at 647-48. Although the guidance expressed in the Powell plurality opinion represents the views of only four Justices, it appears that a fifth Justice, White, who dissented in *Bellotti II* on the ground that he found the Massachusetts statute to be constitutional, would also find this less restrictive version constitutional as well. *Id.* at 656-57 (White, J., dissenting); *see also Planned Parenthood League v. Bellotti*, 641 F.2d 1006, 1010 n.6 (1st Cir. 1981).

The judicial bypass procedure outlined by Justice Powell in *Bellotti II* has been specifically endorsed by the Court in subsequent decisions. *See Ashcroft*, *supra*, 103 S. Ct. at 2525-26; *City of Akron*, *supra*, 103 S. Ct. at 2497-99. In *Ashcroft*, the Supreme Court affirmed the constitutionality of a Missouri parental consent/judicial bypass procedure conforming to the *Bellotti II* standards. *See Ashcroft*, *supra*, 103 S. Ct. at 2526, *aff'g* 655 F.2d 848, 857-60 (8th Cir. 1981).

Likewise, the Minnesota notification/judicial bypass procedure, Minn. Stat. § 144.343 subd. 6, satisfies the constitutional requirements expressed in *Bellotti II*. Subdivision 6(c)(i) requires a judge of a court of competent jurisdiction, after an appropriate hearing, to authorize a physician to perform an abortion upon a pregnant minor without parental notification if the judge determines that the pregnant woman is mature and capable of giving informed consent, or, if not mature, that an abortion without parental notification would be in the pregnant woman's best interests.

Plaintiffs' present four objections to the facial constitutionality of the Minnesota notification/judicial bypass procedure under the due process clause. First, plaintiffs suggest that Minnesota's parental notification statute raises different constitutional issues from the parental consent statutes analyzed by the Supreme Court in *Bellotti II*, *Akron*, and *Ashcroft*. This court

disagrees. The requirement of parental consent is more of a burden on a minor's right to choose an abortion than a requirement of parental notification. Thus, any parental notification/judicial bypass procedure which meets the Supreme Court's constitutional test established for parental consent/judicial bypass procedures is constitutional. *See Indiana Planned Parenthood Affiliates Association v. Pearson*, 716 F.2d 1127, 1131-32 (7th Cir. 1983) (applies Supreme Court's constitutional analysis respecting consent bypass procedures to constitutional analysis of notification bypass procedures).

Second, plaintiffs argue that the two parent notification requirement of the Minnesota statute unconstitutionally burdens a minor's right to seek an abortion. The Supreme Court, however, in *Bellotti II*, suggests that a state may require a pregnant minor to obtain both parents' consent to an abortion as long as it provides an alternative procedure whereby authorization for the abortion can be obtained. *Bellotti II*, *supra*, 443 U.S. at 648-49. Accordingly, this court sees no constitutional infirmity with a two parent notification requirement.

Third, plaintiffs contend that any decision on the "facial" challenge to the Minnesota statute is premature at this time because it is inherently intertwined with the "as applied" challenge. Plaintiffs provide no support for this proposition in the context of parental consent notification/judicial bypass statutes. In fact, a number of courts have upheld the facial constitutionality of analogous statutes without addressing the constitutionality of the statute as applied. *See*, *e.g.*, *Ashcroft*, *supra*, 103 S. Ct. 2517; *Planned Parenthood League v. Bellotti*, *supra*, 6-1 F.2d at 1011. This court therefore rejects plaintiffs' argument and will rule on the facial constitutionality of the challenged statute.

Finally, plaintiffs assert generally that the Minnesota statute lacks procedural protections. Once again, this court cannot agree with plaintiffs' argument. The Minnesota statute provides a variety of procedural protections to pregnant minors. The statute permits the pregnant woman to participate in the court proceedings on her own behalf, and the court may appoint a guardian ad litem. Minn. Stat. § 144.343 subd. 6(c)(ii). Further, proceedings under this section shall be confidential and shall be

given such precedence over other pending matters so that the court may reach a decision promptly and without delay so as to serve the best interests of the pregnant woman. Minn. Stat. § 144.343 subd. 6(c)(iii). This requirement is consistent with Justice Powell's recommendation in *Bellotti II* that the proceedings "be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained." *Bellotti II*, *supra*, 443 U.S. at 644. The statute also requires that the judge of the court who conducts the proceedings shall make written factual findings and legal conclusions and maintain a record of the evidence. Minn. Stat. § 144.343 subd. 6(c)(iii). Finally, the statute makes available to any pregnant woman for whom the court denies an order authorizing an abortion without notification an expedited confidential appeal, waives filing fees at both the trial and appellate levels, and provides access to both the trial and appellate courts on a 24-hours a day, 7 days a week basis. Minn. Stat. § 144.343 subd. 6(c)(iv).

The court concludes that the Minnesota notification/judicial bypass procedure conforms with the constitutional principles first espoused in *Bellotti II* and endorsed by subsequent decisions. The statute does not, on its face, unduly burden the exercise of a minor's fundamental right to choose an abortion. Accordingly, plaintiffs' due process challenge to the facial constitutionality of the Minnesota judicial bypass procedure must be rejected and defendants' motion for summary judgment on this claim will be granted.

B. Constitutionality as Applied

Defendants also contend that the Minnesota notification/judicial bypass procedure does not violate the due process clause as applied. They present three arguments. First, defendants argue that the notification/judicial bypass procedure is being applied in conformance with the relevant constitutional standards of *Bellotti II*. Second, defendants suggest that any issues of fact concerning the so-called effects of the notification/judicial bypass procedure are immaterial to the constitutionality of the statute as applied. Finally, defendants contend that plaintiffs' allegedly anecdotal evidence of isolated

instances in which the notification/judicial bypass procedure has not been applied in conformance with relevant constitutional standards is insufficient to create any genuine issue of fact common to the class concerning the constitutionality of the statute as applied to the class. Defendants present the court with lengthy exhibits to support their position that no material facts are in dispute.

Plaintiffs counter each of defendants' arguments and contend that the defendants have omitted, misstated, and drawn improper inferences from genuine issues of fact. Plaintiffs also present the court with lengthy exhibits which they contend show that there are genuine issues of material facts relating to the operation and effects of the notification/judicial bypass procedure.

This court has reviewed all the files, records and proceedings in this action as they relate to the due process as applied cause of action. Based upon that review, the court is of the opinion that there are genuine issues of material fact in dispute on this claim and that defendants have failed to show that plaintiffs are not entitled to recover under any discernible circumstances. Specifically, plaintiffs have identified disputed issues of material fact relating to confidentiality, delays and inconvenience, and lack of access to the courts in rural counties. This list of material facts in dispute is not all inclusive. The court, at this moment, cannot accept defendants' contention that plaintiffs have presented only immaterial and anecdotal factual issues.

Professors Wright and Miller have cautioned, in the context of summary judgment motions, that "[b]efore the court can apply the law, it must have an adequate factual basis for doing so. In some situations, a fuller development of the facts may serve to clarify the law or help the court determine its application to the case." 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2725, at 85 (2d ed. 1983). In the instant action, the due process as applied challenge provides just such a situation where a complete factual record is necessary prior to a resolution of the claim.

The First Circuit has suggested, in an analogous context, that "a requirement unduly burdensome in operation [as to offend due process] will be struck down even if not clearly invalid on

its face." *Planned Parenthood League v. Bellotti*, *supra*, 641 F.2d at 1011. Thus, plaintiffs allege a viable cause of action. For example, Judge Wright in the Western District of Missouri has enjoined the Missouri statute upheld in *Ashcroft* because the statute "as presently applied unconstitutionally burdens and impinges upon the rights of plaintiff and of other members of her class to the free exercise of an abortion, both in the election and in the effectuation of the same; . . ." *T.L.J. v. Ashcroft*, No. 83-4398-CV-C-5 (W.D. Mo. Nov. 4, 1983) (temporary restraining whether it rationally furthers some legitimate, articulated state purpose . . . ." *San Antonio School District v. Rodriguez*, 411 U.S. 1, 17 (1973).

Plaintiffs do not argue that the distinction created by the Minnesota statute utilizes any suspect classifications which would justify use of strict scrutiny. Nevertheless, plaintiffs contend that heightened scrutiny is available because the statute impermissibly interferes with the exercise of a fundamental right—the right to choose an abortion. *Roe v. Wade*, 410 U.S. 113 (1973). Therefore, according to plaintiffs, the statutory classifications may be justified only by the strict scrutiny test of a compelling state interest or, at a minimum, by a middle level of scrutiny requiring that the classifications be substantially related to a significant state interest. Defendants, however, argue that if the Minnesota statute does not unduly burden a minor's substantive due process right to choose an abortion, then the classifications can be justified under the rational basis test.

As discussed above, this court has already determined that the Minnesota statute does not on its face impermissibly interfere with a minor's substantive due process right to choose an abortion. Thus, since the exercise of a fundamental right is not infringed, heightened scrutiny is not required. Accordingly, this court will evaluate the Minnesota statute for equal protection purposes under the rational basis test. *See Planned Parenthood League v. Bellotti*, *supra*, 641 F.2d at 1012 (rational basis test used for equal protection analysis of Massachusetts parental consent/judicial bypass statute after *Bellotti II*).

Plaintiffs' first equal protection challenge concerns the distinction between minors seeking abortions and minors seeking

childbirth or other health care services. This equal protection challenge was not before the Supreme Court in *Akron* or *Ashcroft* and was explicitly not reached in *Bellotti II*, *supra*, 443 U.S. at 650 n.30. Nevertheless, the Supreme Court has rejected challenges to abortion statutes in other contexts based on different treatment between abortions and other medical decisions. *See, e.g., Matheson*, *supra*, 450 U.S. at 412-13 (parental notice); *Harris v. McRae*, 448 U.S. 297, 325 (1980) (abortion funding); *Danforth*, *supra*, 428 U.S. at 66-67 (written consent); *see also American College of Obstetricians and Gynecologists v. Thornburgh*, 737 F.2d 283, 296 (3d Cir. 1984) (rejecting equal protection challenge to Pennsylvania parental consent/judicial bypass statute).

Furthermore, the Supreme Court has recognized that "the States have a 'significant' interest in certain abortion regulations aimed at protecting children 'that is not present in the case of an adult.' " *Akron*, *supra*, 103 S. Ct. at 2491 n.10 (quoting *Danforth*, *supra*, 428 U.S. at 75). In addition, the state has a legitimate interest in encouraging parental involvement or an alternative judicial procedure in the abortion decision of minors. *See id.* Based on these interests, states may rationally conclude that the decision to have an abortion poses risks to the physical, mental or emotional well-being of minors which are greater than a decision to bear a child or to seek other health care services. *See Bellotti II*, *supra*, 443 U.S. at 640-41, 648-49; *Thornburgh*, *supra*, 737 F.2d at 296; *Planned Parenthood League v. Bellotti*, *supra*, 641 F.2d at 1012-13. Accordingly, this court concludes that the distinction drawn by the Minnesota statute between abortion and other health care services, including childbirth, sought by minors is rationally related to the state's legitimate interest in protecting the well-being of minors and does not violate equal protection.

Plaintiffs' second equal protection challenge addresses the distinction between unemancipated minors as opposed to emancipated minors seeking abortions. A similar equal protection argument was raised in *Planned Parenthood Association v. Ashcroft*, *supra*, 655 F.2d 848, against a Missouri judicial bypass procedure similar to the Minnesota statute challenged here. Appellants argued that the statute was underinclusive

because it did not require the involvement of the parents of emancipated minors regardless of their maturity. The Eighth Circuit rejected the argument, acknowledging that while "the classification may not be perfect, we conclude emancipation is a sufficiently accurate indicia of dependence on parental advice to serve as the basis for a legislative judgment . . . ." *Id.* at 860. As noted above, the state has a legitimate interest in encouraging parental or judicial involvement in the abortion decisions of minors. Despite this interest, however, the state may rationally conclude that minors who are emancipated are sufficiently mature to make an abortion decision without parental or judicial involvement. Accordingly, this court concludes that the distinction drawn by the Minnesota statute between unemancipated and emancipated minors seeking abortions is rationally related to a legitimate state interest and does not violate equal protection.

At oral argument, plaintiffs asserted that there are fact issues precluding the entry of summary judgment on the equal protection claim. Nowhere, however, do plaintiffs present any issues of disputed material fact relevant to this claim other than the facts presented on the due process as applied claim. Moreover, this court concludes that the equal protection claim presents questions of law which subjects it to dismissal upon a summary judgment motion. In sum, the court concludes that the Minnesota notification/judicial bypass statute does not, as a matter of law, violate the equal protection clause and therefore defendants' motion for summary judgment on this claim will be granted.

IV. State Constitutional Claims

Plaintiffs also allege that the Minnesota notification/judicial bypass statute violates due process, privacy, and equal protection provisions of the Minnesota Constitution and that hearings conducted pursuant to the statute constitute a delegation of administrative power to Minnesota state courts in violation of Article III of the Minnesota Constitution. Defendants argue that these claims are barred by the eleventh amendment as recently interpreted by the Supreme Court in *Pennhurst State School & Hospital v. Halderman*, 104 S. Ct. 900 (1984). Plaintiffs, at oral argument, acknowledged that they do not contest the application of *Pennhurst* to their state claims in this action. Accordingly, defendants' motion for summary judgment on the state constitutional claims will be granted.

Based upon the foregoing,

IT IS ORDERED That defendants' motion for partial summary judgment be and the same hereby is granted in part and denied in part.

IT IS FURTHER ORDERED That defendant's summary judgment motion on the facial due process claim be and the same hereby is in all things granted and that claim is hereby dismissed.

IT IS FURTHER ORDERED That defendants' summary judgment motion on the due process as applied claim be and the same hereby is in all things denied.

IT IS FURTHER ORDERED That defendants' summary judgment motion on the equal protection claim be and the same hereby is in all things granted and that claim is hereby dismissed.

IT IS FINALLY ORDERED That defendants' summary judgment motion on the state constitutional claims be and the same hereby is in all things granted and those claims are hereby dismissed.

DATED: January 23, 1985.

/s/ DONALD D. ALSOP

Donald D. Alsop
United States District Judge

UNITED STATES COURT OF APPEALS,
EIGHTH CIRCUIT.

Submitted June 9, 1987.

Decided Nov. 13, 1987.

Nos. 86-5423, 86-5431.

JANE HODGSON, M.D.; ARTHUR HOROWITZ, M.D.; NADINE T., JANET T., ELLEN Z., HEATHER P., MARY J., SHARON L., KATHY M., and JUDY M., individually and on behalf of all other persons similarly situated: DIANE P., SARAH L. and JACKIE H.; MEADOWBROOK WOMEN'S CLINIC, P.A., PLANNED PARENTHOOD OF MINNESOTA, a nonprofit Minnesota corporation; MIDWEST HEALTH CENTER FOR WOMEN, P.A., a nonprofit Minnesota corporation; WOMEN'S HEALTH CENTER OF DULUTH, a nonprofit Minnesota corporation,

Appellees,

v.

THE STATE OF MINNESOTA; RUDY PERPICH as Governor of the State of Minnesota; HUBERT H. HUMPHREY, III, as Attorney General of the State of Minnesota,

Appellants.

Appeal from the United States District Court for the District of Minnesota.

Before LAY, Chief Judge, HEANEY, Circuit Judge, and ROSENN,* Senior Circuit Judge.

* The Honorable Max Rosenn, Senior Circuit Judge, United States Court of Appeals for the Third Circuit, sitting by designation.

PER CURIAM.

The petition for rehearing by the panel is granted and the opinion of this court previously filed, 827 F.2d 1191 (8th Cir.1987), together with the judgment entered in accordance with it, is vacated and withdrawn. This case will be held in abeyance pending a decision by the Supreme Court of the United States in *Hartigan v. Zbaraz*, ____ U.S. ____, 107 S.Ct. 267, 93 L.Ed.2d 245 (1987). In view of the above order the petition for rehearing en banc is denied as moot.

SO ORDERED.

UNITED STATES COURT OF APPEALS,
EIGHTH CIRCUIT.

Dec. 31, 1987.

Nos. 86-5423, 86-5431.

JANE HODGSON, et al.,

Appellees,

v.

THE STATE OF MINNESOTA, et al.,

Appellants.

ON PETITION FOR REHEARING EN BANC

The panel's order of November 13, 1987, 835 F.2d 1545, vacating the judgment and opinion in the above-entitled case is hereby rescinded. The panel reinstates the opinion and judgment of the court.

The petition for rehearing by the court en banc is granted; the panel opinion and judgment entered thereon are vacated. The case shall be argued to the court of appeals en banc and submitted on original briefs and record on February 12 at 9:00 a.m. in St. Paul, Minnesota, in the court of appeals Courtroom No. 1, 584 Federal Courts Building, 316 North Robert Street. Each side will be given 30 minutes for oral argument. Additional citations may be submitted to the court under Fed.R.App.P. 28(j).

(3)

Supreme Court, U.S.
FILED
FEB 3 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1125

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JANE HODGSON, M.D.; ARTHUR HOROWITZ, M.D.; NADINE T., JANET T., ELLEN Z., HEATHER P., MARY J., SHARON L., KATHY M., and JUDY M., individually and on behalf of all other persons similarly situated; DIANE P., SARAH L., and JACKIE H.; MEADOWBROOK WOMEN'S CLINIC, P.A.; PLANNED PARENTHOOD OF MINNESOTA, a nonprofit Minnesota corporation; MIDWEST HEALTH CENTER FOR WOMEN, P.A., a nonprofit Minnesota corporation; WOMEN'S HEALTH CENTER OF DULUTH, P.A., a nonprofit Minnesota corporation,

Petitioners,

vs.

THE STATE OF MINNESOTA; RUDY PERPICH, as Governor of the State of Minnesota; HUBERT H. HUMPHREY, III, as Attorney General of the State of Minnesota,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota
KENNETH E. RASCHKE, JR.
Assistant Attorney General
JOHN B. GALUS
Special Assistant
Attorney General
Counsel of Record
515 Transportation Bldg.
St. Paul, MN 55155
Telephone (612) 296-2654
Counsel for Respondents

224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

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QUESTION PRESENTED

May a state constitutionally require a physician to attempt with reasonable diligence to notify the parents of an unemancipated minor under the age of 18 at least 48 hours before performing an abortion if the notice requirement may be avoided by a court bypass system which both on its face and in actual practice meets the standards set forth by this Court for more burdensome parental consent statutes?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

NO. 88-1125

JANE HODGSON, M.D.; ARTHUR HOROWITZ, M.D.; NADINE T., JANET T., ELLEN Z., HEATHER P., MARY J., SHARON L., KATHY M., and JUDY M., individually and on behalf of all other persons similarly situated; DIANE P., SARAH L., and JACKIE H.; MEADOWBROOK WOMEN'S CLINIC, P.A.; PLANNED PARENTHOOD OF MINNESOTA, a nonprofit Minnesota corporation; MIDWEST HEALTH CENTER FOR WOMEN, P.A., a nonprofit Minnesota corporation; WOMEN'S HEALTH CENTER OF DULUTH, P.A., a nonprofit Minnesota corporation,

Petitioners,

vs.

THE STATE OF MINNESOTA; RUDY PERPICH, as Governor of the State of Minnesota; HUBERT H. HUMPHREY, III, as Attorney General of the State of Minnesota,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Respondents respectfully request that the Court deny the petition for writ of certiorari seeking review of the Eighth Circuit's decision in this case.

STATEMENT OF THE CASE

I. THE STATUTE.

The statute is set forth at 1a-4a of Petitioners' Appendix (hereinafter cited as "P.A.").

II. HISTORY OF THE LITIGATION AND FACTUAL RECORD.

A. Summary Judgment and Issues for Trial.

It is important that the factual record in this case and consequent findings of the district court be evaluated in the context of the district court's pre-trial order granting summary judgment and the framing of the issues for trial.

In an order issued January 23, 1985,[1] the district court granted summary judgment for defendants,[2] dismissing plaintiffs' claims that the Minnesota notice/bypass statute was facially invalid or violated equal protection standards under either the federal or state constitutions. P.A. 157a.

The district court acknowledged that the legal framework for this case was controlled as a matter of law by this Court's decisions in *Bellotti v. Baird*, 443 U.S. 622 (1979) ("*Bellotti II*"); *H.L. v. Matheson*, 450 U.S. 398 (1981); and *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983). Thus the district court held that:

> The requirement of parental consent is more of a burden on a minor's right to choose an abortion than a requirement of parental notification. Thus, any parental notification/judicial bypass procedure which meets the Supreme Court's constitutional test established for parental consent/judicial bypass procedures is constitutional.
>
> . . . The Supreme Court, however, in *Bellotti II*, suggests that a state may require a pregnant minor to obtain both parents' consent to an abortion as long as it provides an alternative procedure whereby authorization for the abortion can be obtained. *Bellotti II, supra*, 443 U.S. at 648-49. *Accordingly, this court sees no constitutional infirmity with a two parent notification requirement.*

Summary Judgment Order P.A. 151a. (Emphasis added).

The district court reserved for trial the question of whether the Minnesota parental notification/judicial bypass system funtioned in accordance with the standards set forth in *Bellotti II*. Nonetheless, as petitioners note in their petition at 5, the district court found the notice/bypass statute facially invalid after trial. This holding was based, in substantial measure, upon a determination that, despite the prior holdings of this Court and the trial court's own summary judgment, the state should have proved by *factual* evidence that a parent notification/judicial bypass statute furthers proper public purposes.[3]

B. Parental Notification.

At trial much of plaintiffs' evidence concerning the alleged burdens of parental notification related generally to the incidence of dysfunctional families, divorce and intrafamilial violence and child abuse in the United States at large and in

---

[1] Memorandum Order of the District Court, Alsop, J., dated January 28, 1985 (hereinafter "Summary Judgment Order"). P.A. 146a.

[2] Respondents will refer to the parties according to their posture at trial. Petitioners will be referred to as "plaintiffs," and respondents as "defendants."

[3] *See, e.g.*, District court order, P.A. 29a, 11a.

Minnesota. *See, e.g.*, A. 457-61,[4] T. 333-34, 984-85.[5] District court findings 68-70, P.A. 29a-31a.

The state does not dispute the existence of dysfunctional families or that there are minors in Minnesota who are victims of violence or fear violence. However, fear of abuse or interference with an abortion was not the most common reason for wishing to avoid parental notice. Of 258 minors appearing before Ramsey County Judge Peterson in judicial bypass hearings in the period from August 1, 1981, through November 30, 1982, only four percent indicated that they did not wish to notify their parents about their abortion because of fear that prior physical abuse would reoccur. Only five percent expressed an apprehension that parents would somehow prevent an abortion from taking place. Plaintiffs' Exhibit (P. Exh.) 21. The various reasons claimed by minors for not wishing to make their parents aware of their pregnancies and abortion decisions include a fear of disapproval and hostility, punishment, interference with her relationship with her boyfriend, upsetting a seriously ill parent and generally damaging the parent-child relationship. *See, e.g.*, A. 292-93; Hodgson Depo. of July 11, 1985, at 122;[6] P. Exh. 21. It appears, however, that a common, if not the most common, reason for the minor's desire to avoid parental notification is a general fear of damaging her good relationship with her parents. P. Exh. 21, A. 293. Dr. Hodgson herself testified that minors commonly seek to avoid parental notification as "a

[4] Page references preceded by "A." are to the Appendix filed in the Appeal to the Eighth Circuit.

[5] Page references preceded by "T." are to portions of the trial transcript not contained in the Appendix on Appeal to the Eighth Circuit.

[6] The testimony of Dr. Hodgson is found in the transcript of her deposition given for purposes of trial on July 11 and 12, 1985, and appears in the record as P. Exh. 92.

matter of love for their parents and they don't want to spoil the relationship that they have with their parents." Hodgson Depo. of July 11, 1985 at 122. Moreover, as testified by a number of witnesses, including Dr. Hodgson, adolescents often misapprehend their parents' likely actions in response to their decision to obtain an abortion. A. 228, A. 786-87, A. 879, A. 996-97. Dr. Hodgson likewise agreed with defendants' experts that notwithstanding the apprehensions of pregnant minors, parents are generally supportive in helping a minor deal with an unintended pregnancy. A. 229, A. 851-53, A. 866, A. 877.

Indeed, although parents of several thousand minors were notified of their daughters' decisions to have abortions pursuant to the statutory requirement from August 1, 1981, to March 1, 1986,[7] the record fails to reveal a single instance in which any such minor has suffered any violence or in which parents prevented any abortion as a consequence of notification.

Plaintiffs also criticized the requirement that both parents be notified on the ground that involvement of a second or noncustodial parent is unnecessary and can produce unwanted or disappointing consequences to the custodial parent or the minor. However, defendants' expert Dr. Vincent Rue, testifying as to his clinical experience in providing psychotherapy

[7] During this period 3,573 bypass petitions were filed in Minnesota courts. P.A. 23a. Both Dr. Hodgson (Hodgson Depo. at 122) and Paula Wendt (A. 312) testified that only about one-half of their minor patients choose the court bypass option. The actual figures offered by Wendt disclose, in fact, that only 40 percent of Meadowbrook minors have actually chosen the court option. A. 312. Since very few minors have been excused under the emancipation or abuse/neglect exceptions, it is reasonable to conclude that the number of minors who have notified their parents is at least equal to the number who sought court dispensation. *See also* Opinion of the Circuit Court. P.A. 83a n.9.

to minors confronted with problem pregnancies, stated that he has encouraged his pregnant minor patients to involve the noncustodial parent. When such advice has been followed, he has observed a subsequent improvement in the relationship between the child and the noncustodial parent. T. 2414-15.

C. The 48-Hour Length of the Parental Notification Requirement.

Plaintiffs also challenged the 48-hour length of the parental notification requirement. Plaintiffs' evidence pertinent to this particular challenge consists of evidence relating to medical risks associated with the postponement of an abortion procedure.

Minors who elect to notify one or both parents by written notice must wait until 48 hours after actual or consecutive delivery of written notice. Constructive delivery of mailed notice occurs at noon on the regular mail delivery date following mailing. Thus the effective length of the statutory parental notice requirement may in many instances be 72 hours.

It is undisputed that, all other things being equal, it is medically preferable to have an abortion at an earlier gestational age than at a later gestational age and that a second trimester abortion is statistically somewhat more risky and is in fact more expensive than a first trimester procedure. There is no evidence in the record, however, that a delay of 48 or 72 hours is medically significant. *See* District court finding 53. P.A. 23a. The district court found that the notice requirement, compounded by "scheduling factors," may reach a week or more. *See* District court finding 52. P.A. 22a-23a. The notice period can, however, run concurrently with any delays caused by scheduling factors, thus eliminating any compounding of normal scheduling delays. A. 158-59, T. 156-59, P. Exh. 70a, at 4, Opinion of the Circuit Court, P.A. at 97a. Furthermore, the record contains no instance in which delay for parental notification resulted in medical complication. Neither does public health data collected and published by the Minnesota Department of Health reveal any increase in medical complications among minors undergoing abortions while the notice/bypass was in effect. A. 827-28, D. Exh. 35.

D. Operation of the Court Bypass System.

A large volume of evidence was introduced dealing with the functioning of the court bypass procedure for minors who wished to secure relief from notification of one or both parents. During the period from August 1, 1981, to March 1, 1986, Minnesota courts entertained 3,573 petitions.[8] Based upon the experience of these thousands of hearings, the district court found as matters of fact that Minnesota courts applied the proper legal standard in ruling upon petitions (District court findings 29-32, P.A. 17a-18a); that hearings were systematically expeditious (District court findings 33-40, P.A. 18a-19a); and that anonymity was carefully safeguarded and breached at all only in a small number of isolated cases (District court findings 41-42, P.A. 19a-20a).

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[8] *See* note 7, *supra*.

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE EIGHTH CIRCUIT UPHOLDING THE MINNESOTA NOTICE/BYPASS STATUTE IS CONSISTENT WITH STANDARDS ALREADY ESTABLISHED BY THIS COURT AS A MATTER OF LAW.

While much remains uncertain concerning the permissible scope of state statutes touching upon abortion, this Court has clearly established that parents and society at large both have a strong, legitimate and long standing interest in promoting parental involvement in important matters involving their minor children, including abortion. The Eighth Circuit's decision upholding Minnesota's notice/bypass statute is consistent with the Court's clearly established standards, and the petition for certiorari should therefore be denied.

In numerous cases this Court has recognized the "cardinal" principle that parental involvement in the care and nurture of children is vital to the very structure of our society. *See, e.g., Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) (mandatory public school attendance interferes with rights and duties of parents in care, nurture and education of children); *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972) (mandatory school attendance until age 16 interferes with the rights and duties of Amish parents in the upbringing of their children). This cardinal principle is equally applicable to issues involving health care for a child,[9] including abortion. *See Bellotti v. Baird*, 443 U.S. 622 (1979) (*Bellotti II*); *H.L. v. Matheson*, 450 U.S. 398 (1981); *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983).

[9] *See, e.g., Parham v. J.R.*, 442 U.S. 584 (1979) (hearing not required prior to parents admitting children to mental health facilities).

Despite the strength of these cardinal principles, however, in view of what was viewed as the "unique" and "nonpostponable" nature of the abortion decision, the Court has determined that the state may not go so far as grant a parent "an absolute and possibly arbitrary veto over the [abortion decision of a minor.]" *See Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976). In *Bellotti II*, while the Court found invalid a Massachusetts law requiring parental *consent* for minors' abortions and providing for a form of court bypass procedure, Justice Powell, in announcing the judgment of the Court with the concurrence of three other Justices, went on "to provide some guidance as to how a state constitutionally may provide for parental involvement . . . in the abortion decision of minors."[10]

> . . . We therefore conclude that if the State decides to require a pregnant minor to obtain one or both parents' consent to an abortion, it also must provide an alternative procedure whereby authorization for the abortion can be obtained.
>
> A pregnant minor is entitled in such a proceeding to show either: (1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests. The proceeding in which this showing is made must assure that a resolution of the issue, and any appeals that may follow, will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained. In sum, the procedure must ensure that the provision re-

[10] *Bellotti II*, 443 U.S. at 651, n. 32.

quiring parental consent does not in fact amount to the "absolute, and possibly arbitrary, veto" that was found impermissible in *Danforth*.

Id. at 643-44 (footnote omitted).

The concurring opinion of then Associate Justice Rehnquist underscores the intent of the plurality to establish, as a matter of law, criteria upon which states and lower courts could rely in enacting and identifying constitutionally valid statutes calling for parental involvement in minors' abortions. *Id.* 443 U.S. at 651-52.

The applicability of the *Bellotti II* plurality standard as a matter of law in judging parental consent statutes was subsequently squarely confirmed in *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983). In that case, Justice Powell noted that "the relevant legal standards with respect to parental-consent requirements are not in dispute." *Id.* at 490. *See also Id.* at 505 (O'Connor, J., concurring in part and dissenting in part).

Furthermore, in the only case to consider a statute merely requiring parental notice, the Court upheld a Utah statute requiring parental notice, but withheld judgment upon whether that requirement could be applied to a girl who was mature or emancipated. *H.L. v. Matheson*, 450 U.S. 398 (1981). It is clear, however, that a majority of the Court supported the concept of parental notification, at least if a court bypass option is available. *Id.* at 413-20 (Powell, J., with Stewart, J., concurring). *Id.* at 420-25 (Justice Stevens concurring).

These cases demonstrate that, as a matter of law, a state may require parental involvement, even parental consent, if it also provides an expeditious, anonymous procedure whereby a minor can demonstrate either sufficient maturity or "best interest" to permit avoiding that involvement. Nothing in the

Court's holdings in these cases has contained the slightest hint that their validity is dependent in any way upon case-by-case factual proof that parents in general are concerned with the welfare of their children, or that their involvement in the life crises and decisions of their children serves a proper and compelling purpose. To the contrary, these cardinal and fundamental principles are taken as given.

As pointed out above, the district court found, after a complete trial that the Minnesota statute with the bypass system in place conformed both on its face[11] and as applied with these standards.[12] The court concluded that Minnesota judges, hearing over 3,500 petitions, applied the appropriate legal standards, and the proceedings were, on the whole, properly expeditious and anonymous.[13]

In upholding the Minnesota law, the Eighth Circuit Court of Appeals has merely applied the legal standard established by this Court to the relevant facts found by the trial court. Therefore, this case does not present an appropriate occasion for the Court to rekindle uncertainty in the states and lower courts concerning the reliability of the Court's holding on such an issue.

II. THIS CASE PRESENTS NO NEW "FACTS" REQUIRING THE COURT'S CONSIDERATION.

Plaintiffs assert that the Court should review this case because it presents a "unique factual record," thereby implying that some hitherto unknown facts have been brought to light in the weeks of testimony reviewed at trial. However, plaintiffs' evidence does little more than reiterate matters of

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[11] Summary Judgment Order. P.A. 146a-157a.
[12] District court findings 29-42. P.A. 17a-20a.
[13] *Id.* District Court Conclusions of Law. P.A. 44a-45a.

fact and opinion already considered by this Court in prior decisions setting forth the standards for parental involvement in their minor children's abortions.

As was recognized by the Eighth Circuit, the cases of *Bellotti II*, *Matheson* and *Ashcroft* were not decided in an intellectual or sociological vacuum. P.A. 85a. This Court is well aware of and has given full consideration to the claims that some minors may be sufficiently mature to make the abortion decisions independently,[14] that there may be some parents who may obstruct the abortion decision,[15] that some parents may be abusive, and that not all parents would necessarily provide helpful communication and support.[16]

The Court has also considered the "burdens" that a judicial bypass procedure inevitably creates for pregnant minors and has found those burdens to be outweighed by the state's important interests in protecting the well-being of minors. Indeed, in *Ashcroft*, the Court held constitutional a judicial bypass statute which conformed to the requirements of *Bellotti II* in the face of uncontradicted testimony that the procedure "might well engender delays of 13 days or more, forcing many minors to pass into a later stage of pregnancy, thereby exposing them to substantially increased risks of morbidity and mortality," and despite apparently uncontradicted expert testimony that compliance with the judicial bypass procedure under the Missouri statute would increase the total cost of the abortion procedure for minors choosing the judicial bypass alternative.[17]

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[14] *See Bellotti II*, 443 U.S. at 628, 653.

[15] *Id.* at 647; *Matheson*, 450 U.S. at 438-39 (Marshall, J., dissenting).

[16] *Matheson*, 450 U.S. at 424 (Stevens, J., concurring) and 438 n. 24 (Marshall, J., dissenting).

[17] Reply Brief of Petitioners at 7-8, *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983).

Similarly, the Court in *Bellotti II* reviewed uncontradicted expert testimony that any judicial bypass proceeding, even if conducted in the most benign manner, could be detrimental to a teenager. The plurality was also fully mindful that even a judicial bypass procedure conforming to the standards laid down in *Bellotti II* would necessarily involve some procedural difficulties and some delay in the performance of an abortion with increased health risks to the minor.[18] Nonetheless the general rule is that the statute may require both notice and consent of parents prior to a minors' abortion at least so long as "mature" and "best interest" minors are not subject to absolute veto by their parents.[19]

The record reflects virtually no facts which would call for invalidation of the Minnesota statute, after some five years of operation. Rather, plaintiffs fall back upon the same alleged "burdens" which were already considered in prior cases. Moreover, for all their research and investigation, plaintiffs have failed to identify a single Minnesota minor who was prevented from having an abortion or who suffered any medical harm or parental abuse as a result of either notifying her parents or going to court.

Far from presenting a record which demonstrates that the principles embodied in *Bellotti II* and *Ashcroft* fail in practice, the instant case demonstrates that a statutory notice/bypass system patterned after the *Bellotti II*/*Ashcroft* standards can increase the potential for parental involvement[20]

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[18] Brief of Intervenor-Appellee Planned Parenthood League at 43, *et. seq.*, *Bellotti v. Baird*, 433 U.S. 622 (1979).

[19] *Bellotti v. Baird*, 443 U.S. 622 (1979); *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983); *H.L. v. Matheson*, 450 U.S. 398 (1981).

[20] One of plaintiffs' witnesses indicated that the percentage of parental notification had increased from 25% to 50% after the law took effect. P.A. 83a, n.9.

and provide effectively for a judicial alternative without causing constitutionally significant hardships for the minors involved.

III. THE TWO-PARENT NOTICE REQUIREMENT IS CONSISTENT WITH THIS COURT'S PRIOR DECISIONS.

In *Bellotti II* this Court addressed a Massachusetts statute which required the consent of both parents for a minor's abortion subject to a court-bypass mechanism. Justice Powell's opinion recognizes this fact and finds it permissible if a proper bypass system is available. 443 U.S. at 648-49. Furthermore, in *H.L. v. Matheson, supra,* the Court declined to find unconstitutional a statute which required notice to both parents but provided no specific court bypass option.

In neither of these cases did the Court suggest that the state is constitutionally limited to a one-parent requirement. Rather a majority of the Court agreed that a state may even require *consent* of one or *both* parents so long as an appropriate alternative to consent is in place.

It is not clear that a similar bypass mechanism is required in the case of mere notice.[21] However, if so, that mechanism was available in Minnesota and has operated to permit minors who had notified one parent to avoid notice to the second. Thus the Minnesota procedure, in this respect as well, fully complies with this Court's precedents.

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[21] *See* Cross-petition for certiorari, *State of Minnesota, et al. v. Hodgson, et al.,* also filed by the defendants in connection with this case.

IV. THE 48 HOUR NOTICE PERIOD IS CONSISTENT WITH THIS COURT'S PRIOR HOLDINGS.

In light of the purposes to be served by a notice requirement, it is clearly necessary that some reasonable amount of time be provided to permit those purposes to be served. *See,* District court finding 73, P.A. 32a. *c.f. H.L. v. Matheson,* 450 U.S. at 446 (Marshall, J., dissenting). Furthermore, the 48 hour wait can coincide with normal scheduling delays which routinely occur when minors set up their abortion appointments. *See* Opinion of the Eighth Circuit. P.A. 97a.

The Court in *Bellotti II* and *Ashcroft* approved statutes which required either parental consent or judicial dispensation. Under the Minnesota statute, the 48-hour notice requirement is not applicable where parental consent is obtained. Thus, under the Minnesota law, every minor has the same options as those upheld in *Bellotti II* and *Ashcroft.* In addition she has the less burdensome primary option of providing for parental notice. Therefore, the Minnesota statute is fully consistent with this Court's established standards.

CONCLUSION

Characteristics of a constitutionally permissible statute generally encouraging involvement of the parents in their daughters' abortion decisions have been explicitly spelled out by this Court, after having fully considered numerous claims concerning the reluctance of some minors, for any number of reasons, to involve their parents. Neither plaintiffs' argument nor the record of this case sheds any new light on these settled principles. The Minnesota statute has properly been found by both the district court and the circuit court to function in accordance with the criteria established by this Court. Thus, no purpose can be served by granting certiorari upon plaintiffs' petition.

For these reasons, the defendants respectfully urge the Court to deny certiorari in this case.

Respectfully submitted,

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota
KENNETH E. RASCHKE, JR.
Assistant Attorney General
JOHN B. GALUS
Special Assistant
Attorney General
Counsel of Record
515 Transportation Bldg.
St. Paul, MN 55155
Telephone: (612) 296-2654
Attorneys for Respondents

Nos. 88-1125 and 88-1309

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JANE HODGSON, ET AL.,

Petitioners and Cross-Respondents,

—v.—

THE STATE OF MINNESOTA, ET AL.,

Respondents and Cross-Petitioners.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

JANET BENSHOOF
(Counsel of Record)
RACHAEL PINE
LYNN PALTROW
American Civil Liberties
Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800

Attorneys for Petitioners/ Cross-Respondents Other Than Planned Parenthood of Minnesota

WILLIAM Z. PENTELOVITCH
REBECCA PALMER
Maslon Edelman Borman & Brand
1800 Midwest Plaza
Minneapolis, Minnesota 55402
(612) 339-8015

Attorneys for Petitioner/ Cross-Respondent Planned Parenthood of Minnesota

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota
KENNETH E. RASCHKE, JR.
Assistant Attorney General
JOHN B. GALUS
Special Assistant
Attorney General
(Counsel of Record)
525 Park Street
St. Paul, Minnesota 55103
(612) 296-2654

Attorneys for Respondents/ Cross-Petitioners

(Counsel Continued On Inside Front Cover)

PETITION FOR CERTIORARI FILED JANUARY 4, 1989
CROSS-PETITION FOR CERTIORARI FILED FEBRUARY 3, 1989
CERTIORARI GRANTED JULY 3, 1989

LINDA OJALA
Kurzman, Grant & Ojala
2445 Park Avenue South
Minneapolis, Minnesota 55404
(612) 871-9004

Attorneys for Petitioners/
Cross-Respondents Other Than
Planned Parenthood of Minnesota

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RELEVANT DOCKET ENTRIES

Civil 3-81-538

DATE		PROCEEDINGS
7-30-81	1	VERIFIED COMPLAINT Issued Summons
	2	PLTFFS' MOTION FOR TEMPORARY RESTRAINING ORDER pursuant to Rule 65, Fed. R. of Civ. P.
	3	AFFIDAVIT OF JANE HODGSON, M.D.
	4	AFFIDAVIT OF GORDON DITMANSON, M.D.
	5	AFFIDAVIT OF ALICE ROE
	6	AFFIDAVIT OF MICHELLE ROE
	7	AFFIDAVIT OF DIANA ROE
	8	AFFIDAVIT OF JANE E. HODGSON, M.D.
	9	AFFIDAVIT OF GAYNELLE DOE
	10	AFFIDAVIT OF JANE MOE
	11	AFFIDAVIT OF ANN DOE
	12	AFFIDAVIT OF DR. RONALD ANDERSON
	13	AFFIDAVIT OF PAULA WENDT
	14	AFFIDAVIT OF LINDA OJALA
	15	AFFIDAVIT OF JACQUELINE DARROCH FORREST
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	17	AFFIDAVIT OF THOMAS P. WEBBER
		ASSIGNED TO ALSOP-J per CIVIL RIGHTS 617
7-31-81	18	FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER (Alsop-J 7-31-81) that motion of pltf for

DATE		PROCEEDINGS

temporary restraining order is granted in part and denied in part. FURTHER ORDERED that a temporary restraining order issue, without security therefor, as follows:

> It is Ordered That, until further Order of this Court, the defendants the State of Minnesota, Albert Quie, and Warren Spannaus, their agents, employees, and those working in concert with them, are enjoined and prohibited from enforcing the provisions of Minnesota Statutes 144.343, Subd. 2 except insofar as it is enforced, in accordance with Minnesota Statutes 144.343, Subd. 6, as though a paragraph (c) were incorporated into Minnesota Statutes 144.343 Subd. 2.

	19	TEMPORARY RESTRAINING ORDER (Alsop-J 7-31-81)
	20	MINUTES OF PROCEEDINGS: (Alsop-J) (Lindberg-Reporter) Mr. Jevne moves for the admission of Janet Benshoof to The bar of this Court for purposes of this lawsuit. Hearing on Pltffs' motion for a temporary restraining order: Argued, submitted and taken under advisement.
	21	NOTICE TO COUNSEL
7-30-81	22	MINUTES OF PROCEEDINGS: (Alsop-J) (Lindbergreporter) Hearing on Pltff's Motion For Temporary Restraining Order: Rescheduled to Friday, July 31, 1981 2 P.M.
8-7-81	23	SUMMONS returned served 8-4-81
8-7-81	24	MINUTES OF PROCEEDINGS: (Alsop-J) (Lindberg-Reporter) STATUS CONFERENCE

DATE		PROCEEDINGS
8-10-81	25	NOTICE OF DISMISSAL pursuant to Rule 41(a)(1)(i) F.R.C.P. to dismiss without prejudice, all claims against Deft. Tom Johnson as County Attorney for Hennepin County by Pltff.
	26	STIPULATION FOR INTERVENTION
	27	AFFIDAVIT OF NADINE T.
	28	ORDER FOR INTERVENTION (Alsop-J 8-10-81) that the unemancipated minor female suing under pseudonym as Nadine T. is hereby permitted to intervene as an additional pltff..
	29	COMPLAINT OF INTERVENOR NADINE T.
	30	NOTICE TO COUNSEL
8-10-81		REPORTER'S NOTES of Motion 8-7-81 (Box 81-3 Lindberg-Reporter)
		REPORTER'S NOTES OF MOTION 7-30-81 and 7-31-81 (Box 81-3 Lindberg-Reporter)
8-24-81	31	JOINT ANSWER OF STATE DEFENDANTS
8-26-81	32	AFFIDAVIT OF KAREN L. IVES
	33	AFFIDAVIT OF MICHAEL D. CALVERT
	34	AFFIDAVIT OF GREGORY DATE
	35	AFFIDAVIT OF PAUL GUNDERSON
	36	AFFIDAVIT OF NANCY L. HELMICH
8-28-81	37	AFFIDAVIT OF JACQUELINE MUCH
	38	AFFIDAVIT OF CARMEN KEMSKI
	39	AFFIDAVIT OF THOMAS CAMPBELL, M.D.
	40	AFFIDAVIT OF A.K.
	41	AFFIDAVIT OF KATHERINE (Tina) Welsh
	42	AFFIDAVIT OF CAROL R.

DATE		PROCEEDINGS
	43	AFFIDAVIT OF RENNE WARD, M.A.
	44	AFFIDAVIT OF JUDY R.
8-28-81	45	AFFIDAVIT of Jan Roe
	46	AFFIDAVIT OF MARTHA Z.
9-3-81	47	AFFIDAVIT OF JANE E. HODGSON, M.D.
	48	REPORTER'S TRANSCRIPT OF MOTION July 31, 1981.
9-4-81	49	SECOND AFFIDAVIT OF KAREN L. IVES
	50	SECOND AFFIDAVIT OF MICHAEL D. CALVERT
9-4-81		REPORTER'S NOTES OF MOTION 9-4-81 (Lindberg-Box 81-4)
	51	MINUTES OF PROCEEDINGS: (Alsop-J) (Lindberg-Reporter) Hearing on Pltff's Motion for Preliminary Injunction: argued, submitted and taken under advisement. Parties each to submit their proposed findings by Sept. 16, 1981. TRO is continued.
	52	AFFIDAVIT
9-10-81	53	SECOND AFFIDAVIT OF GREGORY DATE
	54	PLTFFS' NOTICE OF MOTION FOR CLASS CERTIFICATION Noticed for Sept. 18, 1981.
	55	PLTFFS' MOTION FOR CERTIFICATION AS A CLASS ACTION, pursuant to Rule 23 of the FRCP.
9-17-81	56	Janet T.'S MOTION FOR LEAVE TO INTERVENE AND TO PROCEED PSEUDONYMOUSLY pursuant to Rule 24 (b) of Fed. R. of Civ. P.
	57	AFFIDAVIT of JANET T.
	58	AFFIDAVIT OF PAULA WENDT

DATE		PROCEEDINGS
9-18-81	59	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FOR CLASS CERTIFICATION (Alsop-J 9-18-81) that pltff. class is certified to include: All unemancipated pregnant mature minors seeking abortions in Minnesota who have adequate capacity to give informed consent to abortion but who do not want to involve their parents.
	60	STIPULATION CONCERNING CERTIFICATION OF PLAINTIFF CLASS AND INTERVENTION OF ANONYMOUS PLAINTIFF
	61	ORDER FOR INTERVENTION OF JANET T. (Alsop-J 9-18-81) that the unemancipated minor female suing under pseudonym as Janet T. is hereby permitted to intervene as an additional plaintiff in the above-entitled action.
	62	NOTICE TO COUNSEL
9-21-81	63	AFFIDAVIT OF PAULA WENDT
9-30-81	64	JANET T. INTERVENOR'S PROPOSED COMPLAINT
10-26-81	65	PLTFFS' NOTICE OF MOTION TO REOPEN THE RECORD ON PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION Noticed for Oct. 30, 1981 1:30 P.M. at St. Paul.
	66	MOTION TO REOPEN THE RECORD permitting Pltffs. to submit, affidavits, of Donald R. Rysavy, Sarah L, Kathy M, N.B., Mrs. Nan Roe, Janet Benshoof and Franz Jevne III.
10-29-81	67	STIPULATION CONCERNING LIMITATIONS OF ACCESS TO CERTAIN DOCUMENTS AND TO SHORTEN MOTION TIME ON PLAINTIFFS' MOTION FOR SUBMISSION OF ADDITIONAL DOCUMENTS.

DATE		PROCEEDINGS
10-30-81	68	MINUTES OF PROCEEDINGS: (Alsop-J) (Lindberg-Reporter) Hearing on Pltff's Motion to Re-open Preliminary Injunction Motion: Agreed between parties. Pltffs. to draw stipulation and proposed order.
11-2-81		REPORTER'S NOTES of Motion 10-30-81 (Lindberg-Reporter Box 81-4)
3-23-82	69	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER (Alsop-J 3-22-82) that motion of plaintiffs for a preliminary injunction is granted in part and denied in part. FURTHER ORDERED that a preliminary injunction should issue, without security therefor, as follows:

> Pursuant to the Findings of Fact, Conclusions of Law and Order of the court dated March 22, 1982,
>
> IT IS ORDERED That, until further order of this court, the defendants the State of Minnesota, Albert Quie, and Warren Spannaus, their agents, employees, and those working in concert with them, are ENJOINED AND PROHIBITED from enforcing the provisions of Minn. Stat. § 144.343, Subd. 2, except insofar as it is enforced in accordance with Minn. Stat. § 144.343, Subd. 6, as though a paragraph (c) were incorporated into Minn. Stat. § 144.343, Subd. 2.

	70	PRELIMINARY INJUNCTION (Alsop-J 3-22-82).
	71	NOTICE TO COUNSEL
9-15-82	72	PRETRIAL CONFERENCE (Short-M; 9-14-82)
9-15-82	73	PRETRIAL SCHEDULE (Short-M; 9-14-82) THAT: 1) the period which parties may conduct

DATE		PROCEEDINGS
		discovery shall terminate on Oct. 1, 1983; 2) all non-dispositive motions, specifically those which relate to discovery and the discovery period, shall be filed and scheduled for hearing on or before Oct. 1, 1983; 3) all dispositive motions shall be filed and scheduled for hearing according to the requirements of Judge Alsop's standing Order Re Motion Practice on or before Nov. 1, 1983; and 4) this case shall be considered ready for trial on Dec. 1, 1983.
12-03-82	74	AFFIDAVIT OF FRANZ P. JEVNE, III
8-29-83	75	DEFTS NO. OF MO. & MO. TO COMPEL DISCOVERY AND EXTEND PRETRIAL SCHEDULE Ret. Bef. Mag. Short on 9-12-83 at 9:00 a.m. in St. Paul, MN.
	76	AFFIDAVIT OF KENT G. HARBISON IN SUPPORT OF DEFTS MO. TO COMPEL (SEPARATE)
9-6-83	77	AFFIDAVIT OF JANET BENSHOOF IN OPPOSITION TO DEFT. MOTION TO COMPEL DISCOVERY
	78	AFFIDAVIT OF LINDA M. OJALA IN OPPOSITION TO DEFT MOTION TO COMPEL
9-16-83	79	AMENDED PRETRIAL SCHEDULE (SHORT-M) THAT: 1) Discovery ends 2-01-84; 2) Nondispositive motions by 2-01-84; 3) Dispositive motions by 3-01-84; 4) Case be ready for trial by 4-01-83. Sent copies to counsel.
12-12-83	80	NO. OF TAK. DEPOSITION OF JANE MORROW ON 12-16-83 at 10:00am in Mpls., MN.
12-09-83	81	PLTFFS MOTION FOR A PROTECTIVE ORDER

DATE		PROCEEDINGS
	82	AFFIDAVIT OF PAM GALLOP IN SUPPORT OF MO. FOR PRO. ORDER
	83	AFFIDAVIT OF JANET BENSHOOF IN SUPPORT OF MO. FOR PROT. ORDER
12-15-83	84	STATE OF MINNESOTA AND JUDGE GERALD MARTIN NO. OF MO. & MO. FOR protective order Ret. Bef. Mag. Short on 12-27-83 at 9:00 a.m.
	85	AFFIDAVIT IN SUPPORT OF MOTION FOR PROTECTIVE ORDER OF JOHN B. GALUS.
12-20-83	86	PLTFFS NO. OF MO. & MO. FOR ENLARGEMENT OF TIME FOR DISCOVERY RET. BEF. Mag. Short on 12-27-83 at 9:00 a.m. in St. Paul, MN.
	87	AFFIDAVIT OF FRANZ P. JEVNE, III IN SUPPORT OF PLTFFS MO. FOR ENLARGEMENT OF TIME
	88	PLTFFS NO. OF MO. & MO. FOR LEAVE TO INTERVENE, TO PROCEED PSEUDONYMOUSLY & TO amend complaint Ret. Bef. on 1-9-84 at 9:00 a.m. in St. Paul, MN.
	89	AFFIDAVIT OF LAUREN Z.
	90	AFFIDAVIT OF ELLEN Z.
	91	AFFIDAVIT OF PAULA WENDT
12-21-83	92	AFFIDAVIT IN OPPOSITION TO PLTFFS MO. FOR PROTECTIVE ORDER OF JOHN B. GALUS
12-22-83	93	AFFIDAVIT IN OPPOSITION TO ANY PROTECTIVE ORDER AGAINST THE DEPOSITION OF Judge Martin of JANET BENSHOOF
12-27-83	94	MINUTES (SHORT-MAG) RE: PLTFFS MO. FOR PROTECTIVE ORDER-DENIED; Defts Mo. for protective order-DENIED.

DATE		PROCEEDINGS
12-30-83	95	ORDER (SHORT-MAG) THAT: PLTFFS MO. FOR PROTECTIVE ORDER IS DENIED; STATE OF MN mo. & Judge Gerald Martin for protective order is DENIED.
	96	NOTICE TO COUNSEL
12-20-83	97	PLTFFS MOTION FOR LEAVE TO INTERVENE, PROCEED PSEUDONYMOUSLY AND TO AMEND the Complaint (Rec'd 1-6-84)
1-11-84	98	AFFIDAVIT OF DR. RONALD ANDERSON in support of pltffs' motion for extension of dis.
	99	AFFIRMATION OF STANLEY K. HENSHAW in support of pltffs' motion for protective order
1-17-84	100	MINUTES (Short-M) pltffs mo. to extend discovery-granted, extended to April 1, 1984; mo. to amend complaint-granted; parties to draft another complaint.
1-31-84	101	ORDER (SHORT-MAG) THAT: PLTFFS MO. FOR ENLARGEMENT OF TIME BY 60 DAYS WITHIN WHICH parties must complete discovery is GRANTED: Discovery ends 4-01-84; nondispositive motions by 4-01-84; dispositive motions by 5-01-84; Case to be considered ready for trial on 6-01-84; Pltffs mo's for leave to intervene and amend complaint are GRANTED.
	102	AMENDED COMPLAINT-ISSUED AMENDED SUMMONS
	103	NOTICE TO COUNSEL
2-13-84	104	AMENDED ANSWER OF DEFTS
3-15-84	105	PLTFFS NOTICE OF MOTION FOR LEAVE TO USE DEPOSITIONS OF MEMBERS OF THE PLAINTIFF CLASS OF WOMEN Ret. before on 3-26-84 at 9:00 a.m.

DATE		PROCEEDINGS
	106	AFFIDAVIT OF PAULA WENDT
	107	STATEMENT OF COUNSEL PURSUANT TO LOCAL RULE 4(c)
	108	STIPULATION RE: PLTFFS MOTION #105
4-2-84	109	NOTICE OF TAKING DEPOSITION AND SUBPOENA DUCES TECUM OF SUZANNE SMITH ON 4-5-84 at 4:00 in Mpls., MN
	110	NOTICE OF TAKING DEPOSITION AND SUBPOENA DUCES TECUM OF JUDGE GEORGE O. PETERSEN ON 4-5-84 at 2:00 in Mpls., MN
	111	NOTICE OF TAKING DEPOSITION AND SUBPOENA DUCES TECUM OF JUDGE ALLEN OLEISKY on 4-5-84 at 12:00 in Mpls., MN
4-11-84	112	STIPULATION OF PARTIES TO DEFER HEARING ON RULE 32 MOTION UNTIL TIME CLOSER TO ACTUAL TRIAL DATE Ret. before Mag. Short Apr. 2, 1984 (rec'd 3-27-84)
5-1-84	113	DEFTS. NOTICE OF MO. & MO. FOR PART. SUMMARY JUDGT. ret. before Judge Alsop June 15, 1984, 10:00 a.m.
	114	DEFT. MO. FOR LEAVE TO FILE MEMORANDUM OF POINTS/AUTHORITIES IN SUPPORT OF PART. SUMMARY JUDGT. IN EXCESS OF 35 PAGES
	115	AFFIDAVIT OF STUART BECK
	116	4th AFFIDAVIT OF MICHAEL D. CALVERT
	117	AFFIDAVIT OF DONALD CULLEN
	118	AFFIDAVIT OF CYNTHIA DALY
	119	4th AFFIDAVIT OF GREGORY J. DATE
	120	AFFIDAVIT OF ESTHER S. FELDMAN

DATE		PROCEEDINGS
	121	AFFIDAVIT OF JOHN FILLENWORTH
	122	AFFIDAVIT OF D.J. HANSON
	123	AFFIDAVIT OF NANCY L. HELMICH
	124	4th AFFIDAVIT OF KAREN L. IVES
	125	AFFIDAVIT OF A. MILTON JOHNSON
	126	AFFIDAVIT OF DAVID KNUTSON
	127	AFFIDAVIT OF MARK A. MCDONOUGH
	128	AFFIDAVIT OF DAVID L. NORRGARD
	129	AFFIDAVIT OF JAMES P. SLTEET
	130	AFFIDAVIT OF SUSANNE K. SMITH
	131	AFFIDAVIT OF PAUL WETPHAL
	132	AFFIDAVIT OF GERALD J. WINTER
5-3-84	133	ORDER (Alsop-J) deft. memo. of points/authorities in support of part. summary judgt. mo. may exceed 35 pages, not to exceed 45 pages, responsive briefs by pltffs may exceed 35 pages, not to exceed 45 pages
	134	NOTICE TO COUNSEL
6-7-84	135	DEFTS RESPONSE TO PLTFFS (SECOND) REQUEST FOR ADMISSION
	136	DEPOSITION OF GERALD C. MARTIN (SEPARATE)
	137	DEPOSITION OF KATHERINE WELSH (SEPARATE)
	138	DEPOSITION OF MARIE HONKALA (SEPARATE)
	139	DEPOSITION OF SHERRY SIMPSON (SEPARATE)
	140	APPENDIX TO PLTFFS BRIEF IN OPPOSITION TO DEFTS MO. FOR SUMMARY Judgment (SEPARATE) (VOLUME I)

DATE		PROCEEDINGS
	141	APPENDIX TO PLTFFS BRIEF IN OPPOSITION TO DEFTS MO. FOR SUMMARY Judgment (SEPARATE) (VOLUME II)
	142	APPENDIX TO PLTFFS BRIEF IN OPPOSITION TO DEFTS MO. FOR SUMMARY Judgment (SEPARATE) (VOLUME III)
6-7-84	143	DEPOSITION OF SHERRY SIMPSON (Separate)
	144	DEPOSITION OF CYNTHIA J. (Separate)
	145	DEPOSITION OF BONNIE L. (Separate)
6-25-84	146	PLTFFS NOTICE OF MO. & MO. RE: DEPOSITIONS—Judge Alsop, July 6, 1984, 2:00 p.m.
	147	AFFIRMATION OF JANE HODGSON IN OPPOSITION TO DEFTS. MO. FOR SUMMARY JUDGT.
7-6-84	148	STIPULATION AND ORDER (Alsop-J) that: 1) pltffs' mo. for leave to use depos of members of the pltff class of women at trial in lieu of testimony is GRANTED; 2) pltffs may use all other pseudonymous depos of minors, parents/ immed. family members at trial in lieu of of testimony; 3) pltffs shall not oppose any mo. of state defts to use same; 4) no waiver of pltffs' nor defts' right to raise evidentiary objections to depos at trial
	149	NOTICE TO COUNSEL
7-6-84	150	MINUTES (Alsop-Lindberg) deft. mo. for summary judgment. Plft. mo. to use testimony by deposition is nesolved parties. Motion taken under advisment.
8-30-84		REPORTERS NOTES OF 7-9-84 (Alsop-J; Lindberg-R) RE: Motion (BOX 84-5)
1-23-85	151	MEMORANDUM ORDER (ALSOP-J) THAT: Defts mo. for partial summary judgment—

DATE		PROCEEDINGS
		GRANTED IN PART & DENIED IN PART.; Defts summary judgment mo. on facial due process claim—GRANTED & that claim is dismissed; Defts' summary judgment motion on due process as applied claim—DENIED; Defts' summary judgment motion on equal protection claim—GRANTED & that claim is Dismissed; Defts' summary judgment motion on state constitutional claims—GRANTED & those claims are dismissed.
	152	NOTICE TO COUNSEL
3-25-85	153	PLTFFS NO. OF MO. & MO. TO REOPEN LIMITED DISCOVERY RET. BEF. MAG. SHORT AT THE Pretrial Conference on March 28, 1985.
	154	AFFIDAVIT OF WILLIAM Z. PENTELOVITCH
3-28-85	155	PRETRIAL CONFERENCE OF 3-28-85 (Short-Mag)
	156	SUBSTITUTION OF COUNSEL
3-29-85	157	CERTIFICATE OF READINESS FOR TRIAL (SHORT-MAG)
	158	ORDER (SHORT-MAG) THAT: All foundation objection to exhibits listed on parties exhibit lists filed at final pretrial conference are waived unless made in writing within 60 days of date of that pretrial conference; Parties' stipulation of facts shall be filed within 60 days of pretrial conference date; Parties shall identify all deposition transcripts intended to be used at trial within 7 days of date on which they receive trial notice. That identification shall include name of deponent, pages to be offered at trial & purposed for which testimony will be offered.
	159	NOTICE TO COUNSEL w/copy of order

DATE		PROCEEDINGS
6-24-85	160	PLTFF'S. NOTICE OF TAKING DEPO. & REQUEST FOR PRODUCTION OF DOCUMENTS OF JANE HODGSON, ON 7/11-12/85 comm. at 10:00 am, in Mpls., MN
9-10-85	161	STIPULATION OF FACTS FOR PURPOSES OF TRIAL—SET II
2-5-86	162	DEFTS' OBJECTIONS TO PORTIONS OF DEPOSITION TESTIMONY OFFERED BY PLTFFS.
	163	DEFTS' NO/MO IN LIMINE TO EXCLUDE THE TESTIMONY OF PAUL G. GARRITY
2-10-86	164	DEPO. OF MARY Y. Taken 1-11-84 in Duluth, MN (separate)
	165	DEPO. OF LORRAINE H. Taken 1-18-84 in Burnsville, MN (separate)
	166	DEPO. OF LAUREN Z., taken 3-20-84 in St. Louis Park, MN (separate)
	167	DEPO. OF JENNY M. Taken 12-16-83 in Duluth, MN (separate)
	168	DEPO. OF IDA B. taken 2-8-84 in St. Louis Park, MN (separate)
	169	DEPO. OF AMELIA F., taken 1-10-84 in Duluth, MN (separate)
	170	DEPO. OF SYLVIA P., taken 12-16-83 in Duluth, MN (separate)
	171	DEPO. OF SUSAN B., Taken 1-11-84 in Duluth, MN (separate)
	172	DEPO. OF AGNES I., Taken 12-16-83 in Mpls., MN (separate)
	173	DEPO. OF AMY W., taken 1-11-84 in Duluth, MN (separate)

DATE		PROCEEDINGS
	174	DEPO. OF ANGELA E., Taken 12-27-83 in Mpls., MN (separate)
	175	DEPO. OF ANNA C., Taken 1-18-84, in Mpls., MN (separate)
	176	DEPO. OF BETH F., Taken 12-28-83 in Mpls., MN (separate)
	177	DEPO. OF BONNIE L., Taken 3-23-84 in Mpls., MN (separate)
	178	DEPO. OF CLARA Z., Taken 1-11-84 in Duluth, MN (separate)
	179	DEPO. OF CYNTHIA J., Taken 2-23-84 in Blue Earth Cty, MN (separate)
	180	DEPO. OF ELIZABETH S., Taken 12-16-83 in Duluth, MN (separate)
	181	DEPO. OF EMMA G., Taken 12-15-83 in Mpls., MN (separate)
	182	DEPO. OF FLORENCE K., Taken 12-28-83 in Mpls., MN (separate)
	183	DEPO. OF FRANCIS H. Taken 1-18-84 in Burnsville, MN (separate)
	184	DEPO. OF HARRIET T., taken 12-17-83 in Mpls., MN (separate)
	185	DEPO. OF MARY J., Taken 12-17-83 in St. Louis Park, MN (separate)
	186	DEPO. OF NADINE T., taken 3-21-84 in St. Louis Park, MN (separate)
	187	DEPO. OF NATALIE C., Taken 1-10-84 in Duluth, MN (separate)
	188	DEPO. OF ROSE C., Taken 12-12-83 in Mpls., MN (separate)

DATE		PROCEEDINGS
	189	DEPO. OF ROSE E., Taken 1-10-84 in Duluth, MN (separate)
	190	DEPO. OF SALLY H., Taken 12-16-83 in Mpls., MN (separate)
2-10-86	191	MINUTES (DDA/LL) RE: FIRST DAY OF COURT TRIAL: Mr. Pentelovitch moves the admission of Ms. Lynn and Ms. Pine to the bar of this court for purposes of this case only—GRANTED.
2-11-86	192	MINUTES (DDA/LL) RE: CONTINUED COURT TRIAL
2-13-86	193	TRANSCRIPT OF PROCEEDINGS (LPL) RE: Trial held before DDA on 2-10-86, comm. at 9:30 a.m. (separate)
2-12-86	194	MINUTES (DDA/LL) RE: CONTINUED COURT TRIAL
2-13-86	195	MINUTES (DDA/LL) RE: CONTINUED COURT TRIAL
2-17-86	196	TRANSCRIPT OF PROCEEDINGS (LPL) RE: Trial testimony of Paula Wendt held before DDA on 2/10 & 11/86. (separate)
2-18-86	197	MINUTES (DDA/LL) RE: CONTINUED COURT TRIAL
02-19-86	198	MINUTES (Alsop-J; Lindberg-R) Continued Court Trial
	199	TRANSCRIPT OF PROCEEDINGS (LPL) RE: Trial testimony of Judge Allen Oleisky before Judge Alsop on 02-11-86 (separate)
	200	TRANSCRIPT OF PROCEEDINGS (LPL) RE: Trial testimony of Janet Benshoof, before Judge Alsop on 02-10-86 (separate)
2-20-86	201	MINUTES (DDA/LL) RE: CONTINUED COURT TRIAL

DATE		PROCEEDINGS
	202	PARTIAL TRANSCRIPT OF VIDEO DEPOSITION OF JANE HODGSON, M.D., taken 7-11-85 comm. at 10:30 a.m., in Mpls., MN (separate)
	203	PARTIAL TRANSCRIPT OF VIDEO DEPOSITION OF JANE HODGSON, M.D., taken 7-12-85 comm. at 9:30 a.m., in Mpls., MN (separate)
2-28-86	204	TRANSCRIPT OF PROCEEDINGS (LPL) RE: Trial testimony of Susanne Smith held before DDA on 2-19-86. (separate)
	205	TRANSCRIPT OF PROCEEDINGS (LPL) RE: Trial testimony of Henry Peter Albrecht held before DDA on 2-19-86. (separate)
	206	TRANSCRIPT OF PROCEEDINGS (LPL) RE: Trial testimony of Edwin George Widseth held before DDA on 2-19-86. (separate)
3-4-86	207	PLTFFS FEDERAL RULE OF CIVIL PROCEDURE 26(b)(4)(A)(i) STATEMENT
2-24-86	208	MINUTES (DDA/LL) RE: CONTINUED COURT TRIAL
2-25-86	209	MINUTES (DDA/LL) RE: CONTINUED COURT TRIAL
2-26-86	210	MINUTES (DDA/LL) RE: CONTINUED COURT TRIAL
2-27-86	211	MINUTES (DDA/LL) RE: CONTINUED COURT TRIAL
3-4-86	212	MINUTES (DDA/LL) RE: CONTINUED COURT TRIAL
3-5-86	213	MINUTES (DDA/LL) RE: CONTINUED COURT TRIAL
3-6-86	214	MINUTES (DDA/LL) RE: CONTINUED COURT TRIAL

DATE		PROCEEDINGS
3-10-86	215	MINUTES (DDA/LL) RE: CONTINUED COURT TRIAL
3-11-86	216	MINUTES (DDA/LL) RE: CONTINUED COURT TRIAL
3-12-86	217	MINUTES (DDA/LL) RE: CONTINUED COURT TRIAL
3-13-86	218	MINUTES (DDA/LL) RE: CONTINUED COURT TRIAL; Both parties rest. Proposed Findings of fact, conclusions of law and order for judgment to be submitted 4 weeks after receipt of the transcript. REply brief due 2 weeks later. Final arguments to be scheduled at a later date.
3-14-86	219	COURT EXHIBIT LIST (separate)
3-13-86	220	PLTFFS. WITNESS LIST
	221	PLTFFS. FINAL EXHIBIT LIST
	222	DEFTS. AMENDED WITNESS LIST
	223	DEFTS. AMENDED EXHIBIT LIST
4-3-86	224	ORDER (DDA/4-3-86) that the attached caption be substituted in all future filings of the Court. (counsel list attached)
4-11-86	225	AFF. OF NANCY L. HELMICH wi/att exhibits
	226	STIPULATION AS TO THE RECEIPT OF CERTAIN EVIDENCE BY AFFIDAVITS
6-12-86	227	MINUTES (DDA/LL) RE: CONTINUED COURT TRIAL; the court takes the matter under advisement.
11-6-86	228	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER (DDA/11-6-86) that Minn. Stat. 144.343 (2)-(7) be and the same hereby is declared unconstitutional. That the Clerk enter judgment as follows: IT IS ORDERED,

DATE		PROCEEDINGS
		ADJUDGED, AND DECREED that Minn. Stat. 144.343 (2)-(7) is unconstitutional. IT IS FURTHER Ordered that defendants be and the same here permanently enjoined from enforcing the provisions of Minn. Stat. 144.343 (2)-(7). IT IS FINALLY ORDERED that the following injunction shall issue without security: IT IS ORDERED, ADJUDGED, AND DECREED that defendants are permanently enjoined from enforcing the provisions of Minn Stat 144.343 (2)-(7). (counsel served by Judge's office)
	229	JUDGMENT ENTERED
	230	PERMANENT INJUNCTION (DDA/11-6-86) that upon the court's Order of this date, defts. are permanently enjoined from enforcing the provisions of Minn. Stat. 144.343 (2)-(7). (counsel served by Judge's office)
11-12-86	231	DEFTS. NO/MO FOR PARTIAL STAY OF PERMANENT INJUNCTION ORDER PENDING APPEAL, Ret. before DDA on 11-19-86 at 4:00 p.m.
11-18-86	232	DEFENDANTS' NOTICE OF APPEAL TO THE EIGHTH CIRCUIT COURT OF APPEALS FROM JUDGE ALSOP'S ORDER OF 11-06-86. Delivered two certified copies and one uncertified copy of each of the following to the Court of Appeals—St. Paul office: Defendants' Notice of Appeal, Order (Alsop-J; 11-06-86), Judgment and District Court Clerk' Docket Entries. Copy of Notice of Appeal and Docket Entries mailed to Counsel.
11-24-86	233	PLAINTIFFS' NOTICE OF APPEAL TO THE EIGHTH CIRCUIT COURT OF APPEALS FROM JUDGE ALSOP'S ORDER OF 11-06-86.

DATE	PROCEEDINGS
	Delivered two certified copies and one uncertified copy of each of the following to the Court of Appeals—St. Paul office: Plaintiffs' Notice of Appeal, Order (Alsop-J; 11-06-86), Judgment and District Court Clerk's Docket Entries. Copy of Notice of Appeal and last page of the docket entries mailed to Counsel.

Findings of Fact,
Conclusions of Law and Order

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

3-81 Civ. 538

JANE HODGSON, M.D.; GORDON DITMANSON, M.D.; ARTHUR HOROWITZ, M.D.; MICHELLE ROE, ALICE ROE, and DIANA ROE, individually and on behalf of all other persons similarly situated; MEADOWBROOK WOMEN'S CLINIC, P.A.; PLANNED PARENTHOOD OF MINNESOTA, a non-profit Minnesota corporation; MIDWEST HEALTH CENTER FOR WOMEN, a non-profit Minnesota corporation,

Plaintiffs,

v.

THE STATE OF MINNESOTA; ALBERT QUIE, as Governor of the State of Minnesota; and WARREN SPANNAUS, as Attorney General of the State of Minnesota,

Defendants.

American Civil Liberties Union Foundation, by JANET BENSHOOF, Esq., New York, New York, and Mackall, Crounse & Moore, by FRANZ P. JEVNE, III, Esq., Minneapolis, Minnesota, appeared for plaintiffs.

WARREN SPANNAUS, Attorney General, State of Minnesota, by KENNETH E. RASCHKE, Esq. and WILLIAM P. DONOHUE, Esq., Special Assistant Attorneys General, St. Paul, Minnesota, appeared for defendants.

The above-entitled matter came before the court upon plaintiff's motion for a preliminary injunction. Briefs were submitted on behalf of all parties, and oral argument was heard. Thereafter, the parties agreed to reopen the record and submitted additional affidavits for the court's consideration. The court, having considered the oral arguments and additional affidavits, together with all files, records and proceedings herein, makes the following:

FINDINGS OF FACT

1. Plaintiffs Jane Hodgson, M.D., Gordon Ditmanson, M.D. and Arthur Horowitz, M.D. are all licensed physicians actively engaged in the practice of medicine in the State of Minnesota in the specialty of obstetrics and gynecology, including the performing of abortions. In their practices they provide abortion services to minors, including: (1) minors who are mature and capable of making a well-informed decision to terminate their pregnancies ("mature minors"); (2) minors who may be deemed immature but for whom an abortion is otherwise in their best interest ("best interest minors"); and (3) minors who are "emancipated" as defined under Minn. Stat. § 144.341 and § 144.342 ("emancipated minors").

2. Plaintiff Meadowbrook Women's Clinic, P.A., is a free-standing medical facility located in Minneapolis, Minnesota, which provides contraceptive services, abortion services and related services to its patients, including pregnancy tests and counseling. In 1980, Meadowbrook Clinic provided approximately 2,000 abortions to minors.

3. Plaintiff Planned Parenthood of Minnesota is a non-profit Minnesota corporation. The Planned Parenthood clinic located in St. Paul provides contraceptive services, first trimester abortion services, and related medical services to its patients, including pregnancy tests and pregnancy counseling. In 1980, it provided abortions to 247 minors.

4. Plaintiff Midwest Health Center for Women is a non-profit Minnesota corporation located in Minneapolis, Minnesota, with a branch clinic located in Duluth, Minnesota. Midwest Health Center provides contraceptive services, abortion services, and related medical services to its patients, including pregnancy tests and counseling. In 1980, it provided abortions to about 1,200 teenagers, many of whom were minors.

5. Alice Roe is a sixteen-year old unemancipated minor who was seven weeks pregnant at the commencement of this action. Alice Roe asserts that she is mature and that notification of her parents of her desire to have an abortion would not be in her best interest.

6. Michelle Roe is a fifteen-year old unemancipated minor who was pregnant at the commencement of this action. She asserts that she is mature and that notification of her parents of her desire to have an abortion would not be in her best interest.

7. Diane Roe is a sixteen-year old unemancipated minor who was eight weeks pregnant at the commencement of this action. Diane Roe asserts that she is mature and that notification of her parents of her desire to have an abortion would not be in her best interest.

8. Nadine T. is a sixteen-year old unemancipated minor who was pregnant at the commencement of this action. Nadine T. asserts that she is mature and that to inform her parents of her desire to have an abortion would not be in her best interest.

9. Defendants are the State of Minnesota, its Governor and Attorney General. The Hennepin County Attorney, as representative of all other Minnesota County Attorneys, has been dismissed as a party by plaintiffs.

10. Defendant Albert Quie is the Governor of the State of Minnesota who, as such, is empowered to administer and enforce Minn. Stat. § 144.343, Subds. 2-7.

11. Defendant Warren Spannaus is the Attorney General of the State of Minnesota who, as such, is responsible for the

interpretation, enforcement and implementation of the laws of the State of Minnesota, including the challenged statute.

12. The 1981 Minnesota Legislature enacted Minn. Laws 1981, Ch. 228, codified at Minn. Stat. § 144.343, Subds. 2-7.

13. This Act, effective August 1, 1981, requires 48 hours written notice to both parents of an unemancipated minor or the guardian or conservator of a woman under guardianship or conservatorship prior to the performance of an abortion on the minor, ward, or conservatee insofar as such notice can be given with the exercise of reasonable diligence.

14. The notice requirement (hereinafter referred to as "Subdivision 2") does not apply where both parents, the guardian or the conservator have consented in writing to the abortion, where prompt action is needed to preserve the life of the woman or where a child reports that she is the victim of abuse or neglect.

15. The Act further provides that if Subdivision 2 is enjoined or restrained by judicial order, then the same notice requirement shall be effective, together with an alternative procedure whereby a pregnant woman may secure without notice to her parents a judicial determination that she is mature and capable of giving informed consent to an abortion or, if she is not mature, that the performance of an abortion without notice to her parents would be in her best interest (hereinafter referred to as "Subdivision 6").

16. The plaintiffs have asserted a claim in this court challenging the validity of Minn. Stat. § 144.343, Subds. 2-7 under 42 U.S.C. § 1983, the First and Fourteenth Amendments to the United States Constitution, and Articles III § 1 and V § 7 of the Minnesota Constitution.

17. Plaintiffs challenge both Subdivision 2 and Subdivision 6 on the grounds that both present an unreasonable burden upon the right of a pregnant woman to determine, in consultation with her physician, whether or not to terminate her pregnancy by means of abortion. Subdivision 2 of the Act is challenged as unconstitutional on its face. Subdivision 6 of the Act is challenged both on its face and as applied. Plaintiffs raise only the rights and interests of minors and do not address women who are under guardianship or conservatorship.

18. By Order of July 31, 1981, this court temporarily restrained enforcement of Subdivision 2 of the Act but did not restrain enforcement of Subdivision 6 of the Act.

19. Plaintiffs performed a combined total of approximately 90% of the 19,028 abortions performed in Minnesota in 1980. Of these, 2,733 (14.4%) were performed for minors. 409 (19%) of these minors were from states other than the State of Minnesota, or from Canada. Approximately 84% of the minor abortion patients in Minnesota are age 16 or 17.

20. The majority of minors who received abortion services prior to August 1, 1981 did so without notifying both their parents. The study of expert Dr. Ronald Anderson demonstrated that 55% of minors had not notified either living parent that they were obtaining an abortion, and 20% had notified one parent; therefore, approximately 75% of minors had not told both parents.

21. Subdivision 2 of the Act provides for a 48-hour waiting period after parental notice is given. 48 hours is a reasonable period of notice to allow for parents to aid, counsel, advise and assist their minor daughter in connection with the determination to undergo abortion or to provide the physician with information which may be relevant to the medical judgments involved.

22. As a result of the Temporary Restraining Order issued by this court on July 31, 1981, Minn. Stat. § 144.343, Subd. 6, went into effect on August 1, 1981. This is the section of the Act which provides for a judicial by-pass procedure for unemancipated minors who claim to be mature or claim that it is not in their best interest to give parental notification prior to obtaining an abortion.

23. In the county and district courts, procedures have been developed to implement the provisions of Subdivision 6 of the Act. Specifically, in Hennepin, Ramsey and St. Louis Counties,

the three most populous counties in the state, very detailed procedures have been developed to intake and process, in a confidential and expeditious manner, the large volume of cases expected to occur in those counties.

24. In Hennepin County, a 24-hour child protection hot-line telephone number has been established. The hot-line screens for potential public defender referrals and public defenders are appointed automatically without a court order. The child protection unit and the public defender have 24-hour access to the judges of the district court. Form petitions and a form for findings of fact have been prepared and are available. The hearings are scheduled on a separate, confidential calendar and are heard on an expeditious basis. When necessary, hearings are held on an emergency basis.

25. In Ramsey County there is also a 24-hour child protection intake number. The child protection unit determines the urgency of the matter based on the representations of the caller and refers the matter to the public defender. The public defender is available on a 24-hour a day basis and has access to district court judges on a 24-hour a day basis. Form petitions and a form for findings of fact have been prepared and are available. Matters are scheduled in court on a separate, confidential calendar on an expedited basis and, when necessary, on an emergency basis.

26. In St. Louis County access to the courts is through the chief deputy clerk of the probate family division of the county court who is available to the one major abortion provider in the Duluth area and the public defender on a 24-hour a day basis. He has access to Probate Judge Martin and three other judges on a 24-hour a day basis who are available to hear these matters. The procedures utilized in St. Louis County are based on the procedures in Hennepin and Ramsey Counties, and the St. Louis County courts have developed a form for a petition and a form for findings of fact. All files in such cases are confidential and are kept separate from other juvenile court records.

27. In each of those counties, the affidavits of the court personnel indicate that no problems have been encountered in

assuring petitioners anonymous and expeditious handling of their petitions and hearings.

28. With respect to the non-metropolitan counties, efforts have been made to assure that court personnel are aware of the terms of the law and the procedures used in the metropolitan counties. A survey of the non-metropolitan judicial districts of Minnesota indicates that at the time of submission of the motion in this action, few inquiries regarding hearings had been received and only eight petitions had been filed. The prevalent use of the State's metropolitan communities for the obtaining of abortion services together with the newness of the Act combine to provide only minimal experience of its application in non-metropolitan courts. Except for two isolated instances, which are strongly disputed by defendants, plaintiffs have failed to demonstrate that the Act has not been properly administered by non-metropolitan court personnel. Although the problem of confidentiality is more acute in non-metropolitan counties, all such counties have established procedures for handling petitions. Court officials are aware of the problems and do not foresee any difficulty in providing confidential and expeditious treatment of petitions under Subdivision 6. This court is confident that the non-metropolitan court officials of the State are equally as conscientious as their metropolitan counterparts in the exercise of their constitutionally mandated obligation to faithfully administer and apply the Act.

29. As a practical matter, over 90% of the abortions performed in Minnesota and virtually all abortions on minors take place at facilities located in Ramsey, Hennepin and St. Louis Counties.

30. During the first three months of the operation of Subdivision 6, approximately 122 requests or petitions for hearing were filed in the Minnesota courts. All but eight of these requests or petitions were filed in Ramsey (22 petitions), Hennepin (83 petitions), or St. Louis County (9 petitions).

31. In all of these cases hearings were held and decisions were made within 24 to 48 hours of the petition or on the day requested by the petitioner's attorney. When requested by peti-

tioners, hearings are held on an even more expedited basis. In at least one case, the hearing was held and a decision was rendered within four hours of the filing of the petition.

32. In each of these cases, the hearings were conducted in a confidential and anonymous manner. The hearings are either held in the chambers of the judge or in closed juvenile court rooms.

33. At the time of the submission of this motion, there had been no appeals from any of the decisions.

34. The Minnesota Supreme Court has issued an order indicating that all petitions under Minn. Stat. § 144.343, Subd. 6, will initially be filed in and considered by the county court or in the case of Hennepin and Ramsey Counties, in the district court juvenile division. In addition, the Minnesota Supreme Court has ordered that all appeals shall be on the record to one judge of the district court, including the district court of Hennepin and Ramsey Counties.

35. While plaintiffs' affidavits indicate some difficulty in obtaining information and scheduling hearings, these difficulties appear to have occurred primarily within the first week of implementing the statute. These problems do not seem to have persisted, and the affidavits of the court personnel involved do not corroborate the existence of problems.

36. Plaintiffs' affidavits indicate that their primary complaint about the procedure is the delay which occurs because they must appear before the judge. However, the procedure will inevitably require some time for the filing of the petition, hearing and decision to occur. The delay of 24-48 hours from request to decision experienced in most cases is not undue, particularly in light of the systems demonstrated ability to hear cases on an emergency basis in very short periods of time.

37. The operation of the court by-pass procedure as provided in Minn. Stat. § 144.343, Subd. 6, does not unduly burden the abortion decision of unemancipated minors.

CONCLUSIONS OF LAW

1. The court has jurisdiction of the above-entitled action pursuant to 28 U.S.C. §§ 1331, 1343(3), and 1343(4).

2. It is probable that plaintiffs will be successful in their challenge to the provisions of Minn. Stat. § 144.343, Subd. 2, because this statutory section probably will be determined to be unconstitutional on its face. *See Planned Parenthood Association of Kansas City, Missouri v. Ashcroft*, 655 F.2d 848 (8th Cir. 1981).

3. Plaintiffs will suffer irreparable injury if the defendants are not enjoined from enforcing the provisions of Minn. Stat. § 144.343, Subd. 2.

4. The defendants, their agents, employees, and those working in concert with them, should be enjoined and prohibited from enforcing the provisions of Minn. Stat. § 144.343, Subd. 2.

5. It is probable that plaintiffs will not be successful in their facial challenge to the provisions of Minn. Stat. § 144.343, Subds. 2-7, because with Subd. 6 effective, these statutory sections probably will not be determined to be unconstitutional on their face. *See Planned Parenthood Association of Kansas City, Missouri v. Ashcroft*, *supra*, at 15-20.

6. On the present record, it appears probable that plaintiffs will not be successful in their challenge to the provisions of Minn. Stat. § 144.343, Subds. 2-7, as applied because based on the procedures now in effect in the Minnesota county and district courts, the by-pass procedure of Subdivision 6 is operating effectively and not unduly burdening the abortion decisions of unemancipated minors and, therefore, will probably not be determined to be unconstitutional. *See Planned Parenthood Association of Kansas City Missouri v. Ashcroft*, *supra*.

7. The court should not enjoin the enforcement of Minn. Stat. § 144.343, Subds. 2-7.

Upon the foregoing,

IT IS ORDERED That the motion of the plaintiffs for a preliminary injunction is granted in part and denied in part.

IT IS FURTHER ORDERED That a preliminary injunction should issue, without security therefor, as follows:

> Pursuant to the Findings of Fact, Conclusions of Law and Order of the court dated March 22, 1982,
>
> IT IS ORDERED That, until further order of this court, the defendants the State of Minnesota, Albert Quie, and Warren Spannaus, their agents, employees, and those working in concert with them, are ENJOINED and PROHIBITED from enforcing the provisions of Minn. Stat. § 144.343, Subd. 2, except insofar as it is enforced in accordance with Minn. Stat. § 144.343, Subd. 6, as though a paragraph (c) were incorporated into Minn. Stat. § 144.343, Subd. 2.

DATED: March 22, 1982.

/s/ DONALD D. ALSOP
Donald D. Alsop
United States District Judge

Preliminary Injunction

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

3-81 Civ. 538

JANE HODGSON, M.D.; GORDON DITMANSON, M.D.; ARTHUR HOROWITZ, M.D.; MICHELLE ROE, ALICE ROE, and DIANA ROE, individually and on behalf of all other persons similarly situated; MEADOWBROOK WOMEN'S CLINIC, P.A.; PLANNED PARENTHOOD OF MINNESOTA, a non-profit Minnesota corporation; MIDWEST HEALTH CENTER FOR WOMEN, a non-profit Minnesota corporation,

Plaintiffs,

v.

THE STATE OF MINNESOTA; ALBERT QUIE, as Governor of the State of Minnesota; and WARREN SPANNAUS, as Attorney General of the State of Minnesota,

Defendants.

Pursuant to the Findings of Fact, Conclusions of Law and Order of the court dated March 22, 1982,

> IT IS ORDERED That, until further order of this court, the defendants the State of Minnesota, Albert Quie, and Warren Spannaus, their agents, employees, and those working in concert with them, are ENJOINED and PROHIBITED from enforcing the provisions of Minn. Stat. § 144.343, Subd. 2, except insofar as it is enforced in accordance with Minn. Stat. § 144.343, Subd. 6, as though a paragraph (c) were incorporated into Minn. Stat. § 144.343, Subd. 2.

DATED: March 22, 1982.

/s/ DONALD D. ALSOP
Donald D. Alsop
United States District Judge

Amended Complaint

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil No. 3-81-538

JANE HODGSON, M.D.; GORDON DITMANSON, M.D.; ARTHUR HOROWITZ, M.D.; MICHELLE ROE, ALICE ROE, DIANA ROE, NADINE T., JANET T., and ELLEN Z. individually and on behalf of all other persons similarly situated; LAUREN Z.; MEADOWBROOK WOMEN'S CLINIC, P.A., PLANNED PARENTHOOD OF MINNESOTA, a nonprofit Minnesota corporation; MIDWEST HEALTH CENTER FOR WOMEN, P.A., a nonprofit Minnesota corporation; WOMEN'S HEALTH CENTER OF DULUTH, P.A., a nonprofit Minnesota corporation,

Plaintiffs,

v.

THE STATE OF MINNESOTA; RUDY PERPICH, as Governor of the State of Minnesota; HUBERT H. HUMPHREY, III, as Attorney General of the State of Minnesota,

Defendants.

I. PRELIMINARY STATEMENT

1. This is a civil action brought under 42 U.S.C. § 1983 and the United States and Minnesota Constitutions seeking declaratory and injunctive relief against Minnesota Session Laws, 1981, Chapter 228 (hereinafter cited as Minn. Stat. § 144.343(2-7), which went into effect on August 1, 1981. (A copy of the statute is attached hereto as Exhibit A.) Minn. Stat.

§ 144.343(2) through (5) require, in main part, that, with certain narrow exceptions, all doctors in Minnesota must notify both parents of a minor patient in writing before an abortion can be performed on the minor, or suffer criminal and civil penalties. Plaintiffs seek to invalidate this mandatory notification and the attendant mandatory waiting period imposed by these sections on the ground that they violate the First, Fourth, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution and Article II § 7 of the Minnesota Constitution.

2. Minn. Stat. § 144.343(6), which becomes operative in the event that subsection (2) is enjoined, sets forth a court procedure for minors to secure court authorization for an abortion without parental notification. On July 31, 1981, this Court enjoined the operation of Minn. Stat. § 144.343(2), thus triggering the operation of the court procedures. Plaintiffs seek to invalidate and enjoin the court procedure requirement on the ground that, on its face, and as applied to minors and their families in Minnesota, it violates the First and Fourteenth Amendments to the United States Constitution, Article V § 7 of the Minnesota Constitution, and Article III § 1 of the Minnesota Constitution.

II. JURISDICTION

3. This Court has jurisdiction of this action by virtue of 28 U.S.C. §§ 1343(3) and 1343(4), authorizing jurisdiction of claims brought under 42 U.S.C. § 1983 to enforce rights guaranteed by the United States Constitution. This Court also has jurisdiction of this action pursuant to 28 U.S.C. § 1331 as a claim arising under the United States Constitution. The Court has the power to hear those claims asserted under the Constitution of the State of Minnesota under the principles of pendent jurisdiction. This action also seeks declaratory judgment relief pursuant to 28 U.S.C. §§ 2201 and 2202.

III. PARTIES

4. Plaintiff JANE HODGSON, M.D., is a citizen of the United States and resides in the State of Minnesota. She is a physician licensed to practice medicine in the State of Minnesota and is actively engaged in the practice of obstetrics and gynecology, including the performance of abortions, in Minneapolis, Minnesota, and in Duluth, Minnesota. At the time of the filing of the original complaint Dr. Hodgson was Medical Director of Planned Parenthood of Minnesota. She is currently medical director of the Women's Health Center in Duluth. Dr. Hodgson brings this action on her own behalf and on behalf of her minor patients, among whom are teenagers for whom it is medically inadvisable to notify both parents because of hostile home situations or other reasons; teenagers who are mature and capable of making a well-informed decision to terminate their pregnancy, for some of whom it would be medically inadvisable to notify both parents, such as her three patient plaintiffs Alice Roe, Michelle Roe, and Diana Roe; and minors who have special health problems making abortion medically necessary, but whom Dr. Hodgson cannot certify with any certainty as about to die within three days, as required by Minn. Stat. § 144.343(4).

5. Plaintiff GORDON DITMANSON, M.D., is a citizen of the United States and resides in the State of Minnesota. He is a physician licensed to practice medicine in the State of Minnesota and is actively engaged in the practice of obstetrics and gynecology, including the performance of abortions, in St. Paul, Minnesota. Dr. Ditmanson is Director of the Fertility Control Center at St. Paul Ramsey Hospital located in St. Paul, Minnesota. Dr. Ditmanson brings this action on his own behalf and on behalf of his minor patients, among whom are teenagers for whom it is medically inadvisable to notify both parents because of hostile home situations or other reasons; teenagers who are mature and capable of making a well-informed decision to terminate their pregnancy, for some of whom it would be medically inadvisable to notify both parents; and minors who have special health problems making abortion medically necessary,

but whom Dr. Ditmanson cannot certify with any certainty as about to die within three days, as required by Minn. Stat. § 144.343(4).

6. Plaintiff ARTHUR HOROWITZ, M.D., is a citizen of the United States and resides in the State of Minnesota. He is a physician licensed to practice medicine in the State of Minnesota and is actively engaged in the practice of obstetrics and gynecology, including the performance of abortions, in Minneapolis, Minnesota. Dr. Horowitz brings this action on his own behalf and on behalf of his teenage patients, among whom are teenagers for whom it is medically inadvisable to notify both parents because of hostile home situations or other reasons; teenagers who are mature and capable of making a well-informed decision to terminate their pregnancy, for some of whom it would be medically inadvisable to notify their parents; and minors who have special health problems making an abortion medically necessary but whom Dr. Horowitz cannot certify as about to die within three days as required by Minn. Stat. § 144.343(4).

7. Plaintiff ALICE ROE is a sixteen-year-old, unmarried minor who lives at home. At the time of the filing of the original complaint she was seven weeks pregnant. She is mature and capable of making an informed decision to have an abortion and so decided in consultation with her physician, Dr. Jane Hodgson. Dr. Jane Hodgson agreed with Alice Roe that an abortion was medically indicated for her unplanned and unwanted pregnancy and that notification of both of her parents was likely to cause emotional harm as well as possible physical abuse.

8. At the time of the filing of the original complaint Plaintiff DIANA ROE was a sixteen-year-old unmarried minor living at home who was eight weeks pregnant. She is mature and capable of making an informed decision to have an abortion and so decided in consultation with her physician, Dr. Jane Hodgson. Dr. Hodgson agreed with Diana Roe that she was mature and that an abortion was medically indicated for her unplanned and unwanted pregnancy. Diana Roe and her doctor agreed that

notification of both parents would be medically inadvisable since it could have resulted in serious harm to her.

9. At the time of the filing of the original complaint Plaintiff MICHELLE ROE was a fifteen-year-old unmarried minor living at home with both of her parents. She is mature and capable of making an informed decision to have an abortion and so decided in consultation with her physician Dr. Jane Hodgson. Michelle Roe felt notification would change her entire life and destroy her future.

10. At the time of the filing of an amended complaint on August 7, 1981, Plaintiff NADINE T. was a sixteen-year-old unmarried minor living at home with her parents. She is mature and capable of making an informed decision to have an abortion and so decided in consultation with her physician and counselor at the Meadowbrook clinic. Nadine T. felt that telling either parent would seriously disrupt her family life and decided to seek a court order. Because of the delay Nadine T. encountered in obtaining a court authorization, she was forced to postpone her abortion until the following week, or risk compromising her privacy. Minn. Stat. § 144.343(6) created significant burdens for Nadine by delaying her abortion almost a full week.

11. At the time of the filing of an amended complaint on September 17, 1981, Plaintiff JANET T. was a sixteen-year-old unmarried minor. She is a mature minor who is capable of making an informed decision to have an abortion. Both Janet and her mother felt that it would have been very destructive to them if Janet's father was notified. They elected to go to court. The local judge, however, refused to issue an order certifying her as mature, although he told her that he thought she was and that notification of her father would not be in her best interest. His refusal forced Janet T. and her mother to seek an order in Hennepin County one week later. Although she was granted an order, the delay caused Janet T.'s pregnancy to advance beyond the legal limit for obtaining an abortion in Minnesota. Not having enough time to make travel arrangements or enough money to get to New York to obtain an abortion, Janet T. was never

able to exercise her right to choose abortion and was forced to continue her pregnancy.

13. Plaintiff ELLEN Z. is a seventeen-year-old unmarried minor who lives at home. Her parents are divorced and her mother has legal custody. She is mature and capable of making an informed decision. Ellen's mother agrees that she is mature, that abortion is her best alternative, and that notifying Ellen's father as required by Minn. Stat. § 144.343(2) would be emotionally devastating for Ellen and her mother and would destroy the tenuous relationship Ellen and her father are just now beginning to establish. Ellen and her mother decided to go to court so as to avoid having to notify her father. Because of Minn. Stat. § 144.343(6), she will have to wait 5 days for her court appearance and abortion, will have to miss a second day of school and endure severe emotional distress while waiting for all this to take place.

14. Plaintiffs ALICE ROE, DIANA ROE, MICHELLE ROE, NADINE T., JANET T. and ELLEN Z. wish to sue under pseudonyms to protect their privacy rights. Plaintiffs Alice Roe, Diana Roe, Michelle Roe, Nadine T., Janet T. and Ellen Z. seek to represent themselves and other minors similarly situated who are mature and capable of making their own decisions, and for whom mandatory notification would result in irreparable harm to their privacy rights, their mental and physical health, or their family relationships.

15. Plaintiff LAUREN Z. is the mother of Ellen Z.. Lauren Z.'s husband abandoned her when Ellen was approximately three years old. Lauren has legal custody of Ellen and has provided all support for Ellen since her husband left. Lauren, as a result of the statute, is forced to be involved with her ex-husband, and forced to communicate with him since he will call her when he receives the notification. She must deal not only with Ellen's emotional distress, but also her own and her other daughters' stress. Lauren will also have to miss another day of work and pay to accompany her daughter to court and the clinic. Minn. Stat. § 144.343(2-7) has undermined and interfered with Lauren's family life and her efforts to raise her

daughter to be an independent and responsible decisionmaker. Plaintiff Lauren Z. wishes to sue under a pseudonym to protect her privacy rights and those of her daughter.

16. Plaintiff MEADOWBROOK WOMEN'S CLINIC, P.A., is a freestanding medical facility whose function is to provide birth control, abortion services, and related medical services to its patients, including pregnancy tests and pregnancy counseling. Meadowbrook Clinic provides abortions to minors and in 1980 provided approximately 2,000 abortions for teenagers under eighteen, over half of whom had the abortion without the knowledge of both parents. Meadowbrook raises its own claims and the claims of its minor patients, among whom are immature minors for whom it would be medically inadvisable to notify both parents; some minor patients who may be considered emancipated under Minn. Stat. § 144.343(4); and mature minors capable of making the abortion decision on their own, for some of whom mandatory notification would be against their best interests and violative of their privacy. This corporation has potential criminal liability under this statute, both in its capacity as an agent for the physician and as an accomplice.

17. Plaintiff PLANNED PARENTHOOD OF MINNESOTA is a non-profit Minnesota corporation which operates eleven family planning clinics throughout the State of Minnesota and a network of 300 private physicians who work under contract and provide birth control and related medical services to patients, including pregnancy tests and pregnancy counseling. The Planned Parenthood clinic located in St. Paul also provides abortion services, and in 1980 provided abortions to 247 teenagers under the age of eighteen, over half of whom received the abortion service without electing to notify both of their parents. Planned Parenthood raises claims on its own behalf and the claims of its minor patients, among whom are immature minors for whom it would be medically inadvisable to notify both parents; some minor patients who may be considered emancipated under Minn. Stat. § 144.343(4); and mature minors capable of making the abortion decision on their own, for some of whom mandatory notification would be contrary to their best interests and violative of their privacy. This corporation has potential

criminal liability under this statute both in its capacity as an agent for the physician and as an accomplice.

18. Plaintiff MIDWEST HEALTH CENTER FOR WOMEN is a non-profit Minnesota corporation located in Minneapolis, Minnesota. At the time of the filing of the original complaint it had a branch clinic, now separately incorporated, located in Duluth, Minnesota. Midwest Health Center provides abortion services as well as birth control and related medical services to its patients, including pregnancy tests and pregnancy counseling. Midwest Health Center provides abortions to minors and in 1980 provided approximately 1,200 abortions for teenagers (including 18 and 19 year olds), over half of whom had the abortion without the knowledge of both parents. Midwest Health Center raises their own claims and the claims of their minor patients, among whom are immature minors for whom it would be medically inadvisable to notify both parents; some minor patients who may be emancipated under Minnesota Statutes § 144.343, Subdivision 4; and mature minors capable of making the abortion decision on their own, for some of whom mandatory notification would be contrary to their best interests and violative of their privacy. This corporation has potential criminal liability under this Statute both in its capacity as an agent for the physician and as an accomplice.

19. Plaintiff WOMEN'S HEALTH CENTER OF DULUTH, P.A. located in Duluth, Minnesota was formally a branch of Midwest Health Center for Women. Through a separation agreement with Midwest Health Center for Women it became an independent clinic and was organized as a Minnesota professional and Minnesota non-profit corporation in March of 1983. The center provides abortion services as well as birth control and related medical services to its patients, including pregnancy tests and pregnancy counseling. The Women's Health Center provides abortions to minors and since March '83 has provided approximately 92 abortions for teenagers, approximately 50 of whom went to court so as to avoid notification of their parents. The Women's Health Center raises its own claims and the claims of its minor patients. This corporation has potential

criminal liability under this Statute both in its capacity as an agent for the physician and as an accomplice.

19. Defendant RUDY PERPICH is Governor of the State of Minnesota and, as such, is empowered to administer and enforce the statute. He is charged under the Constitution of the State of Minnesota to take care that the laws of the State of Minnesota are faithfully executed, including Minn. Stat. § 144.343(2-7), which are challenged here for conflicting with the Constitutions of the United States and Minnesota. Defendant Perpich is sued in his official capacity.

20. Defendant HUBERT H. HUMPHREY, III is the Attorney General of the State of Minnesota who, as such, is responsible for interpretation, enforcement, and implementation of the laws of the State of Minnesota, including Minn. Stat. § 144.343(2-7), which are challenged herein. Defendant Humphrey is sued in his official capacity.

IV. CLASS ACTION ALLEGATIONS

21. Plaintiffs Michelle Roe, Alice Roe, Diana Roe, Nadine T., Janet T. and Ellen sue on their own behalf and on behalf of the entire class of pregnant or potentially pregnant minors who are mature and capable of making a well-informed decision, in consultation with their physicians, to have an abortion, but whose right to privacy will be unduly burdened by Minn. Stat. § 144.343(2-7). The class includes those minors for whom it is unclear whether or not they are "emancipated" as excepted under Minn. Stat. § 144.343(4); those minors who have hostile home situations and for whom notification would not be in their best interests or those of their families; those minors who have health problems which any delay would exacerbate; and those minors whose physicians find it medically inadvisable for both parents to be notified.

22. Should Minn. Stat. § 144.343(2) be enjoined by this Court, Plaintiffs Michelle Roe, Alice Roe, Diana Roe, Nadine T., Janet T., and Ellen Z. sue on their own behalf and on behalf of the entire class of pregnant or potentially pregnant minors

who are mature and capable of making a well-informed decision in consultation with their physicians to have an abortion, and for whom the procedure set forth in Minn. Stat. § 144.343(6), is on its face and as applied, burdensome, and an obstacle to the exercise of their right to privacy, as well as a danger to their lives and health because of the delay created thereby.

23. This action may be maintained as a class action on behalf of the class of minors under Rule 23(b)(1)(A) and under Rule 23(b)(1)(B) of the Federal Rules of Civil Procedure; because the prosecution of separate actions by individual members of the class would, as a practical matter, be dispositive of the individual interests of the other members not parties to the adjudication or substantially impair or impede their ability to protect their interests; and there is a risk of inconsistent or varying adjudication with respect to the plaintiff class which would establish incompatible standards of conduct for the defendants who are presently obligated to enforce this statute if it is not enjoined.

24. Prosecution is proper under Rule 23(B)(2) because the parties opposing the class have acted or will act on grounds generally applicable to the class, thereby making appropriate final injunctive relief and corresponding declaratory relief with respect to the class as a whole.

25. The class of minor women is so numerous that joinder of all members is impracticable.

26. The named minor plaintiffs will fairly and adequately represent the interests of the class of minors. Their lawyers have extensive experience in litigation involving constitutional rights, particularly in the field of family planning and abortion. Plaintiffs and their attorneys are prepared to carry forward the claims of the representative parties to final judgment and to protect the interest of all members of the class of minor women.

27. The questions of law and fact which named plaintiffs seek to litigate, in particular the legality and constitutionality of Subdivisions 2-7 of Minnesota Statutes § 144.343, on its face

and as applied, are common to the class of minors they seek to represent.

V. FACTUAL ALLEGATIONS

A. *History of the case*

28. In May, 1981, the Minnesota Legislature amended Minnesota Statutes § 144.343, adding Sections 2-7, which require, under criminal penalty, that doctors who perform abortions on unemancipated minors in Minnesota, with certain exceptions, must notify both parents of the minor in writing of the pending operation.

29. On September 18, 1981, Judge Alsop granted an order for class certification to include all unemancipated pregnant mature minors seeking abortions in Minnesota who have adequate capacity to give informed consent to abortion but who do not want to involve their parents. The court also granted an order for intervention of Janet T., an unemancipated minor suing under a pseudonym. (Alsop, J., 9-18-81)

30. On July 31, 1981 this court granted a temporary restraining order enjoining the enforcement of Minnesota Statutes § 144.343(2) (*Hodgson v. State of Minnesota*, 3-81 Civ. 538 (D. Minn., July 31, 1981). And, on August 31, 1981 this court granted an order, (Alsop, J. - 9-18-81) for intervention of Nadine T., an unemancipated minor suing under pseudonym.

31. On March 22, 1982, this court granted in part and denied in part plaintiffs' motion for a preliminary injunction. The court enjoined and prohibited defendants from enforcing the provisions of Minn. Stat. § 144.343(2), except insofar as it was enforced in accordance with subdivision 6. *Hodgson v. State of Minnesota*, 3-81 Civ. 538 (D. Minn., March 22, 1982).

B. *The Statute*

32. Subdivision 2 of § 144.343 requires both parents be notified, unless both have consented, even if the parents are divorced or separated. Subdivision 2 severely restricts minors'

access to safe, legal abortion in Minnesota, and interferes with the privacy and First Amendment rights of single-parent families.

33. No parental notification is required for minors who seek medical treatment other than abortion for their pregnancies, including caesarean sections or other major surgery. No parental notification is required for treatment of venereal disease or drug abuse.

34. Minn. Stat. § 144.346 authorizes physicians to give notice to parents of minors, if the doctor feels that failure to inform the parent would jeopardize the health of the minor patient. This Section is repealed by Sections 2-7 of § 144.343 insofar as abortion services are concerned but is still applicable as applied to all other minors giving consent to health services pursuant to Minn. Stat. § 144.342, or § 144.343(1).

35. The legislative purpose of these amendments was to restrict minors' access to abortion services to the greatest extent possible in order to protect fetal life.

36. Minn. Stat. § 144.343(2), requires that no abortion shall be performed upon an unemancipated minor or upon a woman for whom a guardian or conservator has been appointed until 48 hours after a written notice of the pending operation has been delivered in a certain specified manner. If delivery is by certified mail, the 48 hours is to run from 12:00 noon on the next day on which regular mail delivery takes place, subsequent to mailing (Minn. Stat. § 144.343(2)(b)). This waiting period of 72 hours or more adds on to the delay that minors may experience in seeking help for their pregnancies, coupled with the delay caused to minors living in rural areas who must travel to the Twin Cities or Duluth areas for abortion services. The forced waiting period presents an undue burden upon minors' right to abortion services by increasing the health and life risks to plaintiffs and, for some minors, foreclosing the abortion option altogether.

37. Implementation of Minn. Stat. § 144.343(2-7) has added to the cost burden upon the plaintiff class since delays can cause

increased cost for the procedure; costs of second trimester procedures exceed those for first trimester procedures, and some minors have to pay the expense of two separate trips. Implementation has increased stress and anxiety and, for some teenagers destroyed the privacy of their decision, or foreclosed the abortion option altogether.

38. Although Minn. Stat. § 144.343(4)(c) provides that a pregnant minor who declares she is a victim of intra-familial sexual abuse, neglect, or physical abuse which has been reported will be an exception to the notification requirement, this statute does not exempt members of plaintiff class who may have reason to believe that their parents will abuse them, but whose parents have never been reported for such. Nor does this statute exempt members of plaintiff class who are victims of rape, even if it has been reported.

39. Although Minn. Stat. § 144.343(4)(a) provides that a doctor may forego notification if the doctor can certify that the minor would die within three days, it is impossible to make this type of certification with any degree of certainty. It will certainly not help those members of plaintiff class who have health problems that would be exacerbated by the delays caused by Minn. Stat. § 144.343(2-7).

40. Subdivision 6 provides that, if Subdivision 2 of the law is ever enjoined, a court bypass option for those minors who elect not to have both parents notified will become operative.

41. Minn. Stat. § 144.343(6)(c)(i) holds that a court of "competent" jurisdiction can authorize a physician to perform the abortion if the judge determines that the pregnant woman is mature and capable of giving informed consent to the abortion. If the judge determines the pregnant woman is not mature or capable of giving informed consent, the judge may authorize the abortion without notification to her parents if her "best interests" would be served.

42. Although this section provides that proceedings should be in a court of "competent jurisdiction," no court is specified to have such jurisdiction. Although this section states in para-

graph (c)(iii) that proceedings shall be confidential and given precedence over other pending matters, no specific provisions for the maintenance of confidentiality or the establishing of such precedence are specified.

43. Although this statute guarantees an expedited, confidential appeal if a woman is denied an order authorizing an abortion, the statute contains no language implementing this guarantee, and in fact the Supreme Court of Minnesota ordered that the only appeal is to a district court judge, making the right to appeal a nullity since in most instances such appeal would be only to a court of the same level.

44. The court procedure outlined in Minn. Stat. § 144.343(6) has not been implemented or enforced by the Minnesota State Office of Court Administration. The following facts have been observed: although this statute provides that, for the purpose of filing the petition or bringing an appeal, the court shall be open to a pregnant minor 24 hours a day, seven days a week, such access has never been provided. Minors' petitions are in fact heard in only 3 of the 87 counties, only two or three days a week, with no access on nights or weekends when minors have a higher assurance of privacy. Upon information and belief, in some counties on certain days a member of plaintiff class would have to travel over fifty miles to locate a sitting judge. In some of the counties in Minnesota, there are no legal aid or public defender offices, nor is there any court-appointed counsel apparatus to provide representation as required by the statute. No extension of the regular court hours of 8:30 to 4:30 has occurred to comply with Minn. Stat. § 144.343(6).

45. Although plaintiff doctors desire to give complete, safe, confidential and proper advice and treatment to their teenage patients regarding the abortion decision, they are prevented from doing so and are restricted in their right to practice medicine consistent with their best medical judgment by the challenged sections.

46. Plaintiffs Planned Parenthood of Minnesota, Meadowbrook Clinic, and Midwest Services for Women of Minneapolis, and Women's Health Clinic of Duluth, desire to give

complete, safe, confidential and proper advice and treatment to their minor patients regarding the abortion decision. They are prevented from doing so by the challenged sections. Many of the patients of these clinics will not seek abortion services if the confidentiality of their relationship with their physician will be breached by clinic personnel acting under the statute.

47. Plaintiff physicians and plaintiff clinics and their employees may be harassed, threatened, and injured by some parents who have been notified of the impending abortion, and who will take such steps to prevent the procedure. They also may be subjected to civil liability or criminal charges if they do not reveal the patient's whereabouts or the time and location of the abortion procedure. Mandatory parental notification will have a chilling effect on the willingness of doctors in Minnesota to perform abortions for plaintiff class and will reduce access to this medical service.

48. Plaintiffs Diana Roe, Michelle Roe, Alice Roe, Nadine T., Janet T. and Ellen Z. and the class they represent have had increased health and life risks due to delays, have been forced to carry their unwanted pregnancies to term, have had to seek illegal abortions, or to go through a traumatic and burdensome court proceeding, increasing risks to their lives and health.

49. Plaintiff Lauren Z. as the mother of a pregnant minor and single parent head of a family will be forced to communicate with her ex-husband, to bear the burdens of the stress caused to her other children, and to miss work and suffer financial loss in order to go to court to avoid notification of her ex-husband.

VI. FIRST CAUSE OF ACTION: FEDERAL DUE PROCESS CLAIMS

50. The challenged sections deprive plaintiff doctors, clinics and their patients, and plaintiff class of minors of the following liberties without due process of law, in violation of the Fourteenth Amendment to the United States Constitution:

(a) Minn. Stat. § 144.343(2-7), on its face and as applied, unduly burdens the rights of minors to freely make and effectuate a decision to terminate a pregnancy, a fundamental right of privacy protected by the First, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution;

(b) Minn. Stat. § 144.343(6), on its face and as applied, unduly burdens the rights of minors to freely make and effectuate a decision to terminate a pregnancy, a fundamental right of privacy protected by the First, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution;

(c) Minn. Stat. § 144.343(2-7) unduly burdens the right of physicians to give, and of women to receive, medical treatment and advice in accordance with accepted medical standards, with regard to the decision whether to terminate a pregnancy, rights guaranteed by the First, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution;

(d) Minn. Stat. § 144.343(2-7) unduly burdens the right of plaintiff family planning and abortion clinics, to give confidential counseling services to minors, to treat and refer patients to doctors and to provide abortion services to minors as guaranteed by the Fifth, Fourth, Ninth, and Fourteenth Amendments to the United States Constitution;

(e) Minn. Stat. § 144.343(6) is vague and overbroad in that it fails to give sufficiently detailed judicial procedures. Minn. Stat. § 144.343(6) is overbroad in that nearly 100% of the minors utilizing the procedure are mature or best interests' minors, both of which categories are entitled to full abortion privacy guaranteed under the Fourteenth Amendment to the United States Constitution;

(f) Minn. Stat. § 144.343(2-7) is vague, particularly as to what constitutes "emancipated minor"; "reasonably diligent effort" (Minn. Stat. § 144.343(3)); or "evidence sufficient to convince a careful and prudent person that the

representations of the pregnant woman regarding information necessary to comply with this section are bona fide and true" (Minn. Stat. § 144.343(5)); so that plaintiff doctors, clinics, and clinic personnel are subjected to criminal penalties without clear knowledge of what the law requires in violation of the Fourteenth Amendment to the United States Constitution.

VII. SECOND CAUSE OF ACTION: FEDERAL EQUAL PROTECTION

51. The challenged sections deprive plaintiffs' class of equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution:

(a) Minn. Stat. § 144.343(2-7) unreasonably singles out and requires parental notification for members of the plaintiff class solely because they seek an abortion, without a compelling state interest, and without requiring parental notification for minors who seek to carry their pregnancies to term or who seek other health care services, in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution;

(b) Minn. Stat. § 144.343(2-7) unreasonably and without a compelling state interest discriminates between those pregnant minor women who are mature and fully informed and capable of making the decision to terminate a pregnancy, and those women who may be deemed emancipated by the state, in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution;

(c) Minn. Stat. § 144.343(2) deprives plaintiff class of equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution, in that it unreasonably and without a compelling state interest discriminates between minors aged 17 and under who do not have authorization by both parents and who do not fall within the exceptions, by imposing on them a waiting

period of at least 72 hours and probably more, while not imposing a waiting period on all other similarly situated women in the State of Minnesota seeking abortion services.

VIII. THIRD CAUSE OF ACTION: VIOLATIONS OF PARENT PLAINTIFF'S FIRST AMENDMENT AND DUE PROCESS RIGHTS

52. Because Minn. Stat. § 144.343 requires both parents be notified, and makes no exception for one parent families or estranged families, forces communication between parents in violation of the First Amendment, and violates family privacy since in many instances the one parent has legal custody, the statute is unconstitutional. Moreover, it is overbroad since any state interest which arguably exists can be furthered through a one-parent notification requirement.

IX. FOURTH CAUSE OF ACTION: MINNESOTA STATE CONSTITUTIONAL CLAIMS

53. The challenged sections deprive plaintiffs of their right to due process and privacy as enumerated in paragraphs 53(a) through (f) and equal protection as enumerated in paragraphs 54(a) through (c) under the Minnesota Constitution, Article 1, Sections 2, 7, 8, and 10.

54. Minn. Stat. § 144.343(6) delegates to state courts of "competent jurisdiction" the authority to hear petitions for abortions. Such hearings, because they are non-adversarial, are essentially administrative. This delegation of administrative powers to the Minnesota state courts violates Article 3, Section 1 of the Minnesota Constitution.

WHEREFORE, plaintiffs pray that this Court:

A. Assume jurisdiction of this action;

B. Certify a plaintiff class of minor women in Minnesota who need to obtain abortion services in accordance with their physician's decision that they are mature and fully informed about the abortion decision, and for whom notification to their parents would violate their right to make this private decision;

C. Issue a temporary restraining order, preliminary injunction and a permanent injunction, restraining defendants, their employees, agents, and servants from enforcing subdivisions 2 through 7 of Minn. Stat. § 144.343;

D. Declare the challenged statutes violative of the United States Constitution, the Minnesota State Constitution, and therefore void and of no effect;

E. Permanently enjoin the operation of Minn. Stat. § 144.343(2-7);

F. Award plaintiffs their costs and attorneys' fees pursuant to 42 U.S.C. Section 1988; and,

G. Enter such other and further relief as the Court shall find just and proper.

Respectfully submitted,

JANET BENSHOOF
SUZANNE M. LYNN
NAN D. HUNTER
American Civil Liberties
Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800

LINDA OJALA
Minnesota Civil Liberties Union
628 Central Avenue
Minneapolis, Minnesota 55414
(612) 378-7627

FRANZ P. JEVNE, III
1600 Twin City Federal Tower
121 South Eighth Street
Minneapolis, Minnesota 55402
(612) 333-1341

Attorneys for Plaintiffs

Amended Answer of Defendants

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Court File No. 3-81-538

JANE HODGSON, M.D.; GORDON DITMANSON, M.D.; ARTHUR HOROWITZ, M.D.; MICHELLE ROE, ALICE ROE, DIANA ROE, NADINE T., JANET T., and ELLEN Z., individually and on behalf of all other persons similarly situated; LAUREN Z., MEADOWBROOK WOMEN'S CLINIC, P.A.; PLANNED PARENTHOOD OF MINNESOTA, a nonprofit Minnesota corporation; MIDWEST HEALTH CENTER FOR WOMEN, a nonprofit Minnesota corporation; WOMEN'S HEALTH CENTER OF DULUTH, P.A., a nonprofit Minnesota corporation,

Plaintiffs,

v.

THE STATE OF MINNESOTA; RUDY PERPICH, as Governor of the State of Minnesota; HUBERT H. HUMPHREY, III, as Attorney General of the State of Minnesota,

Defendants.

Defendants State of Minnesota, Rudy Perpich and Hubert H. Humphrey, III, for their joint and Amended Answer to the Amended Complaint herein, admit, deny and allege as follows:

1. With respect to the allegations of paragraphs 1 and 2, admit that this is a civil action in which Plaintiffs seek declaratory and injunctive relief from the provisions of Minn. Laws 1981, ch. 228, Minn. Stat. § 144.343, subds. 2-7 (hereinafter the Notification Act), but deny that Plaintiffs possess any claim for relief under 42 U.S.C. § 1983, the Constitution of the United

States or the Minnesota Constitution. Insofar as these paragraphs purport to paraphrase or characterize the Notification Act, Defendants refer the Court to the official text thereof. Insofar as paragraph 2 purports to paraphrase or characterize a prior Order of the Court in this action, Defendants refer the Court to such Order.

2. With respect to the allegations of paragraph 3, admit that the Court has jurisdiction to hear cases and grant relief in accordance with the cited federal statutes, but deny that Plaintiffs have suffered deprivations under color of state law of any right, privilege or immunity secured by the Constitution or laws of the United States, deny that they possess any claim for relief thereunder and deny that pendent jurisdiction exists with respect to claims asserted under the Minnesota Constitution.

3. With respect to the allegations of paragraphs 4, 5, and 6, admit Jane Hodgson is a citizen of the United States who resides in and is licensed to practice medicine in the State of Minnesota. With respect to the remaining allegations of said paragraphs, allege that they are without knowledge or information sufficient to form a belief concerning the truth or falsity thereof.

4. Allege that they are without knowledge or information sufficient to form a belief concerning the truth or falsity of the allegations of paragraphs 7, 8, 9, 10, 11, 13, 14 and 15.

5. With respect to the allegations of paragraphs 16, 17, 18 and the first paragraph designated 19, admit that Planned Parenthood of Minnesota, Women's Health Center of Duluth, P.A., and Midwest Health Center for Women are Minnesota non-profit corporations, and allege that they are without knowledge or information sufficient to form a belief concerning the truth or falsity of the remaining allegations therein.

6. With respect to the allegations of the second paragraph designated 19, admit that Rudy Perpich is Governor of the State of Minnesota and has, *inter alia*, the general responsibility to take care that the laws of the state are faithfully executed, but deny that he has any direct or specific responsibility for

administration or enforcement of the Notification Act challenged herein.

7. With respect to the allegations of paragraph 20, admit that Hubert Humphrey, III, is Attorney General of the State of Minnesota, but deny that he has any direct or specific responsibility to enforce, implement, or interpret the Notification Act challenged herein.

8. With respect to the allegations of paragraphs 21, 22, 23, 24, 25, 26 and 27:

a. Deny that Plaintiffs Roe, Nadine T., Janet T. and Ellen Z. have the capacity to sue on their own behalf or to act as legal representatives for others.

b. Deny that Plaintiffs are properly representative of all minor women as alleged in paragraphs 24, 25 and 26, and deny that the relief sought by Plaintiffs is in the best interests of all minors.

c. Allege that purported class or classes referred to in paragraphs 21 and 22 are unduly broad and vaguely described, deny that Plaintiffs are representative of all persons so described and deny that the relief sought by Plaintiffs is in the best interests of all persons so described.

d. Deny that this case is a proper class action or that Plaintiffs have met the requirements of Rule 23 of the Federal Rules of Civil Procedure.

9. With respect to the allegations of paragraphs 28, 29, 30, 31, 32, 33 and 34, admit that Minn. Laws 1981, ch. 228, was passed into law in May, 1981, and to the extent that these paragraphs purport to explain, describe or paraphrase the provisions of Minnesota statutes and the Orders of this Court, refer the Court to the official texts thereof.

10. Deny the allegations of paragraph 35.

11. With respect to the allegations of paragraphs 36, 37, 38, 39 and 40:

a. To the extent that these paragraphs purport to explain, describe or paraphrase Minnesota statutes, refer the Court to the official texts thereof;

b. Deny that the Notification Act imposes an undue burden upon minors' rights to abortion services;

c. With respect to the remaining allegations in those paragraphs, allege that they are without knowledge or information sufficient to form a belief concerning their truth or falsity;

d. Allege that the purported difficulties, inconveniences, costs and consequences complained of in said paragraphs result primarily from actions, inactions and decisions of Plaintiffs themselves and of others over whom Defendants exercise no control.

12. With respect to the allegations of paragraphs 41, 42, 43, 44:

a. To the extent that these paragraphs purport to explain, describe or paraphrase Minnesota statutes, refer the Court to the official texts thereof;

b. Deny all allegations which state or imply that the procedures required by Minn. Stat. § 144.343, subd. 6, have not been properly implemented or enforced, that court procedures pursuant to Minn. Stat. § 144.343, subd. 6, are unavailable, or that Plaintiffs will suffer irreparable harm due to the Notification Act.

13. With respect to the allegations of paragraphs 45 and 46:

a. Allege they are without knowledge concerning the general desires of Plaintiff doctors, Planned Parenthood of Minnesota, Meadowbrook Clinic, Midwest Services for Women of Minneapolis and Women's Health Clinic of Duluth;

b. Deny that the Notification Act prevents such Plaintiffs from offering necessary and proper advice, providing

necessary treatment or from exercising any legal right to provide such advice or services.

14. With respect to the allegations of paragraph 47, allege that they are without knowledge concerning potential voluntary actions of Plaintiffs or third persons not under control of Defendants.

15. With respect to paragraphs 48, 49, 50 and 51:

a. Deny that the Notification Act violates the United States Constitution in any respect.

b. With respect to the remaining allegations in those paragraphs, allege that they are without knowledge or information sufficient to form a belief concerning their truth or falsity.

16. With respect to paragraph 52:

a. To the extent that it purports to explain, describe or paraphrase Minnesota statutes, refer the Court to the official texts thereof;

b. Deny that the Notification Act violates the United States Constitution in any respect.

17. With respect to the allegations of paragraphs 53 and 54:

a. Admit that Minn. Stat. § 144.343, subd. 6, authorizes Minnesota courts, in certain circumstances, to hear petitions for abortions;

b. Deny that Minn. Stat. § 144.343, subd. 6 violates the Minnesota Constitution and allege that the Court is without jurisdiction to determine the claims made in paragraphs 53 and 54.

18. Except as above admitted or qualified, deny each and every allegation, matter, fact and thing contained in the Amended Complaint.

SEPARATE DEFENSES

19. Allege that the Court is precluded by the Eleventh Amendment to the United States Constitution from asserting pendent jurisdiction over the fourth cause of action set forth in the Amended Complaint and that Plaintiffs lack standing to assert such cause of action.

20. Allege that Defendant State of Minnesota is immune from suit under the Eleventh Amendment to the United States Constitution.

21. Allege that the relief sought on behalf of their minor patients by Plaintiffs Hodgson, Ditmanson, Horowitz, Meadowbrook, Planned Parenthood, Midwest and Women's Health Center does not reflect the legal interests of all such persons.

22. Allege that Plaintiffs Roe, Nadine T., Janet T. and Ellen Z. lack standing and are without capacity to sue in their own names or to act as representatives for others.

23. Allege that Minn. Stat. § 144.343, subds. 2-7, are constitutional in all respects.

24. Allege that Minn. Stat. § 144.343, subd. 6 has been implemented in a constitutional manner.

25. Allege that the Amended Complaint fails to set forth a claim for which relief can be granted.

WHEREFORE, Defendants pray for judgment:

1. Dismissing the Amended Complaint.

2. Refusing to certify any of the classes of plaintiffs claimed to be represented.

3. Denying injunctive relief.

4. Declaring that the Notification Act is in all respects valid and constitutional on its face and as applied.

5. Awarding Defendants their costs, disbursements and attorneys fees.

6. Such other relief as the Court shall find just and proper.

Dated: February 7, 1984.

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota

By: /s/ JOHN B. GALUS
John B. Galus

And: /s/ PETER M. ACKERBERG
Peter M. Ackerberg
Special Assistant
Attorneys General

515 Transportation Building
St. Paul, Minnesota 55155
Telephone: (612) 296-2654
Attorneys for Defendants

Stipulation of Facts
for Purposes of Trial—Set II

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil No. 3-81-538

HODGSON, *et al.*,

Plaintiffs,

v.

STATE OF MINNESOTA, *et al.*,

Defendants.

The parties, through their respective undersigned attorneys, stipulate as follows:

1. From August 1, 1981, through December 31, 1984, 2552 petitions were filed by pregnant minors pursuant to the statutory judicial bypass procedure created by Minn. Laws 1981, ch. 228, codified as Minn. Stat. § 144.343, subd. 6.

2. The State of Minnesota is organized in ten judicial districts.

3. Virtually all of the abortions provided in Minnesota to minors under the age of 18 have been and continue to be performed in the major metropolitan areas of Minneapolis, St. Paul and Duluth.

4. The great majority of all petitions filed pursuant to the statutory judicial bypass procedure have been filed and heard in the major metropolitan areas of Minneapolis, St. Paul, and Duluth.

5. In addition to the major metropolitan areas of Minneapolis, St. Paul and Duluth, between August 1, 1981 and December 31, 1984, petitions pursuant to the statutory judicial bypass procedure have been filed and heard in the following suburban or rural Minnesota counties: Dakota, Goodhue, LeSueur, Sibley, Freeborn, Mower, Olmsted, Rice, Steele, Winona, Lyon, Nobles, Stearns, Todd, Pope, Cass, Koochiching, Crow Wing, Lake of the Woods, Anoka, Washington and Wright.

6. The Fourth Judicial District of the State of Minnesota consists of Hennepin County.

7. In Hennepin County all petitions and proceedings under the statutory judicial bypass procedure are in the Juvenile Division of the Hennepin County District Court.

8. Between August 1, 1981 and December 31, 1984, 1,598 petitions pursuant to the statutory judicial bypass procedure were heard and decided in Hennepin County.

9. Susanne K. Smith is the Hennepin County Court Services Supervisor and administrator of the Hennepin County guardian ad litem program.

10. The Hennepin County Public Defender is responsible for providing representation to minors proceeding under the statutory bypass procedure in the Juvenile Division of Hennepin County District Court.

11. David Knutson is a senior attorney in the Hennepin County Public Defender's Office.

12. The Second Judicial District of the State of Minnesota consists of Ramsey County.

13. In Ramsey County, all petitions and proceedings pursuant to the statutory judicial by-pass procedure are heard by the Juvenile Division of the Ramsey County District Court.

14. Between August 1, 1981, and December 31, 1984, 618 petitions pursuant to the statutory judicial bypass procedure

were filed and heard in the Juvenile Division of the Ramsey County District Court.

15. The Ramsey County Public Defender is responsible for providing representation to minors proceeding under the statutory judicial bypass procedure in the Juvenile Division of Ramsey County District Court.

16. The Sixth Judicial District of the State of Minnesota includes the counties of St. Louis, Carlton, Lake and Cook.

17. Between August 1, 1981 and December 31, 1984, a total of 203 petitions pursuant to the statutory judicial bypass procedure were filed and heard in the Sixth Judicial District, all of them in St. Louis County.

18. The First Judicial District of the State of Minnesota includes the counties of Carver, Dakota, Goodhue, LeSueur, McLeod, Scott and Sibley.

19. Between August 1, 1981 and December 31, 1984, 57 petitions pursuant to the statutory judicial bypass procedure were filed in the counties of the First Judicial District.

20. The Third Judicial District of the State of Minnesota includes the counties of Dodge, Fillmore, Freeborn, Houston, Mower, Olmsted, Rice, Steele, Wabasha, Waseca and Winona.

21. Between August 1, 1981 and December 31, 1984, 46 petitions pursuant to the statutory judicial bypass procedure were filed in the county courts of the Third Judicial District.

22. The Tenth Judicial District of the State of Minnesota includes the counties of Anoka, Chisago, Isanti, Kanabec, Pine, Sherburne, Washington and Wright.

23. The Ninth Judicial District of the State of Minnesota includes the counties of Aitkin, Beltrami, Cass, Clearwater, Crow Wing, Hubbard, Itasca, Kittson, Koochiching, Lake of the Woods, Mahnomen, Marshall, Norman, Pennington, Polk, Red Lake and Roseau.

24. The Fifth Judicial District of the State of Minnesota includes the counties of Blue Earth, Brown, Cottonwood, Faribault, Jackson, Lincoln, Lyon, Martin, Murray, Nicollet, Nobles, Pipestone, Redwood, Rock and Watonwan.

25. The Seventh Judicial District of the State of Minnesota includes the counties of Benton, Becker, Clay, Douglas, Mille Lacs, Morrison, Otter Tail, Stearns, Todd and Wadena.

26. The Eighth Judicial District of the State of Minnesota includes the counties of Big Stone, Chippewa, Grant, Kandiyohi, Lac Qui Parle, Meeker, Polk, Renville, Stevens, Swift, Traverse, Wilkin, and Yellow Medicine.

Dated: August 7, 1985

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota

By: /s/ JOHN GALUS (by PMA)
John Galus
Special Assistant
Attorney General
Atty. Reg. No. 33327

515 Transportation Building
Saint Paul, Minnesota 55155
Telephone: (612) 296-2654

Attorneys for Defendants

By: /s/ SUZANNE M. LYNN
Suzanne M. Lynn

Attorney for all Plaintiffs except Planned Parenthood of Minnesota, Inc.

By: /s/ WILLIAM Z. PENTELOVITCH
William Z. Pentelovitch

Attorney for Plaintiff Planned Parenthood of Minnesota, Inc.

DEPOSITION TESTIMONY EXCERPTS OF SYLVIA P., MINOR

[DIRECT BY MS. LYNN]

[6] * * *

Q You elected not to tell your father at all?

A Yes.

Q And can you tell us why you decided not to tell your father?

A Because he's a political figure and he's very much against anything to do with this place or any other abortion or anything.

Q You say he's a political figure. Is this a political stance that he takes?

A Yes.

Q And what did you think his reaction would have been had he found out?

A I think he would have shipped me out of here or else made me give my baby up for adoption if I were to have it, but I wouldn't have been around here. He would have taken me out of the area so nobody would have known where I was, you know, just like a little vacation.

* * * * *

[8] * * *

Q And she immediately called the court while you were there?

A Yes, tried to set it up for me.

Q And what did you understand from her efforts? What did she tell you about her efforts to set up a court hearing?

A That they didn't want my case.

Q She told you that?

A Yes.

Q And did she tell you why they didn't want your case?

A Because of my father.

Q Can you explain what you mean by that?

A Because of his—him being a political figure, that if it ever got out that I had gone to court I suppose that they probably would have been in trouble or I would have been.

Q How do you know—Why do you think that they didn't want your case? Did they recognize your name?

A Yes, and they know my father.

Q So what happened after she informed you that they didn't want your case? Was there a court proceeding set up?

A What do you mean court proceeding to see if I could get my case on?

Q No. What happened then? What steps did Tina take to the best of your knowledge?

A She fought for it. She said I was no different from anybody else who came here and a name doesn't mean anything or [9] a person or anything, that everybody should be helped, not excluding people.

Q And did she tell you this?

A Yes.

Q She told you that this is what she said to them?

A Uh-huh. (meaning yes)

Q And did she succeed in setting up a court hearing for you?

A Yes, she did.

* * * * *

[16] * * *

Q What do you think you would have done if you had had to tell your father?

A I wouldn't have. I would have either left the area—I thought about suicide and that got right out of my head as soon as I came down here and these guys talked to me. Tina and Sherry. I would have either left the area or done something drastic.

* * * * *

[20] * * *

Q During your court appearance did anyone acknowledge that you were the daughter of a political figure, local political figure?

A Did anyone by meaning who?

Q Anyone in the court proceeding.

A Well, the judge knew me. I knew him.

Q How did you know him?
A From seeing him on the TV and reading the papers.
Q How did he know you?
A Because as soon as my father's name was mentioned he knew who I was right away.
Q How do you know he knew that?
A Because he told me so.
Q During the proceeding?
A Well, yes.

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DEPOSITION TESTIMONY EXCERPTS OF NATALIE C., MINOR

[DIRECT BY MS. OJALA]

[4] * * *

Q Okay. Did you talk to anyone about the fact that you were pregnant?
A Yes, my boyfriend.
Q You talked to your boyfriend. Okay. What did you talk about when you talked to him about your pregnancy?
A I told him I was and what should we do. And we talked about it and we decided, yes, that I should get an abortion. So I called here and got an appointment.
Q How old was your boyfriend in September?
A Eighteen.
Q Was he also in high school?
A No, he graduated.
Q He had graduated but lived in Duluth?
A Yes.
Q Could you tell me why you came to the decision? It was a mutual decision?
A Yes.
Q How you came to the decision to have an abortion, what were your reasons?
A Well, my step-dad, he's got a bad temper and I'm scared of him and I was just afraid he'd knock me around. And my mom once said I would be kicked out if I got pregnant if she

ever found out I'd be kicked out. I'm too young. I'm not [5] financially set to have a child.
Q So basically you talked to your boyfriend and the two of you agreed that that would be best?
A Yes.

* * * * *

[7] * * *

Q And why is it that you didn't notify your parents about the fact that you were having an abortion?
A Because of my step-father and I'm just afraid of him knocking me around, going after my boyfriend.
Q So you're saying you were afraid of your step-father and you were afraid he would physically abuse you?
A Yes.
Q Had he ever physically attacked you before?
A Yes.
Q He had.
A (Witness nods head affirmatively)
Q How about the situation with your mother? Were there reasons why you didn't tell your mother?
A Yes. She would have kicked me out of the house.
Q What made you think that she would do that?
A She once told me that.
Q She told you?
A She said if I ever were to get pregnant and she found out I would be kicked out.
Q So you decided that you wouldn't tell your parents and that instead you would go to court for those reasons?
A Yes.

* * * * *

[11] * * *

Q How did you feel when you went in, when you were in the court with the judge?
A Very nervous.
Q You felt nervous?
A Yes.

Q Was there anything else that happened in there that you can remember?

A My neighbor.

Q Who's your neighbor? You saw your neighbor in there?

A Yes.

Q Who was that?

A X

Q And what does he do?

A Type.

Q He does the court reporting?

A Yes.

Q So you saw him in there and he knew you?

A Yes.

Q How did that make you feel?

A Nervous, very nervous.

[12] Q Because you saw somebody that you knew?

A Yes.

Q So you were asked by the attorney what, to state your reasons why you weren't telling your parents?

A Yes.

Q And did the judge ask you any questions at all, do you remember?

A No, I don't think so.

Q Okay. Do you remember about how long the whole thing took?

A Ten, fifteen minutes. Not very long.

Q And, when it was over the judge made a decision?

A Yes.

Q And what was that?

A Yes, that he felt I was mature enough to make my own decision on my own.

* * * * *

DEPOSITION TESTIMONY EXCERPTS OF FRANCIS H., MINOR

[DIRECT BY MS. LYNN]

[10] * * *

Q Did you tell your boyfriend?

A The next day I did. I called from Meadowbrook. I couldn't get a hold of him that evening.

Q Had you tried to get a hold of him?

A Yeah.

Q Now, proceeding to the next day, the next morning, can you tell us what you did?

A Well, we went into Meadowbrook. They took—they—my mom gave them the death certificate and my adopt—or, my papers of me being born; and then they asked me to fill out some forms and then go sit in the waiting room until I was called. And I went and sat in the waiting room. They called me the first time and I went and I watched the film on the procedure. Then I went in the second time with a nurse and she—she asked me about my father, and stuff, and I said, "Well, as you can tell, that isn't my real father. My real father—well, this man was my mom's first husband. They were married and we don't want my father brought into this."

Q Let's backtrack a little so that we can make this a little [11] clearer. You went in and you saw somebody that was a nurse; is that right?

A Uh-huh.

Q And what did she say about—did she say something to you about you and your father and the death certificate?

A She asked me some questions about it and then I just knew what she was talking about.

Q What do you mean you knew what she was talking about?

A Well, it's very plain. You can see the three years' difference.

Q Explain what you mean by "the three years' difference."

A My mother—or, me being born three years after he died.

Q When were you born?

A I was born in '66.

Q And what is the year of the date of your—that's listed on your father's—or, so-called father's—

A '63.

Q So the nurse asked you about that three-year difference?

A Yes.

Q And what did you say?

A I just—I said I didn't want my father brought into it because he had never had any contact with me since I was born, or anything, so I didn't want him contacted.

Q Were you aware of who your father was?

A Yes, I was.

[12] Q And had you ever—how long had you been aware that your father was not the man that your mother was married to?

A I was aware of that—well, I was—my mother actually told me that yes, I do have a different father, when I was in 7th grade; that was five years ago.

Q Under what circumstances did your mother tell you this?

A I was in counseling. A lot of things had been happening in my family. I was in counseling and I wanted to know about my dad. I thought I was adopted and I guess that's what brought it on was I wanted proof, you know, that I wasn't.

Q That you were not—

A —adopted.

* * * * *

[15] * * *

A She gave me the phone number of my father's office. I called him at work because I wanted him to come up because they wanted me to talk about my dad, and stuff. They wanted me to get a relationship with my dad, and stuff. You know, be friends, whatever.

Q Who's "they"?

A The counselors. And they—

Q Do you remember where this program was that you were in?

A It was out—I think it was Fairview.

Q Was it part of your school or—

A No, Fairview Hospital in Minneapolis. They have a crisis unit there and they have something like with the A.L.T.P.; something like that.

Q What's A.L.T.P.?

A It's—it's just a place where—well, the place that—I don't know what the initials stand for. I'm not sure if those are the correct initials either. But it's a place for people with depression and had problems that kept reoccurring all the time, that weren't good for you. And my mom put me in there because I was having a lot of problems.

Q And it was on the advice of your counselors in that program that you tried to contact your father?

A Well, no, but yes.

Q What do you mean, "No, but yes"?

[16] A They thought that a lot of my problems were not knowing about my father and still having feelings for somebody I didn't know at all.

Q So what happened?

A I just—I tried to call my dad and he says, "Well, yeah, I'll come up and see you tomorrow." The next day is a visiting day; and that day, I waited and I waited and I waited and he never came. And then I called him the next day and I asked him why he didn't show up and I don't remember the reason why, but he says, "I'll come up and see you next visiting."

Q Was this an inpatient program?

A Yes.

Q Were you staying—residing in that place?

A Uh-huh. He never came neither one of the times I wanted to see him. After the second time he didn't show up, I didn't call or bother him again.

Q How did it make you feel when he didn't show up?

A Sad, but I was also angry at him for not showing up; for saying something that he said that he'd do and he never did it. It was a broken promise.

Q Now, getting back to the morning that you went to Meadowbrook: I believe you were talking about how you had talked to the nurse and she asked you about your father.

A Uh-huh.

[17] Q Did you explain to her about the difference between the dates on the birth certificate and your birth—on the death certificate, excuse me, and your birth?

A Yes, I did.

Q And what did she say?

A She said that my father—is there any way we could get in touch with my father to have him sign the papers or I'd have to sit—I'd have to go through Court.

Q What did you feel about the Court—the possibility of going to Court?

A I didn't—I didn't want to go to Court.

Q Why?

A It was delaying it and I just—I didn't know what would happen in Court, you know. I didn't know what the Court would be about so—I just—I didn't want to go to Court. There was no way. I didn't want to have to go through waiting until I went through Court to go through and have it—then have it done after that because I could have changed my mind.

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DEPOSITION TESTIMONY EXCERPTS OF CYNTHIA J., MINOR

[DIRECT BY MR. JEVNE]

[CROSS BY MR. ACKERBERG]

[7] * * *

Q I'm going to direct your attention to December 7, 1982 and ask if that was the date upon which you first went to the Planned Parenthood Clinic?

A Yes, it was.

Q What happened? Generally describe what happened at that first visit to the Planned Parenthood Clinic?

A I filled out many forms giving them information, history, and they—I made another appointment to come back later.

Q You advised them as to what your concern was?

A Yes.

Q And did they give you an appointment?

A Yes, they did.

Q Did you then return to the Planned Parenthood Clinic on December 15th?

A Yes.

Q What happened?

A I had a pregnancy test.

Q Anything else?

A It was negative.

Q Did they give you a complete physical at that time?

A Yes.

Q And other tests such as a PAP test?

[8] A Right, yes. There was some concern whether that test was correct or not, if it was negative. It showed negative but we thought otherwise.

Q We're talking about the pregnancy test now?

A Right.

Q Now, the test showed negative. Why was there some concern as to the accuracy of the test at that time?

A Because it might have been too early and that I had missed my period in December.

Q So you felt that because you had missed a menstrual period that there still was a likelihood you were pregnant?

A Yes.

Q And Planned Parenthood, even though the chemical test was negative, recognized this possibility?

A Yes.

Q So what arrangement was made in light of that question that was still unresolved?

A I was to come back again.

Q All right. And how soon did they tell you to come back?

A A couple weeks. A week or so.

Q Did they tell you to come back if you missed another period?

A Yes.

[9] Q And did you make another appointment to go back to the Mankato Planned Parenthood Clinic?

A Yes.

Q Did you in fact return to the Mankato Planned Parenthood Clinic January 27, 1983?

A Yes.

Q Will you tell us what happened at that visit?

A I had another pregnancy test and this time it was positive and they said I was seven plus weeks.

Q To go back to your very first visit, at the time that you had your first visit and physical, were you seen by a physician at that time?

A Yes.

Q Were you also seen by one or more nurses at that time?

A Yes.
Q And the physician reviewed the results of that first pregnancy test?
A Yes.
Q The second time, on January 27th for your second physical, were you also seen by a physician?
A Yes.
Q And he examined you physically?
A Yes.
Q And also examined the results of the pregnancy test?
A Right.
[10] Q Did they perform other physical examination tests on that second visit other than just the pregnancy test?
A No.
Q Now, what did you do after you were advised that you were indeed pregnant at that point?
A I received a pamphlet of alternative services for pregnancy and I looked at the pamphlet and called up to Planned Parenthood. After deciding that I was going to have an abortion, I call the Planned Parenthood in St. Paul.
Q Now, did you do that on the same day that you went to the Mankato Planned Parenthood Clinic?
A Yes.
Q And when you decided to call Planned Parenthood up in St. Paul were you at the Mankato clinic in Mankato or not?
A I was at home.
Q So you made that call from your home?
A Yes.
Q Out of curiosity, this pamphlet they provided for you which described what you said were alternatives, they covered all kinds of alternatives as to how to resolve a pregnancy?
A Yes.
Q Such as having the child, adoption, those kinds of [11] alternatives?
A Yes.
Q Now, tell us what happened when you telephoned Planned Parenthood in St. Paul?
A I told them that I had a positive pregnancy test and I was seven weeks or more and they told me that—they asked my age

and I told them seventeen and they said I would have to have parental consent or consent by a court.
Q Do you remember who you talked with when you called the Planned Parenthood office in St. Paul?
A Sherrie was her name.
Q Now, when you called Sherrie did you discuss things other than this court business?
A Yes.
Q What other things did you discuss with her?
A About my decision to have the abortion and alternatives, cost, that kind of thing.
Q Did you go into some detail with her as to the basis for your decision to have an abortion?
A Yes.
Q Did she discuss with you the basis for that decision?
A Yes.
Q And the validity of that decision?
A Yes.
[12] Q Did she discuss with you whether or not you should consult with your family about that?
A Yes.
Q And what was discussed in that regard?
A Just why I would not tell my parents and what I wanted to do about that.
Q And you discussed that fully with her?
A Yes.
Q Did she give you the benefit of her—give you counseling on those different issues over the phone?
A Yes.
Q With respect to this parental notification had you ever heard about this parental notification law before that day when you went to the Planned Parenthood Clinic January of '83?
A No, I haven't.
Q And the initial information you got about the specifications of this law were from Sherrie in that phone conversation?
A Yes, and a nurse had mentioned it in the Mankato clinic.
Q That there was such a law?
A Yes.

Q Now, with respect to this parental notification what did you decide to do—

[13] A I decided—

Q —in that conversation or during that conversation?

A I decided to go to court to waive my parents' permission.

Q And what steps did you take then to go to court? What is the first thing you did?

A First of all, Sherrie advised me after we had discussed everything where I could call to get this and I called the clerk of court in Mankato and they had no idea. They had no case like this before.

Q First of all, when did you call that clerk of court in Mankato?

A That was the same day.

Q Still on January 27, 1983?

A Yes.

Q And by this time I take it it would have been sometime late in the afternoon.

A Right.

Q Did you make one call or more than one call to the clerk?

A I made two calls.

Q What happened during the first call?

A First call I told them my situation and what I needed to know and they knew nothing and they had to call around and find out information of where to go for [14] myself and that. So I called them back.

Q I want to talk a little more about that first call. When you first raised this question of wanting to get a court order so that you could avoid notification of your parents, what specifically did they answer to you when you said that is what you wanted?

A They acted confused. They were confused because they did not know of anything like that ever before.

Q Did they tell you to call back some later time?

A Yes, they said call back next week and I told them that I couldn't call next week because I was going to be farther along then and it would cause complications.

Q What did they say to that?

A Then they took care of me right then.

Q Is that when they told you they would check around and see what could be done about this?

A Yes.

Q Did you tell them you would call them back at that point?

A Yes.

Q So then you hung up the phone?

A Right.

Q How long was it before you called them back?

A Twenty minutes.

Q What happened? Did you talk to the same person when [15] you called back?

A Yes.

Q Do you remember the name of that person by any chance?

A No.

Q You do know to the best of your recollection it was somebody from the clerk's office?

A Yes.

Q What did that person tell you when you called back the second time?

A I believe they talked to Judge Mason.

Q Do you remember specifically that they mentioned that?

A Yes. And they said they had nothing like this before in Mankato and that I would have to go up to Hennepin County to get a waiver or consent from court.

Q Anything else that you remember from that conversation?

A No.

Q What did you do then?

A Okay. By this time it was close to five o'clock so I couldn't call up anymore. I called Sherrie back at the clinic and told her what had happened in Mankato.

Q Did you make that call the same day or was that the next—

A Yes, the same day.

Q Was that the last call you made on that day relating to this abortion?

[16] A Yes.

Q What did you tell Sherrie?

A I told Sherrie the situation with what happened, what I did and she said that she would check around and I could call her back the next day. She was going to check around and see if she could arrange something in Mankato.

Q Did you call her the next day?

A Yes, I did.

Q And when did you call her? What time of the day? Do you remember?

A Afternoon.

Q It was after school?

A Yes.

Q Now, what took place during that conversation?

A I told her—okay. She said she called around down here for me and they could not arrange anything in Mankato. She gave me information of the St. Paul Detention Center in which I would have to make an appointment and go up to court there.

Q When you say St. Paul Detention Center, are you referring to the juvenile court facility?

A Yes.

Q And did Sherrie give you specific information as to how to arrange that contact with the St. Paul juvenile **[17]** court facility?

A She just told me of the place. That's about it.

Q Did she give you a phone number to call?

A No, not that I recall.

Q What did you do at that point?

A I called the St. Paul Juvenile Detention Center and I made an appointment which was the following Wednesday, I believe, for my court hearing and that was approximately two or three in the afternoon.

Q Was there any discussion about how often or when they would hold these hearings?

A It was Monday through Friday. No weekends. Saturday or Sunday court could not be held.

Q But they could take you Monday through Friday at any time during those days?

A I believe so.

Q And the time that you selected was two or three in the afternoon?

A On Wednesday. It was a Wednesday.

Q Do you remember specifically the date of that court appointment?

A Wednesday the 9th of February.

Q Now, first of all at this point, let's go back to the time when you first found out that you had to go to court if you did not want to advise your **[18]** parents. Why did you feel that you were uncomfortable advising your parents about your predicament?

A Because this was my situation and it's my decision. It would have caused tension in my family. They had enough things going on, I didn't need to tell them about this. It was my own decision.

Q Do your parents—are you aware that your parents had certain religious or political feelings that would have made the subject of abortion uncomfortable for them?

A My parents are Catholic. I'm Catholic. But if I had decided—told them and decided what I had decided, it would have been too big of an obstacle.

Q Their political feelings on the subject?

A I don't know.

Q At any rate, you definitely concluded that you felt you did not want to involve them in this problem.

A Right.

Q Do your parents have any other relatives that are strongly involved in anti-abortion activities or lobbying?

A Yes, I have relatives in St. Paul that are very strong about this. They're active.

Q Are they relatives of your father or mother?

A Father.

Q Are they like sisters or brothers of his?

[19] A Yes.

Q Now, when you found out about this, the fact that you would have to go to court if you did not want to tell your parents, how did you feel about that when you heard about that?

A I knew it was going to be an inconvenience and I was afraid to go because if it was in Mankato, because I know a lot of people in Mankato, and I was afraid that my identity would

be known. Other people would know about it yet my parents wouldn't.

Q Why were you afraid that your identity would become known if it were in Mankato?

A Because the courthouse is in Mankato, I'm from Mankato, I have lived here eighteen years and I know a lot of people because I have been involved in a lot of things and there just is a chance that my identity would be known.

Q Do you know people that are employed at the courthouse in Mankato?

A - Yes.

Q Familiar with them?

A Yes.

Q Did the idea that you would have to go to court then cause you some concern at that point when you initially found out about it?

[20] A Yes.

Q Did it cause you additional concern when you found out that you were going to have to go to the Cities to accomplish this court hearing?

A Yes, definitely.

Q What were the problems caused by the fact that you were going to have to go to the Cities for this court appearance?

A First of all, I had to have transportation up there. I took a Greyhound bus for $20 round trip there. I missed a day of school, of my school which is unexcused which is on my record; the cost for it; going up to the Cities all by myself, all on my own. It was a scary experience.

Q You arranged this all by yourself?

A Yes.

Q And you didn't have any help from anybody else?

A Right.

Q You paid for it all by yourself?

A Yes.

Q How much total funds would you say you expended with your bus fare and meals and so forth in this trip up for the court hearing?

A Probably 30 to 35 dollars plus working. I had to get off work.

[21] Q You missed work as a result of having to do that?

A Yes.

Q How much work did you miss?

A Six hours of work.

Q How much were you paid at that time for your work?

A Three fifty per hour.

Q Now, when you missed school you indicated it was an unexcused absence. What do you mean by that?

A There was no parent's call in for me missing school so I went to detention and had to make that up.

Q So it was just as if you were truant for that day, as if you had just taken off to have fun or something like that?

A Yes.

Q Just out of curiosity, what kind of detention do they make you stay in for that?

A It was after school. A week after school for an hour, 45 minutes after school.

Q Every day for a week?

A Per class period, one hour.

Q So did that involve—are you talking about a week?

A Yes. Five days.

Q Five days you had to stay after school every day?

A Yes.

Q For 45 minutes or an hour?

[22] A Yes.

Q And I take it this probably aiso caused some irritation on the part of your teachers or whatever when you missed that day.

A Yes.

Q Was that expressed to you in any way do you remember?

A No.

Q Now, I want you to tell me exactly how that day went from the time you got up in the morning until the time you got back with respect to the day of your court hearing.

A Okay. I woke up approximately 4:30, got ready, walked down to the bus depot which was a good mile and a half from my house. Then I caught the bus at six o'clock in the morning; rode the bus up to St. Paul stopping in every town on the way. I arrived about ten, 10:30 to St. Paul and lucky for me the Detention Center was right next to the bus stop because I had no idea

where I was in the Cities. I don't know my way around at all. So I was lucky that it was right next to it.

So my appointment was approximately two in the afternoon so I had four hours to waste. I went to the mall, walked around shopping a little bit, had lunch and then went over to the Detention Center and I did homework for two hours and then this was about my **[23]** appointment time and I talked to a lawyer—I had a guardian also and they just prepared me for what the judge was going to ask me.

Q What happened?

A And then they talked to me for about 20 minutes and prepared me for this. Then I went to my—they were going to set me off for another hour because another girl had come before me but I told them I was going to miss my bus so they took care of me right away. And so, let's see, we went through the court procedure and it was in my way. It came out good for me. I got permission by the court and that's it.

Q Did they give you a document then so that you could take that so you could secure your abortion?

A Yes.

Q And you had a hearing actually before a judge?

A Yes.

Q Did that take place in the judge's chambers?

A Yes.

Q And your guardian and your attorney were there with you?

A Yes.

Q Then what happened after that?

A Then I went and took the bus home and I arrived home at eight o'clock at night.

[24] Q When you left to walk to the bus early in the morning, you did that without the knowledge of your parents?

A Yes.

Q Because you obviously did not want them to know where you were.

A Right.

Q And you had to hide that from them also when you returned?

A Yes.

Q How did you feel during that day when you had to go through that long day by yourself?

A I felt that it was not necessary because of my—it was my decision in the first place what I was going to do. It was a very big inconvenience, and I felt down on myself because I was missing school, et cetera.

Q Did you have any fears or concerns during that day?

A Yes. The whole day was—it was a fearful day. All the strange people I didn't know, you know. It was a different atmosphere for me totally.

Q Were there a lot of strange people in the bus station and that sort of thing?

A Yes, definitely.

Q Was that scary for you?

A Yes.

Q Where did you get the money to pay for this particular **[25]** trip?

A Savings account.

Q Savings from your jobs?

A Yes.

Q So now you got back and to the best of your recollection this would have taken place February 9th?

A Right.

Q And before your deposition today you looked at a calendar for that year, didn't you, to try to figure out what would have been the day?

A Yes.

Q Now, after getting back February 9th and now having the court authority, what was the next step?

A I called Sherrie in St. Paul at Planned Parenthood and told her that I had the okay.

Q Did you call her the next day after the hearing?

A Yes, the next day.

Q And then what?

A Then we made an appointment for my abortion.

Q And do you remember what day that appointment was for?

A The 16th of February.

Q That was an appointment for you to be at the St. Paul clinic on Ford Parkway?

A Yes.

Q What arrangements—before we leave the subject of [26] telephone conversations, when you had that initial flurry of conversations with Sherrie about the court procedure and your abortion decision and so forth that you already told us about, what would you say was the total period that you talked with Sherrie on the phone in that initial flurry of conversations?

A I would say an hour.

Q Do you remember how many conversations there would have been when you were trying to resolve that initial court appearance difficulty?

A Different phone conversations which I had to keep confidential from my parents which was another concern.

Q And how did you keep those confidential from your parents?

A Well, the first few times I called I called and it would show up on my parents' phone bill, but then Sherrie told me to call collect which I did.

Q So that was another thing you had to worry about was your parents picking this up on the phone bill?

A Yes.

Q Now, you arranged this appointment for February 16th. What happened then with respect to that appointment?

A February 16th a girlfriend and I drove up to St. Paul and went through all of the informative sheets I had to fill out and history and then they told me that I was [27] too far along. I was 15 weeks and three days in my pregnancy so I was in the second trimester.

Q What did that mean?

A That meant that Planned Parenthood could not give me an abortion. They could only go up to 14 weeks.

Q What was the result?

A They referred me to another clinic in Minneapolis.

Q Did they give you several alternative places to go to get an abortion past the first trimester?

A Yes, they did, but they told me one specific doctor.

Q And that was Dr. Hanson?

A Yes.

Q Mildred Hanson?

A Yes.

Q Now, with respect to getting up to the clinic, you said a friend went with you this time.

A Yes.

Q Did you arrange with her to do that in advance of the appointment?

A Yes.

Q And she drove you up?

A Yes.

Q Did you help pay for any expenses or anything like that with respect to the trip?

A Yes, I paid for all of the gas expense, transportation, [28] lunch, et cetera. I paid for everything.

Q Do you remember how much in the way of expense was involved on the trip on the 16th?

A I would say $25 worth of gas and up to 15, $20 for lunch and dinner, et cetera.

Q What time did you have to leave on that day?

A We left approximately 7:30 in the morning.

Q Was this also a school day?

A Yes.

Q Did you have an excuse to miss school on that day?

A No.

Q Did you also miss work on that day?

A Yes.

Q Did you miss the same amount of work?

A Yes.

Q Now, you left at 7:30 and you got up to St. Paul fairly reasonably early in the morning I guess.

A Sure.

Q Then you went through—you said you filled out some forms.

A True.

Q Did you meet Sherrie, this person you talked to on the phone? Did you meet her in person at that time?

A Yes.

Q Did she give you some counseling about the abortion?

[29] A Yes.
Q What was involved in that decision?
A Yes.
Q And what medically was going to happen and that sort of thing?
A Yes.
Q And then did you have a physical examination?
A Yes.
Q Was it at this physical examination that a determination was made that your pregnancy was too far advanced for Planned Parenthood to do the abortion?
A Yes.
Q Was that examination performed by a physician do you remember?
A Yes, it was.
Q Now, what time was it that you found out that Planned Parenthood could no longer perform the procedure?
A I would say eleven approximately.
Q Had you brought with you sufficient funds to pay for an abortion to Planned Parenthood?
A Yes, scarcely.
Q And do you remember how much money that was?
A It was $175 for Planned Parenthood.
Q Now, when they told you they could not do it and they gave you Dr. Hanson's name, what did you do then?
[30] A They called to Dr. Hanson and told her the situation and asked her if it would be possible that I got in and Dr. Hanson said just to come over to her clinic and she would see what she could do.
Q Did you do that?
A Yes. And I had to be back by a certain time that evening so my parents would not know what was going on. So I had to just go there and see what would happen, you know, see if—when I left Planned Parenthood, I didn't know if I would be able to go through the abortion that day or not.
Q What was your emotional state first of all when you left first to go up to Planned Parenthood that day. How were you feeling?
A I was scared and kind of depressed.

Q What about? What was your emotional state when you found out that you now were too late to have a first trimester abortion?
A I just couldn't believe it. I was very scared. I was crying. I was very shook up.
Q And what happened when you got to Dr. Hanson's office?
A I signed in and they knew my situation and they told me to wait. I was so nervous I couldn't do anything so I just tried to go to sleep. I fell asleep for about four hours and then Dr. Hanson saw me.
[31] Q Did Dr. Hanson take steps to begin the procedure?
A Yes. It was a D and C abortion and I had to have insert laminaria sticks.
Q Laminaria?
A Yes.
Q And that is a preparatory step for an abortion of the kind that you were going to have?
A Yes.
Q And she wanted that done as part of good medical practice for your abortion?
A Yes.
Q And she explained that to you at the time?
A Yes.
Q And the purpose for doing so?
A Right.
Q What were you advised then that you were to do after these laminaria were inserted?
A She gave me medication to take that evening. I was supposed to come back the next day for the abortion.
Q So now you had to return back to Mankato that evening?
A Yes.
Q Did you do so?
A Yes.
Q And your friend drove you?
A Yes.
[32] Q What time did you get back to Mankato?
A I would say approximately nine. Eight or nine o'clock.
Q And how were you feeling at that time?

A Terrible. Absolutely the worst. I have never felt so bad in my life.

Q In what ways were you feeling badly?

A I was sick to my stomach constantly. That's why it took so long to get back to Mankato. We had to stop every two miles it seemed like. I was depressed about having to go back to the Cities the next day. I had to miss school again.

Q Was this illness, your nausea, was that related to your psychological state rather than your physical state?

A It was physical state.

Q You were physically nauseated?

A Yes.

Q What I'm getting at, I mean was that caused by the laminaria?

A Yes, that is what caused it.

Q Did Dr. Hanson say that was an expected effect from doing this?

A Right.

Q I understand then. And what did you do when you got home?

A I went right to bed. My mother came up to talk to me. [33] I couldn't even talk. I just rolled over and went to sleep and she thought that was really weird.

Q Were you concerned about having to go back yet another day?

A Yes.

Q Why were you concerned about that?

A Because I was going to miss school again and school calls your house every time you miss school. Every class period you miss. So my parents work until six at night so they missed a call this day and the second day I had to have someone call from Dr. Hanson's office to clear me from school. Otherwise my parents would find out that I have missed two full days and I wouldn't get away with that. They'd want to know everything, where I had been.

Q Now, the next day did you go back to Dr. Hanson's office?

A Yes.

Q How did you get up there that time?

A My girlfriend drove me.

Q Same as the day before?

A Yes.

Q And what time did you leave that day?

A About 9:30 in the morning.

Q Did you again participate in paying expenses for her [34] driving you?

A Yes. She helped me out but I reimbursed her.

Q Did you find out that the cost of having the abortion, second trimester abortion done by Dr. Hanson, was going to be extremely greater than you were prepared to pay to Planned Parenthood?

A Yes.

Q Do you remember the difference in cost?

A Probably about $125.

Q What did you do about making the payment for the additional cost?

A I gave her all the money I had so my girlfriend helped out with expenses of getting to the Cities and back and I had an I.O.U. of $80 to Dr. Hanson.

Q Did you eventually pay that to her?

A Yes.

Q You went up to her office and you had the procedure that day.

A Yes.

Q And what time did you return to Mankato that day?

A We left at about 5 o'clock and returned about seven.

Q So the total time that was spent in securing this abortion from the first time you found out you had to go through this court procedure up to when you had it was three full days away from Mankato?

[35] A Yes.

Q And had you not had to secure the court permission and go through all that resulted in that and was involved with that, would you have been able to secure your abortion in the period of one day?

A Yes.

Q Would you have been able to secure the abortion at Planned Parenthood, a first trimester abortion?

A Yes.

Q All right. Finally, Cynthia, were there any periods of time when you were concerned about whether or not you could really get through this whole procedure from start to finish in light of the difficulties that you had?

A I was in doubt a lot because of the court case kind of thing, but I decided that this is what I'm going to do and that they can't stop me from doing this.

Q So you very firmly decided you were going to overcome all of these obstacles?

A Yes.

MR. JEVNE: I have nothing further at this time.

CROSS EXAMINATION
BY MR. ACKERBERG:

Q Cynthia, January 27, 1983 I think you've testified you [36] discovered that you were pregnant at least seven weeks.

A Yes.

Q Did you have any more definite word from Planned Parenthood on how far along in your pregnancy you were?

A Seven plus weeks. That's what they told me.

Q Did that mean to you it could have been any period after seven weeks or was it in the area of seven weeks?

A Any time after seven weeks.

Q So you didn't know definitely how far along you were?

A Well, my last regular period was October, October 30th. So from that time it would be ten weeks.

Q So did you think you could have been up to ten weeks pregnant?

A Yes.

Q You made an appointment for your court hearing for February 9, 1983; is that correct?

A Yes.

Q When did you make that appointment?

A On January 27th or the next day, the 28th.

Q So on January 28th you made an appointment for February 9th?

A Yes.

Q Did you try to make an appointment for an earlier court appearance?

A Yes, but I couldn't get around work or school and that [37] was the time that I could get up to the Cities.

Q So an earlier court date was available but you could not make it?

A I don't recall. As far as I know. But I believe that—they set me up with this appointment. That's what they told me. They had an appointment on a Wednesday.

Q Did you ask for an earlier appointment?

A No, I didn't.

Q Did you ask for an appointment during the weekend?

A Yes.

Q What was the response?

A They couldn't do that. When I did ask for an earlier appointment, because Saturdays and Sundays were the days I could go up to the Cities with no problems of school or work, and that was not possible so Wednesday—

Q Who told you that?

A The girl I talked to up in the Detention Center who made my appointment. The secretary.

Q By Detention Center you mean the juvenile court?

A Yes.

Q Did you ask whether weekend hours were available in an emergency situation?

A Yes.

Q What was the response?

A They didn't—no, they couldn't.

• • • • •

[44] • • •

Q Let me try to clarify which court you appeared in. The county seat of Hennepin County is Minneapolis. The county seat of Ramsey County is St. Paul. Did you appear in court in St. Paul or Minneapolis.

A St. Paul Juvenile Detention Center I believe it's called.

Q Before appearing in court you did not visit—did you visit Planned Parenthood in St. Paul?

A No.

Q You were concerned about an unexcused school absence?
A Yes.
Q On the 9th then, the day that you appeared in court, did you appear at Planned Parenthood at all?
A No.
Q While you were waiting to appear in St. Paul court, you were concerned about missing your bus back home?
A Yes.
Q What time did your bus leave?
A Five o'clock I believe.
Q And what time did you—was your court appointment?
A It was at three o'clock.
Q And did you tell somebody that you were concerned about missing your bus back home?
A Yes.

* * * * *

[47] * * *

Q Can you tell me how that date was arranged?
A February 16th?
Q Yes.
A No, I don't know. It was just the appointment that I made.
Q Did you seek an earlier appointment?
A I don't recall.
Q Do you recall any discussion with Sherrie about the time factor, the importance of having an abortion as quickly as possible?
A Yes, Sherrie knew that.
Q But you can't recall why a week went by between the time you called and—
A Probably because I had to work. I was scheduled to work. That was the soonest appointment I could make.
Q Was the abortion performed?
A Yes.
Q By Dr. Hanson?
A Yes.
Q Was it performed safely?
A Yes.

* * * * *

DEPOSITION TESTIMONY EXCERPTS OF BONNIE L., MINOR

[DIRECT BY MR. JEVNE]

[CROSS BY MR. ACKERBERG]

[5] Q Did the doctor tell you approximately how far along you were in your pregnancy?
A Yes. They said I was 13 or 14 weeks along.
Q When you went to that clinic, what time of the day was it that you went?
A Planned Parenthood of Minneapolis?
Q Right. Minneapolis.
A It was in the evening.
Q Now, they referred you to the St. Paul Clinic, correct?
A Yes.
Q When did you make contact with the St. Paul Clinic, if you did?
A I contacted the St. Paul Clinic on Wednesday after school.
Q That would be the very next day?
A Yes.
Q That date would be March 14, 1984?
A Yes.
Q Who did you talk to when you called there?
A I talked to Sherry.
Q Is she a counselor at Planned Parenthood?
A Yes, she is.
Q You later met her personally, did you not?
A Yes, I did.

[8] * * *

Q So you were talking to her on Wednesday now?
A Yes.
Q She was hoping you will get a court hearing on Thursday?
A Yes.
Q Did you call the number that she gave you?
A Yes, I did.
Q When did you call?
A I called Wednesday. Right after I talked to Sherry.

Q And did you get somebody down in Hennepin County Court?

A Yes, I did. I talked to a lady and told her my situation and she said she didn't have an opening until Monday morning. And I told her that that would be too late, and asked if she had any other openings. And she said she didn't. I called back Sherry and told her that. Sherry tried contacting them.

Q Before we get to Sherry contacting them, when you talked with this woman, did you explain the reason it was important for you to have a hearing **[9]** before the next week?

A Yes, I did.

Q What specifically did you tell her?

A That if I didn't have it within the week, it might be too late to have the abortion. I needed the court hearing and the counseling within the week so I could have the abortion on Friday, and maybe Monday at the very latest.

Q Now, then you called Sherry back you said?

A Yes.

Q And you explained to her what happened, I take it?

A Uh-huh.

Q Then what happened next?

A She called them to try to get an appointment and she didn't. She must not have had any luck. She called me back and gave me the Ramsey number or the courthouse.

Q When she called you back, did she explain to you that she hadn't been able to get a hearing either?

A Yes. She said she didn't have any luck either. Then I called Ramsey and I told them the exact same thing I told Hennepin County and they said they could get me in on Friday at 2:30.

* * * * *

[14] * * *

Q Now, did you have an appointment at Planned Parenthood to go ahead and have the abortion procedure?

A Yes. I did on Monday.

Q Go ahead and tell us what time the appointment was for.

A The appointment was for 9:30 and I went in and had a little more counseling. I had a checkup and just their basic exam and I went in there to get it and Dr. Hanson sized me again,

sized me and said I was too far along and I wouldn't be able to have it at Planned Parenthood.

Q What do you mean by too far along?

A I was over the 14 weeks that Planned Parenthood would do. They do up to 14 weeks pregnancy.

Q Did she propose some alternative to you?

A She said I could go to her clinic and have it done there.

Q That would be a second trimester procedure down there?

A Yes, it would.

Q And did you go through, first of all, when **[15]** you went down there on Monday, did you miss the whole day of school on Monday?

A Yes, I did.

Q How did you, what excuse did you develop for that day?

A I called the school as my mother saying I was sick and that I wouldn't be in school and that excused me for the whole day.

Q Again you had to tell a lie to the school, in effect, to get out of school that day?

A Yes.

Q Did that also have the effect of making you nervous and have to worry about whether you might get caught?

A Yes.

Q Then, did you go through this procedure at Dr. Hanson's?

A Yes, I did.

Q Tell us what happened next, then?

A I had to go Tuesday, to get the sticks put in.

Q The sticks?

A Yes.

Q By the sticks you mean laminaria sticks?

A Yes.

[16] Q That is a procedure that Dr. Hanson uses as kind of a preparation for having the abortion, correct?

A Yes.

Q When on Tuesday did you go down to Dr. Hanson's office?

A Tuesday, I left school at 1:30 and we got down there at about 2:40 and waited around until I was called in.

Q Again, how were you getting around in and out of the city on these occasions?

A The bus or cab.

Q How about when you went to Planned Parenthood on Monday?

A We had a friend of John's take us down there.

Q Now John is your boyfriend, I take it?

A Yes.

Q Did you have to miss school time on Tuesday when you went to Dr. Hanson's office?

A Yes, I did. I had to miss the last hour.

Q How did you manage that?

A It's a study hall and I went down and I checked in and I said I was going to some classroom to work and so they thought I was there the whole hour. After I checked in, I left.

Q Again you were deceiving the school [17] authorities and you might have been caught?

A Yes.

Q After the laminaria sticks were inserted on Tuesday, then what happened?

A I had to go back Wednesday at the same time. And I did the same thing for study hall and then I waited around then until the procedure happened.

Q Now the procedure has been complete?

A Yes.

* * * * *

BY MR. ACKERBERG:

[21] Q Do you know who the woman is you contacted at Hennepin County?

A No, I don't.

Q Do you know what the telephone number was or what office it was?

A No, I don't know.

Q Did you or Sherry make any effort to contact the judge in Hennepin County directly?

A I didn't. I don't know what Sherry did.

Q You received court approval on Friday afternoon from Ramsey County?

A Yes, I did.

Q Why wasn't the abortion performed on the Friday after that?

A I don't think they had abortions on Friday afternoon. I don't think I could have. I don't think I could have gotten in on Friday.

Q Why didn't you have it on Saturday?

A I don't think they are open.

Q Why didn't you have it on Sunday?

A They aren't open on Sunday.

Q When Dr. Hanson sized you and said that you were over 14 weeks, did she say how many weeks you were?

A She said I was probably about 15.

* * * * *

TRIAL TESTIMONY EXCERPTS OF DR. STANLEY HENSHAW, DIRECTOR OF RESEARCH AT ALAN GUTTMACHER INSTITUTE

[DIRECT BY MS. LYNN]

[19] * * *

Q And how accurate is the Alan Guttmacher Institute data on fertility-related subjects generally considered in the demographic statistics community?

A Our statistics are considered the best available and are actually quite accurate as regards abortion. They are accepted by the United States Department of Commerce for publication in the Statistical Abstract of the United States and in fact the Centers for Disease Control, it often uses our total numbers of abortions for scientific purposes.

* * * * *

[20] A I wouldn't be able to identify factors specific to Minnesota that were different from the country.

Q What about the numbers of abortions and/or abortion rate for Minnesota women under 18?

A That also peaked in 1980. I don't have the rate, but I have looked at the numbers and the numbers peaked in 1980 and have declined since then.

* * * * *

[30] • • •

BY MS. LYNN:

Q Dr. Henshaw, can you tell us what this table shows?

A I think the interesting part of the table is the percent change from 1980 to 1982 in the abortion rates. It shows a decline of 25 percent in abortion rate to women under 18 and the decline of 11 percent in the abortion rate to women 18 to 19.

Q Now why did you pick the two age groups, under 18 and 18-19 for the purposes of comparison in this table?

[31] A Well, we were interested in what happened as a consequence of the law. The law would affect women under 18 primarily and many factors may influence teenagers. Aside from the law abortion rates might change over a period of time so the 18 to 19-year-old group was the most appropriate group to compare to the minors under 18.

Q All right. Now you testified earlier that abortion rates for all Minnesota women in the years, in the early 80s, that is 1980 through '82 declined and that the rate of decline was much greater for women under 20 and that the greatest decline occurred among women aged 15 to 17, is that correct?

A That is correct.

Q Can you identify any factors that in your opinion may have contributed to this trend?

THE COURT: When you say "this trend" are you talking about the minus 25 on the third line?

MS. LYNN: I am talking about—yes.

THE COURT: What trends are you talking about, Dr. Henshaw?

THE WITNESS: I haven't answered the question yet.

THE COURT: She is giving you a question about what contributed to the "trend" and I don't know what trend you are talking about.

THE WITNESS: There are a number of trends. One is the decline overall and the other is the decline among the [32] minors and the 18 to 19-year-olds.

I can only name some factors that can change reported numbers of abortions.

First I would like to point out that the statistics are not perfectly accurate. These numbers of abortions are based on the State Health Department numbers. We at AGI do our own count of abortions. In each state there are some differences between our count and their count and we do ours accurate enough to know it means theirs are not completely accurate, neither are ours.

I have tried to compare and can see that they have missed some providers that we know about and we have missed some that they know about so that there is some degree of error in the number of abortions here.

• • • • •

THE WITNESS: Another factors is that a number of Minnesota women go out of state for abortions. For example, a clinic opened in Fargo, North Dakota, in 1981 that would—that could affect the changes here to some degree, would probably affect women of all ages.

Then I think it seems likely that the law had some effect on reducing the number of abortions reported here for the minors.

[33] Now as far as the 18 and 19-year-olds, I can't say what probably caused the decline except that some influence evidently has been affecting teenagers, probably the minors as well as 18 to 19-year-olds.

The fact that the rate dropped more for minors suggests that the law might have had some effect.

• • • • •

[38] • • •

BY MS. LYNN:

Q All right. Dr. Henshaw, what is this Table 2, that is Exhibit 28, show?

A Okay. That table has birth rates 1981 and 1982 for Minnesota women age 15 to 17 and 18 to 19. It shows a decline in the birth rate of the 15 to 17-year-olds of about 3½ percent and a decline in the birth rate of 18 to 19-year-olds of 6.1 percent.

Now down below we have an average of four neighboring states and I have shown the same calculations and those states, the birth rates for the 15 to 17-year-olds declined 5.2 percent and the 18 to 19-year-olds declined 4.7 percent.

Q All right. Dr. Henshaw, can you identify any factors that may have contributed to these, to this—these trends, that is a decline in their fertility rate for the applicable age groups in both Minnesota and the four states—

THE COURT: Fertility rate and birth rate are the same thing?

THE WITNESS: The same thing in this context because we are referring to specific age groups.

All I can say is that there are—appear to be some [39] regional influences on the birth rates of teenagers in these age groups.

Now the reason we are looking at the table is to see if the Minnesota law may have had an effect on the minors in Minnesota.

Would you like me to go through that analysis?

BY MS. LYNN:

Q Yes. Would you discuss a little bit what you think what impact if any the law may have had on these fertility trends?

A Well, we were interested in the fact that the birth rate went down for the 15 to 17-year-olds after the implementation of the law. So I was—I did this comparison to try to see what the effect of the law might be separated out from other trends that were occurring, and if you compare the 15 to 17-year-olds to 18 to 19-year-olds in Minnesota, the decline was less for the 15 to 17-year-olds by a small amount.

Similarly, the decline in Minnesota for the younger women was less than the decline then in the other states, in the other four states.

Q Now would you explain why you chose to compare Minnesota with these four states?

A These were all neighboring states, three of them border on Minnesota. The fourth, Nebraska, is very close. I omitted one other state which borders on Minnesota, North Dakota,

because it had a similar kind of law that was implemented [40] during this time period.

THE COURT: What are you telling me this shows?

THE WITNESS: This shows that if—if the minors had had the same trends in birth rate compared to the 18 to 19-year-olds as occurred in other states their birth rate would in fact—would have gone down about three more percentage points than it did. So the suggestion is if the law had any effect it appears more likely that the effect was to slow down the decline in the birth rate rather than to encourage a decline in the birth rate of the minors.

THE COURT: What is the effective date of the law, to your understanding?

THE WITNESS: I understood that it would affect births starting around February 1982. The law went into effect August 1st, 1981, according to my understanding. Births in 1981 would not be affected.

THE COURT: All right, go ahead.

BY MS. LYNN:

Q Okay. Did you have occasion, Dr. Henshaw, to look into the fertility rates for unmarried versus married teenagers in this same time period?

A Yes. I also looked at national rates by numbers of births to married and unmarried teenagers.

Q And what do those numbers show?

A I am afraid you have my notes on that.

[41] MS. LYNN: Pardon me, Your Honor.

THE WITNESS: What the numbers show is that the decline in births occurred primarily among married teenagers 15 to 17; that the number of births to unmarried women 15 to 17 declined only 3 percent between 1981 and 1982.

The number of births to married teenagers declined 22 percent and in fact if you look at the absolute number decline of births there was a decline of 41 births among

unmarried teenagers, a decline of 119 births among married teenagers.

BY MS. LYNN:

Q What does the fact that the numbers of births went down for married teenagers much more than unmarried teenagers in 1981 to '82 suggest to you?

A It suggests that there is a trend toward, a desire for postponing childbearing and that that is reflected in the trend among the married teenagers having fewer births. Among unmarried women there was little change in—there was no essential decline when you took the population into account. I couldn't do a rate because I don't know the proportion of women who were unmarried in the two years, but we know that overall the number of teenagers is declining each year by 4 to 6 or 7 percent and the decline in the number of births to unmarried women is actually less than the probable decline in the number of unmarried teenagers in this group in the **[42]** population.

Q Does this different rate of decline among births between married and unmarried teenagers suggest anything to you about the possible impact of the parental notification law?

A Well, it is—if the law—we were interested to see whether the law may have had the effect of encouraging some women to carry pregnancies to term rather than having births (sic). Assuming those would have been the unmarried women—

THE COURT: Say that again: you were trying to see if it had any effect on what?

THE WITNESS: On encouraging teenagers to carry their pregnancies to term.

THE COURT: Rather than—

THE WITNESS: Rather than having abortions; I am sorry.

THE COURT: I thought you were comparing the same thing for a moment.

THE WITNESS: I was; I misspoke.

Now given that there was a trend toward fewer births, it appears that the unmarried women did not participate in

this trend toward fewer births and it is possible, it can't be proven, but it is possible that one reason is that some of them carried pregnancies to term who otherwise would have had abortions.

* * * * *

[43] * * *

BY MS. LYNN:

Q Dr. Henshaw, could you explain the concept of abortion need?

A Yes. We at the Alan Guttmacher Institute have tried to estimate the number of women who need abortions in each part of the country. The purpose is to assess the adequacy of abortion services. By "need" what we mean is the number of women who would obtain an abortion if services were readily available to her.

Q And can you make any statement about Minnesota's abortion need and its performance in meeting that need?

A. Yes. We have estimated that the need for abortion services in Minnesota in a year, say 1982, is something over 30,000 women. Now we might want to deflate that a little bit **[44]** because Minnesota is quite a rural state. Rural states more than average anyway a non-metropolitan state. So maybe a little under 30,000 would be my estimate of the number of women in Minnesota who we would estimate have an unintended pregnancy in a year—well, in 1982—and if services were readily available would obtain an abortion.

The number of abortions that actually occurred was on the order of 19,000 in 1982. Our conclusion is that there is a significant amount of unmet need for abortion services in the state.

THE COURT: How did you arrive at an estimate of unintended pregnancies?

THE WITNESS: What we do is assume that the use of abortion services in a state where services are readily available is a good indicator of how many women would need abortion services if they were available. We took the five states where 80 percent of the women lived in a county

with a big abortion provider and assumed that in those states services are available.

Then we applied the abortion rates from those states specific by age and race of the women to the populations of other areas to estimate how many women in those areas would obtain abortions.

THE COURT: All right, that tells me how you are doing it.

BY MS. LYNN:

[45] Q All right. Have you made any determination about the degree to which abortion services are accessible to women in Minnesota?

A Well, there are two things we look at in terms of availability of abortion services. One is a number of counties with an abortion provider and in Minnesota 6 percent of the counties have an abortion provider as compared to the country as a whole where 22 percent of the counties have at least one provider. Now both of these figures may be missing a few counties because we know that we miss a few physicians who do abortions privately in their offices to their own patients. We think that this covers substantially all the providers who do a large number of abortions so that they are well-known to women and really visible and accessible.

The second measure is proportion of women who live in a county with a provider. In Minnesota 44 percent of women 15 to 44, this is for 1982, lived in a county with an abortion provider as compared to 72 percent in the country as a whole. So by these measures Minnesota is lower than the country as a whole in terms of accessibility of abortion services. It is primarily, I would say, probably because Minnesota is somewhat more nonmetropolitan than the country as a whole.

THE COURT: Give me what you perceive to be the standard for each of those two methods?

THE WITNESS: Well—

[46] THE COURT: 6 percent—

THE WITNESS: Versus 22 percent average U.S. Now we think the average U.S. is low, it should be higher than that but this just gives you a standard.

THE COURT: And the percentage that live in the county?

THE WITNESS: 44 percent versus 72 percent.

THE COURT: All right.

BY MS. LYNN:

Q Where are the abortion, Minnesota abortion providers that you identified located?

A The clinics are located in the major cities, Duluth, then the Twin Cities areas. There are some other providers which are relatively less important in a couple of other counties.

Q Does the fact that virtually all of Minnesota abortion providers are located in the two major metropolitan areas of Minnesota have any impact on the ability of Minnesota women to obtain abortions?

A Well, it means that many women would have to travel long distances to obtain abortion services. For example, a woman who lives in the center of the state say, Brainerd, needs to travel at least 200 miles, I think over 200 miles round trip to either Duluth or Minneapolis to obtain services.

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[49] * * *

BY MS. LYNN:

Q Yeah. Well, what effect in your opinion does delay have on abortion for women?

A I have just been editing our International Fact Book on Abortion. One part of that fact book is on complications from abortion and I have worked with CDC and made the calculation that for each additional week of gestation between eight weeks and 20 weeks the probability of mortality increases by about 30 percent. The probability of mortality is very low in any case but it does increase with each additional week during that gestation period.

THE COURT: 30 percent, did you say?
THE WITNESS: Yes.

BY MS. LYNN:

Q Have you ever done any study on accessibility of abortion services and how that accessibility relates to delay?

A Yes, we did one study in which we looked at the gestation of women obtaining abortions who obtain their abortion inside the county of residence versus outside the county of residence. We found that those who were outside their county of residence **[50]** had their abortions on the average of 4.7 days later than women who had their abortions inside their home counties. This was based on a regression analysis which took into account other demographic differences between the women who may have traveled outside their counties and those who obtained abortions in their counties.

Q And then in your opinion does this relationship between the accessibility and delay hold true in Minnesota?

A I would think it would probably hold true in Minnesota.

Q How does Minnesota compare with the nation as a whole in terms of the gestational age at which women get abortions?

A Well, looking at the Minnesota Health Department statistics, compared to the U.S. total, it looks as if Minnesota women are obtaining their abortion a little bit later than the country as a whole. The latest year for which I have data from both the U.S. as a whole and Minnesota is 1981 and in that year 13½ percent of Minnesota abortions were obtained past 12 weeks gestation as compared to the U.S. total figure of 9.9 percent.

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[53] * * *

1980 in particular is a year in which a higher proportion of women seem to get late abortions so to try to even out some of these fluctuations I have calculated an average for three years, 1978 to 1980 as the "before" period; 1982 and 1983 as the "after" period.

Now if you compare the averages for women under age 20 for 1978 to 1980 an average of 16.9 percent of them obtained abortions past the 12-weeks gestation. For the average of 1982 to '83 18 percent obtained their abortions past the 12 weeks. Now to see whether these other fluctuations or some systematic change may have helped to account for that increase I looked at the same figures for women aged 20 and over, the proportion who obtained abortions past 12 weeks for the 1978 to '80 period was 9.4 percent and for the later period, '82 to '83 9.5 percent.

So there is a tiny increase for the women 20 years and over, but a much larger increase for the women under age 20.

Q What does the fact that the proportion of teenagers who got abortions after 12 weeks increased much more than the pro-**[54]**portion of older women getting abortions after 12 weeks in 1982 to '83 suggest to you with regard to the parental notification law?

A Well, it suggests the possibility that the law may have caused some delay in the women obtaining abortions after the law went into effect.

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[58] * * *

MS. LYNN: Based on all the figures that he has testified about in his testimony can he draw any conclusions or can he make any inferences from those figures as to the possible effect of the parental notification law, based on the figures that he testified about, not in general?

THE COURT: Do you have an opinion in that regard?

THE WITNESS: I have opinions about the possible effect of the law.

THE COURT: I will overrule the objection. You are going to tell me your opinion after the possible effect or the effects?

THE WITNESS: If I have an opinion as to the effect, all opinions have degrees of certainty and doubt.

THE COURT: You bet they do. Do you have an opinion to a reasonable scientific certainty as to the effect of the law?

THE WITNESS: Not to a scientific certainty.

THE COURT: This is just your thought as to the possible effect of these numbers?

THE WITNESS: What direction the numbers point to. I don't think you can be sure. I think if you look at the evidence you have to think, well, there it is more likely than **[59]** not a certain effect based on the facts. But we don't have all the facts. We certainly can't prove it.

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[61] Q What about the effect that the impact of the law with regard to the number of abortions or the abortion rate?

A I would say that the law appears to have resulted in a decreased abortion rate among the minors. However, it is difficult to know what that really means. Some of the decrease would have been women going out of state for abortions or perhaps passing as age 18 or, I would think, I would say it is more likely than not that that resulted in decreased abortions.

However, I wouldn't say that we know to what extent that that is true.

Q And do you have any opinion about the possible effect of the law with regard to the birth rate?

A My opinion would be that the law has induced some of the minor teenagers to carry pregnancies to term who would otherwise have obtained abortions.

Q And do you think that the law may have had a different impact, differential impact on different classes of minors within the state?

A I think the minors who would have carried to term instead of having the abortion would be those who would have been relatively late in obtaining abortions anyway.

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TRIAL TESTIMONY EXCERPTS OF PAULA WENDT, CO-ADMINISTRATOR OF MEADOWBROOK WOMEN'S CLINIC

[DIRECT BY MS. BENSHOOF]

[CROSS BY MR. GALUS]

[6] * * *

Q So you have been seeing teenage pregnant patients for 15 years, is that correct?

A That is correct.

Q About how many women have you personally done abortion counseling with, both adult and minors?

A Since 1971 I probably have personally counseled about 10,000 women who were seeking an abortion. The minors would probably be about 3000 and then I supervise the rest of the clinic staff in seeing the minors in the last three to four years as an administrator.

Q So before counseling over 10,000 women you have supervised the counseling of about how many more?

A Say that again?

[7] Q You stated that have personally counseled over 10,000 women—

A Right.

Q —seeking abortions?

In your supervisory capacity—

A Oh—

Q —how many more women have you had that counseling influence over?

A Probably another twenty or twenty-five thousand women.

* * * * *

[14] * * *

Q And then what happens to a patient?

A If they checked all the wrong things on here?

Q No, if they want an abortion, and they want to proceed.

A Oh, okay. Then she would be taken with whoever she comes with to the film and watch the film that describes how we do the abortion and what the aftercare instructions are.

Q Does the film include medical risks, or what does the film include?

A The film talks about, procedure-wise, how we do the abortion; and it talks about what it feels like, what the experience is like, what to expect afterwards physically; a little bit emotionally, and talks about what are the symptoms of complications and what do so if those occur.

Q What happens after the film?

A Then she will have her blood drawn, leave us a urine sample. One of the nurses will take her into health history and pelvic exam, breast exam, basic GYN kind of things and they will then give her consent forms and a post-abortion book. She will go back to the lobby and be with whoever she came **[15]** with and read over those forms and then one of the counselors will call her and review what has gone on so far, see if she has any questions on the film, on the consent form, on the post-abortion book; you know, take care of some of those kind of details; where she is going to go for her two-week checkup, who is with her, does she have a ride, and then they will do, you know, the counseling session at that time also.

Q Who do you decide does the counseling with the particular patient?

A It is a random thing; it is whichever counseling is next for a patient.

Q What happens during the counseling session;

A That is always basically determined by what the woman's requests or needs are. But basically what we are doing is talking about why she has decided to have an abortion, why she feels that would be her best decision; how she feels about that, what has been her experience with abortion in the past, what kind of support systems does she have. For some people they want to talk about their religious or moral feelings, for some they want to talk about their relationships, whether it is with parents, boyfriends, husbands, sometimes there is some other things that come up, abuse kind of things. We run into a lot of women telling us that they are unhealthy—

MR. GALUS: Excuse me—never mind, I withdraw it. Proceed.

[16] THE WITNESS: —that they are in unhealthy marriages or dangerous situations. So we talk about the abortion, but we also do referrals back to the community as indicated by the particular patient.

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[33] * * *

Q Prior to August 1981 what was the Meadowbrook policy on minors notifying their parents?

A We didn't require them to notify their parents. We encouraged them to certainly leave that as an option for them but they didn't have to do that in order to come to Meadowbrook and have an abortion.

But again if the counselor who was dealing with her, and it would usually end up with me also, felt she wasn't able to take care of herself after the abortion or be responsible if she was going to go, if we just didn't feel she was going to be aware of any possible complication and she could deal with them, she didn't seem to have a handle on all of that, and we were worried about her leaving the clinic and worried about her after the abortion, we would require that she leave and come back with an adult.

It didn't have to be a parent but an adult person who then would know about the abortion and would agree to help her get medical care if she needed that post-abortion.

Q I am looking at Plaintiffs' Exhibit 65 now and I notice at the bottom you have a form for the counselor to fill out about minors?

[34] A Right.

Q I see you have parent or adult advocate?

A Right.

Q What is the genesis of this form and is it still used since we now have the law?

A Well, what we did with that was we would, if you saw a minor whose parents did not know about the abortion I would discuss with her now if you have any problems after the abortion what will you do to take care of yourself. If she would say to me, well, I would never tell my parents and if I got sick I would just not do anything about it, then what we would talk

about was that was not an option. In order to be responsible for herself as far as this decision went, she had to understand that in case of an emergency she had to tell somebody. Generally if she lived at home with her parents it would be her parents, so we would discuss that to the point where she would agree and she would tell me who she was going to tell if she got sick in the middle of the night and then we would sign this as a way of sort of cementing the contract.

Q Do you sign this anymore?

A No, we don't.

Q So subsequent to the change in law the nature of your counseling insofar as seeing that they had someone there is changed, is that true?

A It has changed in a lot of ways. We still talk about [35] this but it is not done as formally as we did it before because with the parental notification law a lot of that is sort of taken care of or it appears to be even though it is really not.

Q Why did you not require parental notice or consent from minors?

A Well, the doctors that I worked for had had a lot of experience with women before abortions were legal in the United States and they had dealt with all ages of women and so this was not a really new thing for them to start doing and they had some very strong feelings about women of all ages having access to this kind of medical care without being forced to involve other people.

They also had had a lot of experience with young women and they felt that in their medical opinion, their expert opinion, these women were able to consent for this procedure and that indeed they had a right to consent to this procedure.

Q Ms. Wendt, you have talked about the doctors you work for but you also said earlier that you set the policy at the Meadowbrook Clinic on many issues.

Is it in your professional opinion as a counselor, as a nurse, as a teen clinic person, as a director of the clinic, in your professional opinion why would you not require parental notice or consent?

[36] A Because I think that minors are capable of making that decision on their own without being required to tell a parent or an adult.

Q Do you think it is bad counseling or medical care to violate that privacy?

A I do.

Q Why?

A Because I think that the decision to have an abortion is uniquely private and personal and that truly nobody else can be involved in pressuring you one way or the other to make that decision. I sort of feel about it the same way I do about teenage women are not required to get anybody's consent to have a child and go on welfare and live away from the family they are with now. This is the opposite end of that kind of decision. It is still a pregnancy-related decision, it is still a decision that is going to affect her life in many ways for the rest of her life and I have talked to a lot of these young women over a lot of years and I feel very strongly that they are capable of making this decision and making a good decision and they will tell the people they feel are necessary for support, counsel, information.

They go to the people who are going to be the most supportive for them and they seek out those that they need.

Q Do you encourage them to tell one or both parents?

A Well, I talk about what their family situation is like and [37] what they think would happen if one or both parents knew about the pregnancy and the abortion and based on what feedback I get then we discuss it further.

Q Do many teenagers, let's say before the law, voluntarily tell one or two parents?

A I would say that before the law probably about 25 percent of them told one or both parents.

Q Why didn't they tell both parents?

A They have a whole lot of reasons for not telling their parents.

Q In the course of your business have you compiled those reasons for any official—

A I did. I did.

Q Who for?

A I compiled them for Suzanne Smith.

Q Who is she?
A The woman in charge of the guardians.
Q Guardians where?
A Hennepin County.
Q She asked you to make this list?
A Yes, she did.
Q And you made it in the course of your regular business at Meadowbrook?
A Yes.
Q To give to Smith to the Hennepin County Juvenile System?
[38] A Yes.
Q Could you read that list for the Court, please?
A We took these off of patients counseled and from patient interviews. These are why the minors told us, probably in a month's period of time, that they didn't want to tell both parents:

Feels she would be punished and not get to go to college as promised.

Parents are against abortion.

Mother has heart problems and there are family problems.

Lived with boyfriend for six months. Just moved back home, doesn't want to disrupt anything.

They are both in their sixties and have heart problems.

Mom opposes abortion—does not get along with parents, states none of the kids do, because of their beliefs on abortion. Has placed a child for adoption. Feels mom would have made her stay pregnant and raise the child. Just moved in with dad—afraid he would send her back to live with mom. Parents are strict and religious. Parents are going through a divorce.

Lives with stepmom. Father lives somewhere else.

Mother killed self ten years ago.

Disowned older sister because she got pregnant.

[39] Does not want to ruin a good relationship.

In family counseling, her psychologist sent her to Meadowbrook.

They would oppose the decision.

They would make me stop seeing my boyfriend.

Would be kicked out of the house.

My mother would not stand for it in her household. We have not been on speaking terms since age 12. This young woman is 17.

Has one year left at home and thinks it would be very uncomfortable.

Father deceased—mom only concerned with self and her new husband.

Sister was pregnant at the same age and caused a lot of family hurt.

Boyfriend closer to her dad than she is—would hurt his relationship with her family.

Father is a doctor, she works for him, knows he is anti-abortion. They have all talked about it and says her parents would never allow her to have an abortion.

These are common reasons why they would tell us they don't want to tell either parent.

Reasons why one parent is aware:

Told mom because, you should have parents during this time.

[40] Sees dad but they have poor communication so did not want him to know.

Q These are reasons why they don't tell the other one?
A Right, right. Father lives in Alaska, no contact for years.

Name on birth certificate only for child support reasons. Tried to locate dad, he was in prison. Went to court. She missed three days of school and mom missing two days of work.

Did not tell dad because he would hassle mom.

Father out of state.

Father sees her about once a year. He has promised to pay for her college and she is afraid he would change his mind.

Parents thought it would be good for her to go through court.

Dad not very understanding. None of the six kids like him. Mom is thinking of getting a legal separation.

Father would be disappointed and sometimes he is violent.

Father unaware, alcoholic.

He would get overly angry.

Says father is extremely fond of her and this would be hard for him.

Doctors orders not to tell father.

[41] Father not an active member of the family, unstable.

Didn't tell him because he couldn't handle it.

Couldn't get ahold of one parent.

Dad would hassle mom and blame her if he knew.

Father in another state. Says brother has little problems and she is anorexic because of dad.

Okay, mother was abusive and she chose to live with her father. She has had minimal contact with her mother since that time. Mother has undergone psychiatric treatment and has been hospitalized several times.

This was one who chose to tell neither parent and she said that three years ago her father found her older sister in a somewhat compromising situation with her boyfriend. She said her father became so enraged over this that he took her sister to a bar on Hennepin Avenue in downtown Minneapolis and forced her to sit and watch the prostitutes the way they were picked up by men. She said that he told her sister that if she were going to act like a whore she should see the way they live. This young woman felt strongly neither one of her parents should know she was pregnant.

Q Ms. Wendt, you have talked to thousands of teenage women in Minnesota. Do you think their fears are genuine?

A I think their fears are genuine and I think they don't even tell us half of what is going on in their families.

Q Why do you think that is, is that your professional [42] assessment as a counselor, that you don't even see half of what is going on?

A This is my professional opinion counseling women of all ages for a whole lot of years, women who are emotionally, sexually or physically abused tend not even to think of it as something they would tell you about. So you will always find under-reporting and people who work in medical clinics are real aware of that.

Q So if there is a situation of emotional or sexual abuse or battering that doesn't come right out, they don't—

A It often does not come right out. When I work as a nurse and do the physical exams, what we learn to pick up then is any unusual bruises or marks on women's bodies and if you generally—if you say to a woman tell me who hit you or tell me

what happened they will say nothing. They will say nobody did or nothing happened. But if you look at her and say tell me who hurt you like that or, you know, it looks like somebody did this to you on purpose, why did that happen—it is always the way you phrase it, then she will say that she has been abused or that she was assaulted or whatever.

So we see it in two different ways. I see it as working as a nurse and I see it working as a counselor. We learn different ways to pick up the abuse in the clients that we see and a lot of times it is sort of under the surface a little bit, you have to know what you are looking for in order [43] to be able to find it.

So the answer is yes, they don't always come right out and tell us that they have been abused or are being abused.

Q So you think that teenagers' assessments of their family situation or reaction are pretty genuine?

A I think they are genuine and I think they don't even know the extent that it is happening to them in their own families sometimes.

Q In your counseling, individual counseling sessions, or your work at the teen clinic, do you run into a lot of families in Minnesota where there is a battering situation?

A Run into it quite a lot. We have a format at the teen clinic we use where we ask them to check for us whether or not they have ever been physically or sexually abused and it is always amazing to me how many of them will check yes because—

Q This surprises even you?

A It does, it really does. And then I will also talk about it, I say, well, now, tell me, you checked yes here, tell me what this is all about and a fair number of them are currently in a situation where they are in danger and of course, at Meadowbrook and the teen clinic once I hear that then I am responsible to report to Child Protection, which just adds a whole other part to all of this.

Q How does, if you report to Child Protection something you hear from a minor at Meadowbrook, doesn't that compromise [44] her abortion privacy?

A Well, we are never quite sure about that. It seems to depend on the county we report to. I have gotten angry phone calls from parents who are furious because they find out I

reported a problem in their family and they just want me to know there is no problem here and the people I reported to will occasionally say to me, oh, the Smith family, we know them well, we have been dealing with them for a long time.

But by law in Minnesota we have to report when we hear that things like that are going on.

Q So if you report to Child Protection then doesn't the family find out that the daughter was at your place for an abortion?

A Sometimes they do.

Q Isn't this a conflict?

A It is very difficult for us.

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[47] * * *

Q As if you could waive that?

A Right, right. They are very frightened about the court bypass. They are very nervous about that. They don't understand. Even those who have been in court before have been in court because they have been in trouble with the law or they have been involved in their parents' custody or divorce so either they know nothing about the court or their experience has been pretty negative.

So we want them to know that they have a true option that they can either tell one or both parents or they can go to court.

Q Do they understand the biological parent distinction?

A Not always. Not always. We will say over the telephone this means both of your biological parents. Do you live with both of your biological parents and if a mother calls or a [48] father calls then they are going to bring consent from the other parent. We say this is her biological father and mother, and it has totally changed the way we make appointments going over all of this.

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[53] Q Is it your professional opinion that the physical abuse exception in the law does not really except those kids who are subject to physical abuse?

A That is correct.

Q The law doesn't require that it have been reported but does Meadowbrook have any internal policies on that?

A Well, can I read this phrase in here?

Q Yeah, read the phrase in the law, refer to the law. In fact, that would be very helpful to the Court, I think.

A Well, it says if the pregnant minor woman declares that she is a victim of sexual abuse, neglect or physical abuse as defined in Section 626.556, notice of that declaration shall be made to the proper authorities.

On the next page, "A person shall not be held liable under this section if the person establishes by written evidence that the person relied upon evidence sufficient to convince a careful and prudent person that the representations of the pregnant woman are bonafide and true."

Well, that doesn't say a lot about what kind of information we need and we never felt that if she just said on the telephone she was a victim of sexual or physical abuse that that would be enough to satisfy the law. When we see women who are pregnant from rape or from incest our policy is that we do an abortion at no charge for these women if it has been reported to the police or a rape counseling center. So [54] we already had a policy on sort of how we defined this.

Occasionally we have had a young woman come in who is like pregnant by a father and the case is in litigation and clearly it has been reported to child abuse authorities and, you know, that is all we do.

But as far as those young women who are physically or sexually abused we don't—we do require that they go to court in order to satisfy the law.

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BY MS. BENSHOOF:

Q Why is that?

A Because I feel that that sentence is very unclear, that it says that I can let her go through without either telling her parents or going to court if I have reason to believe that she has been physically or sexually abused and if it has been reported to the proper authorities, but by whom, by her, by me, you know,

how much abuse, what are the constraints here, what is the definition of this.

Q Have you discussed this Meadowbrook policy with your doctors?

A A lot.

[55] Q And how do they feel that you should interpret this?

A They feel that I should always act as conservatively as possible.

Q Why?

A Because they feel that they are liable if they do not uphold this law.

Q What happens if a minor comes in and says here is a note from my mom, notarized, and my dad is dead or a minor and her mom comes in and says dad is dead. What do you do then?

A If they tell us one party is deceased we ask them to bring us proof of that which is either a death certificate or some other mention of the death like in the paper or from the funeral home.

Q Well, when you require minors or mothers who have lost husbands to bring in death certificates or funeral home certificates, isn't this a little traumatic?

A It is for a lot of them. They are very upset that we won't take their word for it. The reason we don't take their word for it is that in the beginning of all of this we had cases where a parent would come in with a daughter for a pregnancy test and say they wanted an abortion. We would say the biological father has to consent or you go to court and the mother would say, but he is dead, and I would say, well, you know, when did it happen or I need some sort of a notice of this and then she would say to me, one woman said to me, well, [56] he is in Louisiana, and then I said, we have to send a letter of notice to him or you need to go to court or you need to get a notarized letter from him and then she told me that he lived on Portland Avenue. So we had enough of those cases occur that we didn't feel that we could always take our parents' word for what the situation was and my doctors always look over the charts and they always look to see how this law has been upheld and they felt that we needed some verification of this in the chart.

But it is a difficult thing to bring up with people especially sometimes, I think especially mothers more than anybody, it is like they are dealing with this problem with their child now and then we ask them to revert back to another kind of problem.

Q Give an example.

A It is hard on the minors too, they will bring in death certificates, like, you know, mother murdered, found dead in field.

Q Is that a real story?

A It is a real story. Or father suicide, shot his brains out. They will come in with these things and it is like you can't just put it in the chart and never comment on it so then most of the counseling session we talk about what happened in the family and then how everything is going now and how has everything gone since.

[57] Q So often instead of focusing on the minor and abortion you have to give therapy for the suicide or death?

A It gets all brought up for them.

Q Do you find that has changed the nature of counseling?

A It does. Sometimes, I mean, this whole law, in a lot of ways has changed the nature of what we did. If she is going to be a court person we spend most of our time in the morning talking about going to court, getting to court, what it is going to be like, what kind of things she needs to know.

Q Just back up a minute; you say in the morning, you mean those minors who are going to court must come at 7:30?

A Right. The judges in Hennepin County want the minors to be counseled by Meadowbrook staff or abortion clinic staff before they go to court.

Q Is that the legal requirement?

A That is not a legal requirement—it is a request they make.

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[60] * * *

Q And as a counselor how do you feel about this? What is your professional opinion about this change in counseling of pregnant minors for their emotional and psychological health?

A I think in a lot of—in a lot of ways they are being shortchanged now and it is very different for them than it was before

we had this law. Even when they come back from court between 1:00 o'clock and 2:00 o'clock they have been up for a long time and they have been busy for a long time and they still have—wouldn't have had the abortion done yet. We feel we can't burden them anymore by taking more of their time and energy and doing this huge counseling session again. So what we do is we move them all ahead to the cashier and we move them all ahead to procedure. They do see a counselor again when they come back, but they are hungry, tired, sick, a **[61]** lot of them, and they just want to do this and get this over with. They have been very burdened for a day, a couple of days because of this. So it has changed from the way it was before. We don't have the kind of time to spend with her talking about her relationship with her parents, her relationship with her boyfriend, how she feels about sexually active at 16, what are her thoughts about contraception. We still do it all but we used to have more time to do it before. I think that we used to establish more of a relationship with her.

I think that part of what we do is we are sort of role models and teachers for them because they are young women who are sexually active and they got pregnant and they are having an abortion and some of them aren't very good contraceptors yet and they are good medical consumers yet so we try to do a lot of them with our young women and the law makes it a lot harder for us, makes it a lot harder for her to get what she needs.

Q When you counsel a minor at 7:30 in the morning, who might have been up driving for two hours, are her concerns in counseling on the abortion or the court?

A Her concerns are not on the abortion until she comes back. It is like they put it on hold until they come back. They will go to court and be very determined about that but they are very afraid they are going to denied and they always want to know what the judge is going to ask me and is he going to let **[62]** me have the abortion.

Then when they come back it is all of a sudden they will be overwhelmed by this fear of what they have to do next because the next thing they have to do is go in there and have the abortion. All of a sudden they realize, oh, I have to go do something

that is going to be painful. Now that I have done all this, this is now, I have to do this too.

Q Are they often physically ill in the morning from being pregnant?

A They are. A lot of our patients are and they are too. It is just that our other patients get to come in, get the abortion done a lot sooner.

Q I mean, I guess what I am asking is a medical question, is morning sickness really in the morning?

A For a lot of women it is.

Q So that the counseling to get them to court and getting to court is the time of the pregnancy sickness time?

A Uh-huh. And we always hold food for our patients. With our minors we have to always remember to say, now on your way out of the building stop at the coffee shop and buy a roll and a glass of milk because she will not be back until 1:00 or 2:00 in the afternoon, she will be dizzy, sick, and the procedure will be harder on her and a lot of times she will say I don't want to eat in the morning, I don't eat in the morning. I will say please eat a roll and drink a glass of milk because I am thinking of what she will be like when she comes back.

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[65] * * *

BY MS. BENSHOOF:

Q Ms. Wendt, since August 1st, 1981 and to the present, how many minors have been patients at the Meadowbrook Clinic?

A Up until December of 1985 we have seen 2895.

Q And how many of these minors went to court?

A About half of those minors went to court.

Q Do you have the exact figures?

A 1160.

Q Out of those 2895 minors, do you know how many came from Hennepin County and how many from other parts of Minnesota?

A The number of patients who come from counties other than Hennepin and Ramsey was 1880.

Q And how many of those patients were second trimester patients, those minor patients?

A Of the total number of minors seen, 672 were second trimester abortion patients.

Q Ms. Wendt, getting back to where we were stopping your testimony yesterday, you stated that your clinic requires that when a minor chooses not to go through the court bypass system **[66]** or have mailed notification, she brings in a letter from both parents or brings both parents to the clinic with her, is that correct?

A That is correct.

Q What kind of letter do you require?

A We require a letter consenting to the abortion that the parent signs and has notarized.

Q Why do you require that this letter be notarized?

A We feel that that is the best way to know that these are indeed her biological parents.

Q Do you send minors back out of the clinic if there is improper compliance with this requirement?

A Yes, we do.

Q How often does that occur?

A It happens about once a week.

Q Do you know how many minors you sent back in the month of January because of improper compliance?

A In the last two weeks of January I think it was two.

Q Do you know the circumstances of those two minors?

A Yes, I do. Let's see—well, let me think—one was a young woman who came in with a father and did not bring a notarized note from the mother so we had to send them back to get the note from the mother notarized.

Q Do you know how much travel time was involved in that particular minor?

* * * * *

[73] But that happens sometimes when we send these letters, so—

BY MS. BENSHOOF:

Q Did they understand why they couldn't have the abortion that day?

A No, not really. They didn't quite understand that there is a time delay that we have to adhere to or that we feel we have to adhere to.

Mom, as a custodial parent, was very upset that dad had to be notified at all. They had the option of going to the court but they did choose to send the letter. They didn't think they would have to end up speaking to him about it.

Q How pregnant was this young girl?

A She was eight weeks pregnant.

Q So the delay in this instance didn't cause a change in the cost of the abortion?

A No, it didn't cause that. It did delay her four days and it upset the mother and daughter very much and upset the man in Detroit also very much.

Q How far did they have to travel?

A They came from Plymouth, so probably about 30 miles.

Q You stated that one of the options under the law is that your minor patient can choose to mail notification to both parents.

About how many of your minor patients choose this option under the law?

[74] A About 4 percent choose to mail letter of notice to a parent. They could mail to both parents, usually it turns out to one parent and it is usually an absent parent; someone who has been absent for many years.

Q So this option is really chosen by those minors in two biological parent families?

A Correct.

Q You stated 4 percent. Do you know about how many a year then choose this option?

A Probably about 20 or 24 a year will do this.

Q Do you know about—if you don't—if you could give an educated approximation, how many of your minor patients actually live with both biological parents?

A I think about 25 percent live with both biological parents.

Q Live with. You testified earlier that about 25 percent tell both biological parents. Do you know how many live with both biological parents?

A Oh, it would be about 50 percent live with both.

Q In contrast to the timing for a minor who chooses mailed notification, how is the time for adult women different?

A Adult women have no time constraints at all. They can call—

THE COURT: Excuse me for interrupting; you say she said 25 percent tell their parents, I understood her to say [75] that before the law 25 percent of the minors told their parents.

MS. BENSHOOF: Right. She said before the law 25 percent told both parents. More told one before the law, she testified 25 percent told both.

THE COURT: I didn't get both. I got parents. Is that what you are telling us?

THE WITNESS: Uh-huh.

* * * * *

[76] * * *

Q When you tell minors, and you have done this personally hundreds, thousands of times, that there will be a three-day or more delay once the letter is mailed, what are their reactions?

A Well, they don't quite understand why that has to be. We just tell them that it is arbitrary, the law has built into it this amount of time that is a waiting period. It is a difficult decision for them to make whether or not they want that letter sent in the first place because, of course, there is a chance that it will reach that parent and sometimes that is the only contact that they will have had in years and they are very mixed about it. So on the one hand they would like some [77] contact with the parent but they are embarrassed and ashamed that it is a pregnancy-related kind of contact.

Q How do the mothers that accompany the minors who have to have a mailed notification to an ex-husband or a never husband react to this statement by you that they must mail and then wait?

A They generally react with anger and frustration and irritation and then tell us—tell me the stories of their various separation, child custody battles and money problems. So we get into all of the things that happened when that relationship split up and a lot of it comes back again. I have to talk to mothers who were interested in pursuing child support with the absent father and use this as a way to find out where that man is through other relatives and it is, you know, that is not even what is happening with her minor daughter and being in our clinic, but that is like a secondary thing that starts because of that.

Q You say the focus then goes away from the minor to the whole family problem.

A It goes back to the marriage.

Q What reactions, if any, has Meadowbrook gotten from parents who received the mailed notification?

MR. GALUS: Objection, hearsay.

THE COURT: Objection overruled. It is admissible not for its truth but just what was said, it seems to me—I [78] guess it does, its truth is the significance of it. You may answer; go ahead.

THE WITNESS: Okay. I am the one who gets the telephone calls when the parents who receive the letter are very angry about getting the letter, finding out that their daughter is pregnant and being notified of the whole situation.

We have a letter we send that has the minor's name and the date of the abortion and then in the body of the letter is something about, you know, a teenage pregnancy is difficult for everybody and we ask you give her your love, care and support at this time. We thought we would soften it a little bit when we send these letters and we don't hear from them very often, but when we do the absent parent is usually very angry and it has to do with their not feeling we have a right to do an abortion at all on their daughter.

They are not sure they want her to have one, even though they haven't seen her for years and they are really angry with the custodial parent who usually is the mother for letting this happen, letting the daughter get pregnant.

Occasionally we will be threatened by an absent parent. There was a big family argument a few years ago where a mother brought a young daughter to the clinic for an abortion. The father received a notarized letter—I mean, a certified letter informing him. He called the clinic, was anti-abortion, was going to stop the abortion from [79] happening. We told him he could not.

Q You spoke to him?

A My former boss spoke to him and I sat in her office because the patient was my patient. As the administrator of the clinic she spoke with him. We told the mother that we couldn't see her daughter for an abortion until all of this calmed down because this whole extended family was getting involved in this and the mother said don't worry, I will take care of it. She drove over to the father's house and shot her gun through his door and came back and said he will not bother you again.

Q The mother had shot the father?

A She didn't shoot the father, she shot the door.

* * * * *

Q Was this reported to the police?

A I don't know.

Q Did you then proceed with the abortion?

A Yes, we did.

Q Was there a delay because of this?

A There was some days delay there.

Q You have stated that you have gotten reactions to Meadowbrook from mailed notifications. Do you have any [80] personal knowledge as to what effect the mailed notification has on the minor or her parent that is in your charts?

A From talking to some of them, when they come back for their checkups—

Q How long after the abortion?

A Two weeks after the abortion, after talking to some of them when they bring their girlfriends back from abortions, I don't know of one instance where contact with the absent parent has been reestablished because he or she got the letter; even when there was contact at that time. So I feel badly for the kids because that is something that they want and yet, you know,

over a short period of time after the abortion I know from them that that has not happened.

Q By contact do you mean—what do you mean by that word, "contact"?

A That the parent would call again to see how she was or would say, you know, I would like to start seeing you again or spend some time with you. That is what the minors tell me that they would want from sending that letter or from having some sort of a forced contact with him or her.

* * * * *

[85] * * *

Q As a counselor and nurse do you believe that some of this parental notice that you have just described, is that detrimental to the minor's health?

A I think it is detrimental to her emotional, psychological, primarily those two aspects of her health and also her physical health if it delays her getting the abortion.

Q Has a parent contacted pursuant to the law ever contacted the minor to help with medical information on a minor?

A I have never had a parent contacted to give me medical information on a minor.

Q When a parent comes to the clinic with a minor do you take the medical history with the parent present or not?

A We always see our patient alone when we do the medical history, we feel that—

Q Why?

A We feel we get more accurate medical history if there is nobody else there, particularly with the minors because they will have some aspects of their medical history that their parents do not know about and we want to know those things; like drug use, problems with drugs, suicide attempts, accidents, other kinds of thing that they have been involved in. They generally won't tell us all of those things if there is a parent in the room.

[86] Q You said suicide attempts. Are you saying that you find out about suicide attempts that the parents don't know about?

A Yes, we do. We ask—we check that out with all our patients. When women call and we make the appointment we

ask each patient if she has ever seen a counselor, a psychiatrist, attempted suicide, or been hospitalized for depression. For women who have had those kind of histories we want to make sure before they come that they have access to psychological help and support if they need it and then the nurse asks it, then we ask her also to fill it out on the self history sheet and the nurse will ask it again when she does the exam. We find lots of women of all ages who have had varieties of emotional problems or problems with depression or suicide attempts and a lot of teenagers make suicide attempts that nobody ever knows about.

Q Does this surprise you?

A I don't know if it surprises me, I think after all this time it doesn't surprise me. I think what I get concerned about is nobody knows about it and if these things haven't changed in her life, then I am afraid that she is at risk for having it happen again.

Now this shouldn't be a secret that she carries by herself.

Q When you find this out do the counselors discuss the problem with her?

[87] A We always discuss when it was, what happened, what she did about it. It is pretty common for—well, when people make suicide attempts if they have to go to the hospital they will be seen in the emergency room but never see a counselor-therapist or psychiatrist. So we have lots of women who try to kill themselves who have never seen anybody therapeutically which I think is amazing and our requirement is that if somebody has attempted suicide within the last three to five years and it was a true attempt, like they took enough pills to truly kill themselves, then we require a psychiatric evaluation before we do the abortion.

Q So you find out from your interviews with the minors that they have not told their parents about the serious problems in their life?

A Those personal emotional feelings that they have, yes.

Q When you have minor patients who come in with one parent with them, does that one parent come in and sit down and talk to you and tell you why they think the other parent shouldn't be notified?

A Yes, they often do that. We also see the patient—

Q Could you just describe what process you go through in talking to the other parent and what reasons they give you?

A We always talk to the patient alone first, and in this instance the minor patient, and then when we have the mother sign the consent form or the father sign the consent form, [88] then we talk to them about how all of this has been going, do they have any questions, and generally we don't solicit their feelings about the law or their feelings about going to court or notifying a parent, they tell us how they feel about all of this.

The basic feeling is that they feel it is a real infringement on their privacy and their rights as custodial parents. A lot of mothers or custodial parents who have been through a bad divorce, I think that the divorce means that the absent parent has no legal rights at all to that child and they don't understand that it has to be "termination of parental rights", and that happens rarely. So they have been believing that the other parent has absolutely no right to know anything about that child that they are raising and then we tell them that either they have to go to court or they have to get a letter of consent or we have to send a letter informing that absent parent, and they are very angry about that. They want us to do something about it.

THE COURT: It appears that you are.
THE WITNESS: You mean right now?
THE COURT: Right at this very moment.
THE WITNESS: Right at this very moment.

BY MS. BENSHOOF:

Q They want you to do something about it. Are some of the women battered?

[89] A Yes, some of the women are battered, they have been in bad marriages and been left with no money and they have been raising these kids and they feel they have been very burdened by these bad marriages.

Q Do some of the battered women feel that notice to their father is going to invoke a battering incident?

A Mostly the ones who are still living with that man, they will—the daughter and the mother will sometimes tell us that

they can't let him know about the abortion because he would be very angry and blame the mother and take it out on mother. I think we find more women who are being battered in these families than we do minors. It is unfortunate that this is another way that the minor gets involved in her parents' marriage because it is—she is pregnant and she is trying to decide whether or not to have an abortion and her parents' marriage shouldn't really affect that.

But what happens is the mother will be so angry or worried or concerned when we all three talk together we end up talking about the marriage and the temper of the father and what he is going to do to the mother and the daughter is supporting the mother in the bad marriage.

Q In your professional opinion, based on seeing thousands of these cases, is the two-parent notice requirement the burden on single-parent families?

A It is a big burden on single-parent families and in a lot **[90]** of ways.

They simply do not understand why it has to affect them at all for a lot of them that marriage or relationship is considered over. There is very little contact with the absent parent, and just the very thought, even if there is a court bypass, just the very thought that they might have to contact that parent or might have had to contact that parent enrages them.

THE COURT: You say a notice, in two-parent families?

THE WITNESS: One custodial parent families.

THE COURT: Okay.

THE WITNESS: they have a very hard time with that and even if there is a court bypass they a lot of times go with their daughter to court, they feel strongly that if the daughter chooses to tell them that they should be the only person involved in this decision and they don't like letting the people at court know their private business, the custodial parent doesn't.

The minors don't either, but the parents have very strong feelings about this.

Q Would you say that counseling of patients has changed since the law was implemented in Minnesota as far as your clinic practice is concerned?

A As far as the kind of counseling I do, before the law, **[91]** if I was dealing with a patient and custodial parent we would talk about their relationship, how they were each doing.

Q You mean—"they" meaning the minor and the—

A The mom and the daughter, how mom was doing knowing about the daughter's pregnancy, how they were getting along what effect it would have on the future and I still talk about those things. But now I have to add in the part about how was court for you and then hear about the marriage and all of those other problems, that sort of get reawakened by having to comply with this law.

Q Have you been aware among your patients of violence to occur within a family because of knowledge of the teenager's pregnancy?

A Yes, I have, in many, many cases.

* * * * *

[92] * * *

BY MS. BENSHOOF:

Q When violence occurs, is this noted in the patient's charts?

A Often it is, especially if it happens at the clinic.

Q And do you have personal knowledge of violence occurring at the clinic?

A I do.

Q Could you tell the Court about that?

A A couple of weeks ago a young woman came in with both of her parents. Her boyfriend wanted to be a support person so he came also with one of his friends and the mother found him in the lobby and told him he had better leave and the two young people said he was not leaving—

MR. GALUS: Excuse me, I would like to move to strike that conversation in the lobby.

BY MS. BENSHOOF:

Q I would like to go back a minute, Ms. Wendt; you stated that a young girl came with two parents. Is this someone who chose not to go through court?

A This is somebody who because of time involved couldn't make it through the court process and out of desperation had to tell her parents.

Q This is someone who tried to go to court but couldn't?

[93] A She wanted to go to court but she couldn't make it. She was trying to go to Ramsey County Court and with the appointment to go to Planned Parenthood and see a counselor and then to see the public defender, to go to court, she ran out of time. She got grounded for some other reason at home and knew she had to tell her parents finally in order to get to an abortion clinic to have the abortion.

Q This is one of your patients?

A This is one of my patients.

MR. GALUS: Your Honor, I would like to move to strike that portion of the preceding answer referring to experiences of this person with the Ramsey County Court system and the public defender in the absence of any foundation as to this witness' firsthand knowledge of those experiences.

THE COURT: Objection overruled and the answer may stand. Go ahead, tell us about the story.

THE WITNESS: So the father went into the lobby and beat up the boyfriend in the lobby.

BY MS. BENSHOOF:

Q Were others of your patients in the lobby?

A There were about 50 people in the lobby and one of the nurses heard the noise and ran out there and told this man he had to stop and he had to leave so he dragged the boyfriend out to the front desk and threw him into the wall a couple of [94] times and then he left.

Q What did you do about this situation? You were in charge then of the situation, is that true?

A I was in charge of the situation. We called hospital security—

THE COURT: Maybe I don't have to know all of the details of it, counsel. What do I care what she did.

MS. BENSHOOF: Okay.

BY MS. BENSHOOF:

Q What happened to the minor after, and her pregnancy, after this violence occured?

A Well, there was so much arguing going on between the minor and the mother that I said they could not have the abortion on that day until things calmed down.

What ended up happening was that the minor got kicked out of her house, went to live with grandma, and got kicked out of grandma's house and the last I heard was living with the boyfriend's sister.

Q When you testified a little earlier that about 1800 of your patients have gone to court, is that the right figure—1160 of your patients have gone through court—

A Right.

Q Do you know approximately about how many of these patients have gotten certified as mature and how many as best interest?

[95] A Well, in the last three months of 1985 51 percent were certified as mature and 48 mature and best interest.

Q So 99 percent were mature?

A Correct.

Q But some were also checked best interest?

A Correct.

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Q In this three-month figure that you testified about you said that 99 percent were mature.

[96] How many were found best interest out of that group of minors?

A 1 percent was found in best interest.

THE COURT: Well, now, wait a minute, you have given me percentages, 51 percent and 48 percent of the 200 and then one is best interest?

THE WITNESS: One person was marked in best interest.

THE COURT: All right.

BY MS. BENSHOOF:

Q Are you familiar with the patient file of that one person?

A I am.

Q And have you brought that file with you today?

A Yes.

Q Could you describe that one best interest minor for this Court?

A She was a young woman who was 17 years old who is in school and works. She will be 18 in March. She is a regular contraceptor and she has had regular medical care in the past.

Q Are those all indications to you as a professional of maturity?

A Yes, they are.

* * * * *

[106] * *

Q Can teenagers get one-day D&E procedures when they have to go to court?

A They cannot.

Q Why not?

A Because they have to be in court at 10:30 in the morning. We insert all the laminaria between 9:30 and 10:00 o'clock in the morning. Once you put the laminaria in the cervix the abortion has begun and we can't insert laminaria and send them downtown to go to court because their petitions have not been approved yet. So for the teenage women who go to court what would be a one-day process for her will become a two-day process.

Q How do the teenagers react to this?

A They are resigned to it. They know that there is no way out of it. They don't have any other options, you know, they

want the abortion badly enough, they will do anything that we tell them that they have to do.

It is very hard for them a lot of times; they will end up delaying even more because sometimes they can't come back the next day to have the abortion done so they will come in, get prepared for court, go to court, and come back and reschedule for another couple of days or reschedule for another day. So it will complicate the whole process for them quite a lot.

[107] * * * * *

Q From your experiences you have described about what teenagers go through, to get to court, and to go through court, they are pretty desperate to have that abortion without parental knowledge; is that your opinion?

A When they went to do it without telling their parents, they feel very strongly about doing that and they will make arrangements that they need to make. I can't believe sometimes that they can actually get to the clinic and make all of these arrangements and carry it all out. It astonishes me. I forget **[108]** sometimes that they don't have the same—they don't have the same sort of freedoms that I do, they don't have the money, the time, the privacy. They will come, it is not infrequent, to have Methodist security tell me that they found some of my patients sleeping in their cars in the parking lot or they spent the night in the hospital lobby. I forget they sometimes don't have money for food and motel, you know, so they will do anything to get these arrangements taken care of.

Q Do you have a patient example in January in which the patient, because of this law, could not obtain a one-day dilation and evacuation procedure?

A I do. I know of many cases like this but this is one specific case. What the minors will occasionally do when they make their appointment is tell us they are 18 and we will tell them they have to bring identification when they come and in this particular case, of course, she said yes and she came to the clinic and we asked her for her identification and she told us she was 16. They seem to think that if they—

Q What day did she come to the clinic?

A 12/23. They seem to think if they just get there and show up we are not going to turn them away.

Q But do you turn them away?

A We always do. So we told her about court and she got an appointment for January 2nd and we inserted laminaria for her on the 6th and did her abortion on the 7th. So she went from **[109]** being 16 weeks pregnant to being 19 weeks pregnant before she finally got the abortion.

Q How come? Do you have any personal knowledge, or if it is in your records, why she had to wait from 12/23 to January 2nd to get to court?

A I don't know that.

Q Why—how much did the abortion cost increase?

A It increased $100 for her.

Q And there were how many days delay?

A There were—it took her 15 days from the first contact until the abortion was finished.

Q So she had a 19-week abortion?

A Correct.

Q If this law was not in place could she have had her abortion accomplished in one day?

A She would have had it done on the 23rd and it would have been done in one day.

Q Do you know if she had one supportive parent?

A She didn't have either supportive parent.

She ended up telling her sister, who lives in Minneapolis because of our requirement that she spend the night in the city.

Q Based on your experience with this law, with your patients at Meadowbrook, has the parental notification requirement delayed abortions for teenagers?

[110] A It does delay them. It delays them for a whole lot of reasons. This is just sometimes involved in understanding what the law is and deciding what they want to do and then deciding how they are going to carry that out. So really no matter which option they choose there is always a delay. Even if they have two supportive parents we require that they either bring the parents to sign the consent and we check ID on the parents, or she has to bring a notarized letter of consent from each parent.

So, you know, before 1981 she would just come and say, yes, I told my parents and we are getting along fine about it, but now even for those families there is some delay involved plus the original delay in telling her parents in the first place, if you are pregnant.

Q As a counselor and nurse what is the effect of this delay on the minor's physical or mental wellbeing?

A Well, I believe that would she be able to have the abortion as soon as she can make arrangements like a woman of any other age, even a delay of three or four days or a week in my opinion is damaging for her physically and emotionally. I don't believe she should have to go through that to obtain an abortion. There are different kinds of burdens depending upon how she has chosen to satisfy the law which we see repeated over time. It is not really easy for any of them. I think it depends on her individual situation, of course, which **[111]** ends up being the worst; but even in families where the minor lives with a supportive custodial parent and decides to tell that parent they still have to decide and they usually decide together whether to inform the absent parent or whether to go to court.

So there is an increased burden on certainly the minor and her abortion decision, and also on her mother or the custodial parent because it brings in that whole other problem of what happened in the relationship between the two adults. So the minor is definitely burdened by her mom's feelings about all of this and what might happen now with the absent parent.

For those who go to court in some ways it is easier for them because their parents never do need to know, but it takes a lot of planning and a lot of determination for them to do this. There are a lot of arrangements for them to make and they feel very sensitive and embarrassed about letting a group of strangers know that they are pregnant.

Q What do you mean by a group of strangers?

A The people at court. It is a whole new group of people that they need to meet in addition to the people at the clinic and they feel very sensitive and embarrassed by people having to know their personal business. Teenagers tend to feel that way. But to have something like this be so public is very hard for

them. They always are real concerned about what kind of [112] questions are going to be asked them.

The custodial moms who go to court are also concerned about that. They have real negative feelings about having strangers involved in their life with their child in the way they are raising their child, so there is a lot of anger and resentment about that. That is more from the custodial parent. The teenagers are just sort of more sensitive to it and embarrassed and ashamed by all of it.

Q You stated that the teenagers feel shamed. Do you feel this shame at going to court based on your experiences as a counselor is something that will last all their life for some of them?

A I think for a lot of them this whole pregnancy-abortion-complying with the law scenario in their lives is going to be active for them for a long time. What I know from the past is that when they told supportive parents and had supportive parents it could turn into a positive experience for them, but the law makes them do a variety of things. I mean, they can choose one but they still have to do something to comply and it is not really their free will anymore and they are telling people in a lot of ways what is going on for them privately.

It depends on what the experience was like. Some of them are upset about going to court, they feel like they have done something wrong or they have had to prove why they should be able to have an abortion. I used to see that when [113] I sent women out of state, they would try to prove to me they should be able to have an abortion. I was always saying you don't need to have to prove that to me, that is your right and the kids say that about going to court too. Where there is the most negative impact I think is when they tell parents they should not have told.

Q Because court isn't an option?

A Yes. For a variety of reasons they don't believe it is an option, they are afraid of it, they are not sure they could work it out for themselves. So for a lot of them the minute I say court it is like they go deaf, it is no longer something that they hear me talking about. So they tell parents who ordinarily they would not have. This is one of those kinds of things that parents don't

let go of. For some parents once they know their daughter has been pregnant and either had a child or an abortion the whole thing about trust, responsibility, being mature, a lot of times the teenagers have problems for a long time because of this.

THE COURT: Are you suggesting they don't have problems just by virtue of being pregnant and having an abortion? Isn't that traumatic?

THE WITNESS: Yes, it is.

THE COURT: Notification or no notification?

THE WITNESS: I think it is very true it is a very difficult situation for any woman. Sometimes the teenagers [114] seem to do better with it because they know they cannot be a parent. Older women will tend to be more ambivalent about whether it is the best decision. So just being pregnant and deciding what to do is incredibly stressful and the patients have generally used us or the clinic as a way to work that out and as a resource in the future also. So we find that when they tell parents who are not supportive it becomes even more traumatic for them.

BY MS. BENSHOOF:

Q To follow up the judge's question, this is a very vulnerable time, let's say a minor has a support system erected for her; when she goes to the clinic, like she has told her mother or her aunt or her boyfriend's parents, does the notification process—how does that affect this support system that has already been erected to help the girl?

A Well, that same support system stays there and usually we meet those people, but then those people will end up also being involved in the court or the notification process. So it becomes very large for a lot of these young people.

Q Would you say for some minors their present support systems are undermined by this interference by the state?

A I would say—I don't know I would say that compliance with the law doesn't allow them to turn to their best support persons all the time; that where a lot of them would have done it alone with a supportive boyfriend or sister or maybe school

[115] counselor, they are not allowed to do that anymore. They are being forced to involve other people in their decision.

Q Do you believe that forced notification, that is those minors who are either forced to tell their parents because they can't face court, or those minors who have gone to court because the law requires it, do you believe that system has improved the quality of the minor's abortion decision, your patient's—your patient's abortion decisions?

A I believe it complicated their abortion decision and it has complicated it for them even after the abortion.

* * * * *

CROSS EXAMINATION
BY MR. GALUS:

[140] * * *

Q Ms. Wendt, irrespective of any directive from any Minnesota state court concerning counseling, does Meadowbrook in the ordinary course of its business examine minors, cause minors to be examined by a physician before performing the abortion?

A Yes. Every patient is examined by a doctor before having an abortion.

Q And irrespective of any obligation of the statute at issue in this lawsuit, or any directive from Judge Oleisky or any other court, it is true, is it not, that Meadowbrook, in the normal course of its business, explains aftercare procedures to its patients?

A Yes.

Q And it does so in a manner that will make those procedures understood?

A Yes.

[141] Q Irrespective of the statute at issue in this lawsuit, for example, those minor women who were not going through the court process, is it Meadowbrook's standard practice to inform patients of any medical complications that can occur?

A Yes, it is.

Q An attempt to see to it that the patient understands those complications?

A Correct.

Q And I take it that in a normal course of your business even for those minor patients not affected by the obligation to go to court, you take care to see to it a true statement of medical history is given to a physician?

A Yes.

Q I take it irrespective of the statute and irrespective of that class of minors that are going to satisfy the statute by going to court, I take it a physician advises—it is the practice of Meadowbrook to advise each of its patients as to any additional physical risks—I am sorry—that may be present because of any anomalies in their medical history?

A Yes, it is.

Q And I take it that irrespective of any obligation imposed by a court or by the statute it is the normal course of Meadowbrook's business or the normal nature of its counseling to have the minor sign an informed consent form, correct?

A Correct.

[142] Q Including a statement about the physician's liability.

A Correct.

Q And you in the course of—you counsel all of minor patients, do you not?

A Yes, we do.

Q Even those that are not going to court?

A Yes, we do.

Q Irrespective of any court-imposed requirement of counseling, is it the normal course of your counseling to counsel as to pregnancy alternatives?

A Yes, it is.

Q And including abortion, adoption, marriage and single parenthood?

A Yes.

Q Okay. And in the course of counseling you try to draw out the young woman as to whether or not you feel she needs any additional counseling, is that correct?

A We make that assessment, yes.

Q Do you counsel irrespective of any directive from any Minnesota court or any obligation imposed by the statute at issue in this lawsuit? Is it the normal practice at Meadowbrook

to counsel pregnant minors as to possible emotional and psychological problems that she might experience after abortion?

A We counsel all women about those possibilities.

[143] Q And do you counsel as to methods of contraception that are available?

A Yes.

Q Irrespective of the statute?

A Correct.

Q You did that before the statute?

A Correct.

Q Do you determine whether or not that the pregnant minor wants to have the abortion?

A Yes, we do.

Q And you do that irrespective of the statute?

A Yes.

Q You did that before the statute was enacted?

A Yes.

Q And even before the statute was enacted and irrespective of the statute is it Meadowbrook's practice to determine whether the young woman has been coerced by any party?

A Yes, it is.

Q Before the statute was enacted in the course of the intake process or the counseling process, was it Meadowbrook's practice to determine whether or not the young woman lives with her parents?

A Sometimes yes, sometimes no. We didn't ever mark that on our charts as a matter of form.

Q Did you inquiry into that as a matter of practice?

[144] A Generally it would have been discussed.

Q Okay. And if she didn't live with her parents was it your practice, even before the statute was enacted, to inquire where she did live if she didn't live with her parents?

A Yes.

Q Did you inquire as to the source of her financial support even before the statute was enacted?

A No.

Q Okay. Now that none of that information was relevant to billing, or it was—

A We are a fee-for-service clinic so generally not.

Q You didn't inquire as to source of financial support?

A Generally not.

Q Okay. Did you determine in the course of the intake process or the counseling function even before the statute was enacted whether or not she was attending school?

A She would fill it out on her self history form so generally we would know. We wouldn't necessarily inquire.

Q You would know from the form?

A Generally.

Q It was information you would have?

A Uh-huh, generally.

Q And then that—in what cases wouldn't you have it?

A If she didn't fill it out we wouldn't necessarily write it down.

[145] Q Did that also include her grade?

A The last grade completed in school has been on some of our forms.

Q Before the statute—I am sorry—

A I am not sure at what time it was or was not on the forms.

Q Okay. Do you obtain information today as a matter of practice or is the form designed such that that information will be elicited even with respect to those young women who are not going through the judicial bypass proceeding?

A Correct.

Q Through the intake process or the counseling process is it—was it your normal practice before the statute was enacted to determine whether or not a pregnant minor was employed?

A That too sometimes she would fill out on the form but we didn't ask it as a standard question.

Q Well, was the form—was there a question on the form, "Are you employed?"

A There is now. I am not sure when that form was changed.

Q And do you ask that information even of your patients who aren't going through the judicial bypass?

A Sometimes.

Q Well, is the form designed to elicit that information?

A Yeah, but whether or not we talk about it will vary.

[146] Q Okay. In the course of—the nature of your counseling before the statute was enacted did you—was it the practice

of Meadowbrook to speak with the young woman about her plans for the future such as schooling, employment or otherwise?

A Sometimes.

Q What would determine the times you did and the times you didn't if you know?

A It would depend what the counseling session was mainly focusing on, which issues would come up.

Q And it was nondirectional from your perspective?

A Fairly so. I mean, whether she was more confused about whether or not to have an abortion at all or something else—

Q I am sorry, I didn't mean to cut you off.

A I am sorry.

Q Before the statute was enacted you counseled hundreds of pregnant minors, correct?

A Correct.

Q Personally?

A Personally.

Q And even though the counseling was nondirectional, largely nondirectional, did that information tend to be elicited in the course of the counseling, that is future plans?

A It often would be.

• • • • •

[158] Q Some don't come in that week, do they?

A Correct.

Q They come in the following week because an earlier appointment is not consistent with their schedule, correct?

A Correct.

Q And in the case of a first trimester abortion, an apparently healthy young woman, you don't try to urge them to rearrange their scheduling and come in that week, do you?

A No, not necessarily.

Q Is it ever the case that someone who calls on Monday and you are booked for Tuesday?

A Yes.

Q Is it ever the case that somebody calls on Monday and you are booked for the rest of the week?

A No.

Q What is your average backlog, if you can tell us?

A It is generally one or two days. However, if a person, a woman says that she must be seen on a particular day our policy is we will always see her.

Q Okay. What if a young woman doesn't express that type of necessity?

A Then we would negotiate a time that is good for her.

Q In terms of a backlog, I take it it ranges from time to time?

A It generally is about one or two days.

[159] Q It stays pretty constant at one or two days?

A Yes.

Q So a caller on a Monday can typically get in Wednesday or Thursday?

A Yes.

Q And a caller on Tuesday can generally get in Thursday or Friday?

A Yes.

• • • • •

[162] • • •

Q Okay. In that initial inquiry I take it you identify or you learn from the substance of the conversation that some of your patients are not going to be going to court, that they have no problem involving their parents, correct?

A Correct.

Q And they are apparently healthy teenagers, correct?

A Correct.

Q And they have had their pregnancy and they are still within the first trimester?

A Correct.

Q With respect to that group, do you urge them, do you advise them about any particular risk of morbidity or mortality in terms of how soon to get their abortion?

A If they are well into the first trimester, they are not close to 12 weeks—

Q I meant to say well within, if you can't generalize, let [163] me say 9 weeks.

A No, we would not.

Q So if an apparently healthy teenager calls up and tells you she is 9 weeks pregnant according to what her family doctor told her you don't urge her to come in immediately for reasons of medical risk, do you?

A No.

Q And if you have—if you get a call from someone who identifies herself as an apparently healthy teenager who is 10 weeks pregnant according to what her family doctor told her you don't urge her to come in immediately to avoid any medical risks of delay, do you?

A Not immediately, but we won't let her wait past 12 weeks.

Q Between 10 and 12 weeks you really don't press her to come in, do you?

A We don't.

* * * * *

[171] * * *

Q But in the literature you routinely distribute to your minor patients, you do warn them or give them information about possible psychological consequences, do you not?

A About feeling depressed after the abortion, possibly, and hormonal change.

Q You urge them to seek help if they feel the need, don't you?

[172] A Correct.

Q And I take it you give that information and those warning to your patients because those phenomena occur from time to time, correct?

A They do.

Q And they are not trivial phenomenon, correct?

A For some people they are not.

* * * * *

[175] * * *

A We see about a third of our patients back again for a post-abortion checkup but we have no way of knowing where else they might go for that.

Q Okay. So two-thirds of your minor patients you have no way of knowing whether or not they have heeded your advice to seek aftercare?

A Whereas with our adult patients, correct.

* * * * *

[180] * * *

Q Have you, based upon your experience, been able to form an opinion quantitatively as to what sort of delay on average the judicial bypass procedure involves?

A Not exactly.

Q Approximately?

A Well, it depends on when she first calls and we don't keep a record of all those calls, but generally it takes her about three to four days to a week to make all of her arrangements and get it all done.

When she first calls us and starts talking it until when she decides on what she is going to do to satisfy the law.

Q But not all of that, that period of time, is attributable to the statute, is it?

A Sometimes it is.

Q Well, isn't it most common that if somebody calls on a Monday the abortion, even if she is not going to go through court, isn't it the more common situation if somebody calls Monday the abortion will not be until Wednesday or Thursday anyway?

A That is true.

* * * * *

[185] * * *

Q But if they—but if they report—they can't report it then and avoid court?

A And still get an abortion—they could report it to me and I would report to Child Protection and then the investigation would start and then if Child Protection found reason to believe that this was a legitimate concern or accusation then in that case they would not go to court or notify their parents.

Q So in other words, Meadowbrook will make such a victim go to court until and unless there has been some determination made by Child Protection?

A Correct.

* * * * *

[188] * * *

Q Okay. It is your understanding that proceedings under the statute have to be of a confidential nature?

A Correct.

Q To protect the privacy interests of the young woman involved?

A Correct.

Q And there have been literally thousands of such proceedings in the Twin Cities, haven't there?

A Correct.

Q There hasn't been a problem with confidentiality, has there?

A None that has been reported to me.

Q You are aware, are you not, of four instances where a **[189]** petition—where a petition has not been granted?

A Yes.

Q Okay. And one of those instances was a situation where your patient reported in the course of going through the court process, whether to the public defender or the guardian or the judge, that she really didn't want to have an abortion but her mom was forcing her into it?

A Correct.

Q That was a 14-year-old girl?

A Correct.

Q Was that, do you think that was inappropriate for the court to fail to grant permission in that circumstance?

A As far as I understood it the court is determining whether or not she is mature enough to make the decision to have the abortion without telling one or both parents. I don't think that that necessarily has anything to do with her decision whether or not to go ahead with the abortion.

Q Do you think that a 14-year-old girl who says that she wants permission to have an abortion on the one hand, but really doesn't want the abortion but her mom is forcing her into it, do you think that raises any suspicion as to her maturity?

A No.

Q Okay. You are aware of other instances, are you not, where one of your patients—excuse me—one of your patients went to the Hennepin County Court system accompanied by her **[190]** boyfriend and at some point in the process expressed the view, "I don't want to have an abortion, I want to get married."?

A Correct.

Q And do you think it was unreasonable, inappropriate for the court not to grant the permission in those circumstances?

A Again I think the issue here is whether or not she is mature enough to have the abortion without telling one or both parties, not whether or not she has decided absolutely to have an abortion.

Q So you think the court should have granted permission to have an abortion in that situation?

A They are not granting permission to have an abortion, they are granting permission if she chooses to have an abortion she doesn't need to notify one or both parents.

Q And you think the court should have granted such permission in that circumstance?

A I think they should have signed the petition.

THE COURT: Your understanding of maturity, is mature enough so as not to tell their parents?

THE WITNESS: So they can give informed consent to have an abortion.

THE COURT: Mature enough for informed consent, okay.

* * * * *

Q I believe you also testified about your understanding of **[191]** a situation where a minor presented a petition to Judge Farrell and then froze up and couldn't express herself verbally?

A Correct.

Q And after some further counseling you were permitted to go back to court with her and explain her situation on her behalf?

A Not even after further counseling, after a whole lot of tears and anxiety I arranged to get this heard again.

Q Do you have an understanding, and I am sorry that your testimony was of some length, I am sure you said this, but it escapes my mind; did you have an understanding as to the grounds upon which Judge Farrell, the first time, denied the petition?

A Yes, I do understand that.

Q And what is your understanding of the grounds?

A That it would be difficult for him to know anything about a minor who would not speak to him.

Q Do you think that was a reasonable conclusion for him to draw?

A Yes.

Q Do you think the fact that a woman will not say anything raises at least some doubt as to whether or not she is mature?

A No. I think it talks about how afraid she is to be where she is.

Q Well, did the judge have a basis upon which to determine she was mature in light of the fact she wouldn't say anything?

[192] A I think he was nervous because she was 13 and wouldn't talk.

Q 13 and wouldn't say anything?

A Uh-huh.

Q Okay. Do you think that provides—that circumstance provided Judge Farrell sufficient basis to find she was mature?

A No, I don't.

Q Do you think that circumstance provided Judge Farrell with sufficient basis to determine that irrespective of her maturity abortion was in her best interests?

A Very possibly.

Q Could you tell us how someone can determine—someone can determine from a 13-year-old who wouldn't say anything

whether or not the abortion, without notice to her parents, is in her best interests?

A Because her boyfriend was there, he was her primary support person along with his parents and he was the one who was doing the talking and the explaining for his girlfriend so they definitely had a lot of information about her and about her family.

Q In any event, on that occasion, as soon as—how soon did Judge Farrell agree to rehear the situation?

A I think it was about a week.

Q Did that young woman get—thereafter get an abortion from Meadowbrook?

[193] A She did.

Q Without medical complication?

A Without.

Q Now you recall four instances, do you not, in which a young woman, pregnant minor patient of yours, went to Hennepin County Court and indicated that she wasn't sure whether or not she wanted to have the abortion?

A Right.

Q And that was one of your patients?

A Yes.

Q Personally counseled by you?

A I think so.

Q And her petition was denied or not granted?

A Correct.

Q Okay. In that circumstance, do you know the judge in that circumstance?

A No, I don't.

Q Whoever he was in that circumstance do you think the judge had sufficient basis to determine her maturity?

A I do.

Q Despite her statement that she didn't know whether or not she wanted to have an abortion?

A Well, maturity, having to do with her ability to give informed consent, if she made that decision.

* * * * *

TRIAL TESTIMONY EXCERPTS BY JUDGE ALLEN OLEISKY, JUVENILE DIVISION JUDGE OF HENNEPIN COUNTY

[DIRECT AND REDIRECT BY MS. BENSHOOF]

[CROSS BY MR. GALUS]

[12] Q Approximately how many petitions have you heard since August 1981?

A Over 1000.

Q Would you say that you have heard more petitions than any other judge in the State of Minnesota?

A At least in Hennepin County and I think we do more than any of the other counties.

Q I am referring now to Plaintiffs' Exhibit 10.

A Yes.

Q Were these statistics prepared under your direction?

A Yes.

Q Now this only goes up to April 4, 1984, but it shows that you had in Hennepin County at that time heard 1237 cases.

Had you heard the majority of those?

A Yes. It shows I have heard 59 percent of them as of that point.

Q At the bottom of that form it states that 46 percent of the petitioners were Hennepin County residents and 54 percent were outside of Hennepin County. How come you heard—

THE COURT: I am sorry, counsel, I have lost you a little bit. What Page of 10 are you on?

MS. BENSHOOF: Page 1 of Petitioner's Exhibit 10 (sic) the bottom of the page.

THE COURT: Petitioner's residence, Hennepin—nonresident?

[13] MS. BENSHOOF: 54 percent.

How come you hear so many petitions from outside of Hennepin County?

THE WITNESS: That was a decision we made early on. We found out that most of the clinics were located in Hennepin County and secondly, being a district court we were a court of

statewide jurisdiction and we decided that we would hear these cases in Hennepin County, wherever. The juvenile code states a juvenile court has jurisdiction in one of two places, either where the child resides or where the child can be found and since the child was coming to Hennepin County to have the process we felt that we had statutory grounds to hear the cases.

Q Do you hear petitions from every county?

A Except Ramsey County. We made an informal agreement with Ramsey County that we would not hear children who resided in their county and vice versa.

* * * * *

[14] * * *

BY MS. BENSHOOF:

Q Do you ever ask minors when they come before you why they didn't go to their home counties?

A Yes.

Q What do they say?

[15] A A number of reasons. They are afraid that people will know them in their small counties, that the clerk of court, the people attending there who work in the courthouse; some felt that they didn't know that they had to go to court until they actually arrived at the clinic and as a result they were down here in Minneapolis and then they would have to go back to their home county and it would be a real imposition because of taking time off from school and arranging rides; that whole issue of getting back and forth on school days, that was a real problem for them.

Also some had heard that they couldn't get a hearing in their local counties.

Q Do you think that these explanations given to you were valid?

A Yes.

Q How were the hearings on these petitions scheduled? Could you just explain the process in Hennepin County?

A Yes. What happens is that the clinic, as I understand it, will call our guardian ad litem's office or the guardian ad litem's office will call the clinic, they will tell them there are

hearings, there are children available. We normally have these hearings on Monday, Tuesday and Thursday. Early on we had them on different days but we usually arrived at a consensus to do it Monday, Tuesday and Thursday. The child then comes down to the Juvenile Justice Center, meets with the [16] public defender, is interviewed separately by the public defender and then is interviewed separately by the guardian ad litem. When that is completed they come to see me on an individual basis and I will have the hearing in my chambers with a court reporter present.

Q Who is present in your chambers when you hear the petitions?

A The child, the court reporter, the guardian ad litem, the attorney for the child, usually the public defender, and if a parent or guardian comes with the child we will allow them to sit. We usually don't allow the boyfriends to come in.

Q About how many of these petitions do you hear per day on the days you hear them?

A I think I average about between three to seven. Yesterday I had seven petitions, and I think on Monday I had two or three—no, today is Tuesday—yesterday I had seven so they average between three to five and anytime over that is exceptional.

Q Do you try to set a set number on each day?

A We have tried to maximize it at five or six because when we go over five or six we have problems with time of the public defender, guardian ad litems, et cetera.

Q What did you mean, problems with time?

A Time to interview the child and get it into court. We [17] try to have the hearings at 11:30 in the morning and try to have the child out of there by noon or a little after to accomodate, minimize court time and to minimize the time that the public defender has to come down.

• • • • •

[18] • • •

Q So the minors who come for these hearings sit with the public, in other words?

A Yes.

Q Do you think this a problem for those minors?

A They tend to sit a little further away from the rest of the children who are coming in on delinquency-type cases, but it is being out in the public, obviously, and I don't know if it would—what effect it has on them or not.

Q When you go into the waiting room to get to your office do you know which minors are which?

A I can always recognize the children who are going to have an abortion, they look different than a lot of the kids coming into court on delinquency. A lot of them are with their boyfriends, holding hands, the boyfriends have their arms around them, they dress a little different than a lot of the kids who are coming into court on delinquency matters and for some reason, maybe the vast majority of people we have in court are boys, as opposed to girls, about 80 percent of the delinquency cases are boys, and all of a sudden when you walk out and see a group of girls sitting together in that particular area, to me they are easily recognizable.

[19] Q The girls all know why the other girls are there?

A The people in court certainly do and anybody who attends court on a regular basis, the probation officer, public defenders, county attorneys, social workers, police officers would know why the girls are there and who that group is.

Q You stated that the guardian and the public defender set up the hearings and then they tell you how many there are on particular days?

A Yes. One of my clerks will call about 10:00 o'clock to the guardian ad litem's office to find out the number of hearings we are going to have.

Q Do the number of minors show up for court that are scheduled, usually?

A No. In many cases they will say there is going to be seven or six or whatever the number and in many cases there would be two or three less.

Q Do you personally know why?

A In some cases I do.

Q Why?

A They got lost, they can't find us. I think they will make the appointment with the clinic and then never show up, it is too

long a drive, the weather may be inclement, just numerous reasons or maybe they will go forward and not have the abortion and get parental consent.

* * * * *

[20] * * *

Q I notice that on Plaintiffs' Exhibit 13, which is the report of the guardian ad litem, this is a report given to you at the time of the hearing, is that correct?

A Yes.

Q Refer to the last page of this exhibit. There is a recommendation of the guardian ad litem. I would like to just go through this a little bit with you.

I see that under No. A there is a recommendation that you authorize the minor as emancipated.

What I would like you to explain is I thought the law provides an exception for not having to go to court if you are emancipated. So why is this recommendation in the guardian's form?

A I don't know. I think we just put it in there. I probably could think of only one child who has ever come to court that was married. And it may well be that the clinic will sometimes be very fastidious about bringing the child in. We found certain clinics are very careful and circumspect and any question, if there is any doubt, they will bring the case to court and I think that is the reason.

Q You mean circumspect about breaking the law?

[21] A Yes, and they are very careful that every i be dotted and every t crossed to ensure strict compliance.

Q It states here for B or C that the guardian makes a recommendation as to whether the minor appears mature and capable of giving informed consent or that the minor is not mature but the abortion is in her best interest.

Did you give any training or guidance to the guardian as to how or why they should make those two recommendations?

A We did discuss it numerous times with the supervisors from the guardian ad litem's office and something strike me in my mind that we even did some research on and some writings on this, and that we gathered some information about that, trying to qualify and quantify what we thought would be mature

and capable. But the statute was vague and really didn't give us any clear definition.

Q What did you tell them that they should use as a guidance for "what is mature"?

A I was concerned that the child was not being pressured by someone else to make the decision, that the child had weighed all the alternatives and options available to her; that she was able to make a decision not based upon other's feelings and based upon an independent viewpoint and giving some real thought to it rather than a spur of the moment thing, and her reasons were not just because it was going to ruin her figure or she was going to not be popular or give in to her boyfriend. [22] We were really concerned about the child and as a result if you go back on some of the questions we were real concerned about her post-high school plans, what her goals in life were, et cetera; and those were gauges we felt would measure maturity.

Q The sentence on that report says mature and capable of giving informed consent.

What is the difference between the two, in your opinion.

A I don't think there is any.

Q What standards have you related to the guardians about best interest and what that means?

A Well, one of the things that you quickly learn in juvenile court is that there are a lot of teenage mothers who are not capable of parenting their children, that they end-up in child protection and end up losing their children because of inability to parent. We call it, "Children having children," and we wanted the guardian ad litems to look at some of these girls and determine whether or not all things being considered if it was in their best interest to have a child, a baby; could a 13-year-old girl raise a child, could a 14-year-old girl who had mental or real emotional stability problems make a real informed consent about raising her child or giving it up for adoption. You know, formerly I always asked the children why. Have you ever thought of giving this child up for adoption, [23] there are millions of people in the United States that would love to have your baby and would give it a fine home, and they always tell me if I have this baby I could never give it up for adoption.

So those are some issues we were concerned with, particularly with the younger girls, the 13, 14, 15-year-old girls, that maturity level was a real concern of ours and the statute mandated that we look at it. So those are some of the guidelines we wanted to talk to some of our guardians about and have them talk to the child to inform them.

Q You talked about age when you mentioned 13 or 14. Do you know about what percent of your minors are 16 or 17 years old?

A I think it is in the material that is in the exhibit, but the vast-majority of children that appear before me are 16-17 years old.

They looked—if I could refer to Exhibit 10—

Q Right.

A 55 percent were 17, 34 percent were 16, 10 percent were 15 and I can't tell, is that 1 percent—1 percent were 14 and less than 3/10s of a percent were 13.

I don't ever recall a child younger than 13.

Q Right. So that the best interests is best interest to have an abortion versus going through childbirth; it is not best interest to notify the parent?

[24] A Yes.

THE COURT: I am not very good at math, judge, but isn't the 14-year-old 1/10 of 1 percent?

THE WITNESS: I am sorry, judge, that is right.

* * * * *

BY MS. BENSHOOF:

Q At the judicial hearing could you just describe who questions the minor?

A Normally what goes ahead is that the public defender will give a brief summary of the grounds why she believes the child is capable of giving an informed consent, is mature or is in the best interest and will ask the child some very brief questions.

I don't put the children under oath and I have been very careful trying to take off my—I don't wear my judicial robes at that point. I am usually wearing a suit jacket or in shirtsleeves.

I am sitting at a desk rather than in the courtroom itself so that she will ask the child some questions, verify her **[25]** signature on the petition and the guardian ad litem will usually give her opinion and why she has formed her conclusions and last I will ask the child some questions.

The questions I particularly am interested in is why they can't—the relationship between them and their parents, if anybody is pressuring them to do so, and if they would weigh the alternatives and if they are positive about it.

Sometimes I have asked them are you 95 percent or how much percent are you sure of this and then I will ask them again, reaffirm where the abortion is going to be held and when and then obviously if I approve it I will sign the order, give it to the court reporter who will then take it out to another clerk who will make a photocopy of the order and give it to the child.

Q You ask the teenagers why they can't tell their parents?

A Many times I do.

Q What responses do you get?

A Oh, numerous. Some—a number of them have told their parent, one of their parents. Others will say that they have been told if they ever get pregnant that they will be told to leave the house. Many will be told that there is a lot of strife and stress in their family situation and by telling them that they are pregnant it will just add and accumulate to it.

Others will tell us that there has been an older sister who had an abortion or a baby and it brought all kinds of **[26]** chaotic experiences. Others will tell us that physical and mental harassment by a father, in some cases some have told us they have been sexually molested by a member of the home or the stepfather or the father and that may be the reason that they are pregnant.

Others will tell us that it would create real problems in school, in the community, just a multitude of reasons.

Q Did you keep a list of all these reasons?

A We have—I don't recall if it is—I know we did have tabulated over the years a lot of the reasons and some will tell us also because—I think I may have mentioned this—because of some moral and family reasons that they have.

Q You have had 13 years' experience as a judge. When these minors are relating this to you do you believe them?

A Yes.

Q You stated that you hear these minors in your office with your robe off trying to make this, the setting, quite informal.

Why do you do that?

A I think you put the child at ease. I think it is intimidating to come into a courtroom and see a judge sitting on the bench and the court reporter in a very formal setting and we thought we would get a much better flow of information by bringing the child into the court chambers, making it as **[27]** comfortable as possible. I have a very spacious, commodious chambers. There is a sofa, there are—there is some arm chairs, there is books, a library-type atmosphere and windows outlooking and the courtroom is very similar to this courtroom that Judge Alsop is sitting in, it is a windowless courtroom that I sit in and we thought that opening it up would make it much more conducive to have a relaxed atmosphere and try to take some of the tension away from the girls.

Q You are trying to make things as good as possible?

A Yes.

Q You say you take some of the tension away from the girls. Do you feel they feel tension?

A I think they are under some stress coming in front of a strange man in a strange situation and in a courthouse in a strange city for many girls who don't come to court. We ran a computer on these girls in '82 or '83 and we found out that like 95 percent had no juvenile court record or had ever been in juvenile court before.

Most of them obviously had never been in a court before.

Q Do you think that experience of a minor going to juvenile court is a frightening one?

A Probably, no question about it.

Q What do you base that on?

A Well, I think any of us coming to court, we are **[28]** apprehensive and anxiety-ridden and are tense. Having to wait—many of the children arrive at our courthouse by 10:00 o'clock and they can't get to see me until 11:30, quarter to 12:00, even though we try to give them priority.

So there is some tension and anxiety. I know the lawyers are sitting there telling them don't worry, there is no problem, but I can tell questioning some of the girls in court they tense up a little bit, they are a little rigid. I try to make them at ease a bit and I know the public defender does too.

Q You stated you have heard over 1000 of these girls.

In about how many have you found the girls mature and capable of giving informed consent?

A Probably over 90 percent of them.

Q I thought I saw a statistic on one of these, that it was 95 percent, is that—

A I could—I don't quarrel with that.

Q Okay. Have you ever found a minor both immature and no best interest?

A I think maybe one or two cases we have turned down where I think I remember once where the minor came in and she wanted to have the baby and her mother told her to have the abortion and I think I denied on that basis.

Q That would not be a denial that she was not mature?

A No, in her best interest.

[29] THE COURT: I am not sure I understood. You say 90 percent or 94, if that is the figure, is that figure written on Exhibit 10 someplace, counsel?

You mentioned that it was 94 percent on the record and I am not sure where you are getting that.

MS. BENSHOOF: I don't think it is on the record. I think he is just remembering.

THE WITNESS: I think just my recollection, Your Honor, based on I think some statistics I have seen.

THE COURT: These are your cases or Hennepin County cases?

THE WITNESS: My cases. I would say 90 percent.

THE COURT: Where you found either mature or best interest?

THE WITNESS: No, mature itself.

THE COURT: All right. In 90 percent of the cases you have heard you have found it to be mature?

THE WITNESS: Yes.

THE COURT: All right. Now there are some of the additional 10 percent that you found best interest?

THE WITNESS: It is my recollection the other 10 percent would—I would probably go on best interest.

THE COURT: So there is no minor you have turned down as being immature and not best interest?

THE WITNESS: No.

THE COURT: So you are saying of your 1000 cases you [30] have never denied a petition?

THE WITNESS: I think I have denied one or two, sir, but I probably—I take back that earlier answer; I probably denied it on the grounds that she is not mature but I have stricken the mature but said the proposed abortion is not in her best interest because she wanted to have the child and she was being coerced by the parent. One girl I think told us that she wanted to have it, so deny it, so the boyfriend would marry her.

BY MS. BENSHOOF:

Q She wanted you to deny it so the boyfriend would marry her?

A Yes.

Q Did he marry her?

A No. I think later she came back and told the guardian he decided he didn't want to marry her.

Q Did she come through again?

A I think she came through again and got the abortion.

Q So then you found her mature when she didn't get married?

A Right. And I think the girl we denied against best interest was because she wanted to have the baby and the parent told her, the mother told her no, if she had the baby she would have to move out of the house.

Q In that case you were finding the girl mature because you were finding she should make the decision herself?

[31] A Yes.

THE COURT: You denied two petitions?

THE WITNESS: I think there was a third one, judge, I am not positive and I don't recall the circumstances but it can't go over two or three.

THE COURT: All right.

[BY MS. BENSHOOF:]

Q But these cases were not really denials because of a finding of no maturity?

A That is correct.

Q In your experience has the law—when I say your experience I mean in Hennepin County, not just your own cases, if you have personal knowledge of other ones in your experience, has the law resulted in any case where there has been a finding of immaturity and no best interest and the court has then ordered notification and the minor has gotten parental help?

A No.

Q And how many of the cases you have heard are the minors accompanied by a parent?

A I can't really quantify it but I probably—probably at least maybe 10 to 20 percent a parent will come into court. For instance, yesterday, if I might answer, I think of the seven I heard yesterday there were three parents present.

Q Three parents?

A Three of the seven there was a mother present.

* * * * *

[33] * * *

Q Do you speak to the one parent who may accompany the minor to the court?

A Yes.

Q Would you ask them questions?

A Yes, I do. I will ask, "Your daughter has applied to the court for an abortion. What is your position, do you have any feelings about it; do you think it is the right decision for her, do you approve; any comment that you would like to make," and they usually answer me.

Q What reasons do the parents give to you as to why they can't notify the absent biological parent?

A Sometimes they tell us that it may jeopardize the relationship, that there may be some repercussions as far as child support or custody; that the other biological parent may claim you are not doing your proper job in raising our daughter because she has gotten pregnant and is having premarital sex **[34]** and they are concerned that it will bring the other parent back into their life who has just been absent and they will say things have been going smoothly and by notifying him he is going to become intrusive in our life situation again.

Q Do you have any situations where one of the parties is a battered wife?

A Yes, and we have heard that where the parent will say I am afraid of assault from my husband or if he were to know about this. The child will tell us that too, obviously, in many cases.

Q Do you believe them?

A Yes.

Q You see such cases in your other life as a judge also, don't you?

A Continually, yes. And it is a fact of life that in our cases, 50 percent of my case load is hearing child abuse cases and 25 or 30 percent of my case load is physical abuse of parents and children by spouses and other parents toward the child.

Q So you think that battering is a frequent crime in Minnesota?

A No question it is a frequent occurrence.

Q A serious crime in Minnesota?

A It is a real serious issue because battered children end up battering; have low self-esteem and end up battering their **[35]** children when they grow up. It is a learned reaction and experience so it is a real concern to us.

Q So some of these batter situations you see the husband and wife are still living in the same house?

A Yes.

Q Since you have had so much experience with this in your opinion is the notification of such a thing as a pregnancy the kind of event that would provoke an incident?

A No question it is going to set the whole thing off again in some cases.

Q You say no question, could you just explain the basis of your opinion?

A Well, I think a lot of parents who abuse and batter their spouses and children are very controlling people and this is something that is coming outside of their experience and something that they don't have control about and they become very upset about it and it is something that is going to set them off.

It has got financial repercussions to them, obviously legal repercussions, the whole issue of control I think becomes a concern. A lot of these people rule by physical force or dominate their families.

Q When the parents come into chambers with you with their teenage daughters, do they express to you any feelings about the invasion of their privacy?

A Some parents are real upset like why do I have to be here **[36]** and I am giving consent; she has lived with me for 12 years, he hasn't. They are talking about the absent father.

In the vast majority of cases they are women who are coming with daughters and they will say the spouse hasn't had contact with the child for years, hasn't paid support, and why do we have to notify him. I am the one who has raised this child and I have given her consent.

Q What do you say to these parents?

A I tell them it is the law, I have no choice. There is a presumption that it is a valid law in our state and obviously I don't go into any challenges going on. I tell them that is the way it has to be and I try to set them at ease and try to assure them that we are going to make it as quickly and as painless as possible.

Q You testified as to the burden on the single parents or on these battered parents.

Have you made any communications to the legislature regarding this burden?

A Yes.

Q Could you describe that?

A In 1983 Representative Kathleen Vellanga, a legislator, I think from St. Paul, introduced a bill saying if one parent knows and consents that it was not necessary to have the court

hearing and Judge Peterson and I and Suzanne Smith agree to testify and we went over to the legislature and [37] Judge Peterson and I testified and presented some statistical information, et cetera, to a legislative committee.

Q What committee did you testify before?

A I want to say it was a subcommittee of the laws and family law committee or crime and family law.

Q What was the substance of your testimony?

A That in essence what I just said here, that 25 to 30 percent of the children appeared with one parent or one parent had known and consented; that it would be a burden on that single parent to have to come to court, or for the child, and I repeated some of the information that I stated earlier about bringing in unnecessary noncustodial parents back into their lives and I thought it just didn't really make much difference as long as the custodial parent consented.

That was my belief then and now.

Q Based on your observations of the minors, both before you and in your waiting room, do you have any opinions as to the emotional impact on the minor of having to go through the court process?

A I think it has some impact. They sandpaper them pretty well, very frankly, I think the child is well prepared by the clinic and the guardian ad litem and the defense attorney so by the time they get to me they are pretty well prepared.

CROSS EXAMINATION
BY MR. GALUS:

[40] * * *

Q A large number, and I don't have the number at hand, it is in the records, of the large number of children who have gone through the court process in your courtroom, are you aware of any instance in which your court and staff did not scrupu-[41] lously abide by the confidentiality of these proceedings?

A No.

Q I believe counsel asked you in particular about a portion of the petition itself and asked whether the real name of the

petitioner is noted there or not. I understood you to say the real name is noted?

A Yes.

Q What arrangements, if any, after the hearing is conducted, do you make with respect to the confidentiality of the written record of those proceedings, including the petition which has the real name of the minor?

A We take the petition, the guardian ad litem's record and the court record and we file them back in a locked file room in Juvenile Court on the second floor; that is a locking vault and I don't even have access to it.

* * * * *

[42] * * *

Q On those occasions do you ever make exceptions to your normal hours of operation to accommodate the fact that they couldn't get there on time?

A Yes, I have heard them at 1:30, 2:00 o'clock—we are [43] available; in fact if they want to hear it on a weekend, when we first implemented that law we notified the clinics and the public defender and the guardian ad litem's office that they could call the Juvenile Center and they would give the number out and I would make myself available seven days a week and we never were called.

* * * * *

[48] * * *

Q You testified, I believe, that typically these hearings are held on Mondays, Tuesdays and Thursdays?

A Yes, sir.

Q Have you from time to time been asked to hear such proceedings on Wednesdays or Fridays?

A Yes.

Q What has been your experience when you have had those [49] requests?

A I will hear them.

Q In all cases?

A In all cases.

Q You mentioned, I believe, in your direct testimony that you can typically, by viewing the groups of young people in and about the Juvenile Justice Center, identify those who are there for parental notification proceedings, is that correct?

A Yes.

Q And you mentioned the sex of the group as being one clue, correct?

A Right.

Q Is it also the case that that group tends to appear more composed than the other persons at your courthouse?

A That may be one of the factors. I neglected to mention on direct also that that group tends to be not having parents with them. Many of the parties who appear in juvenile court have a parent or an adult with them and that particular group obviously rarely has a parent with them and so they tend to be readily identifiable.

* * * * *

[52] * * *

Q Assuming that where some exigent circumstance where the welfare of the child required action during those periods of time, would you—do you stand ready to hold a hearing at that time?

A Yes. I have heard cases where there has been requests for me to approve blood transfusions for a parent who refused to allow the patient to have a blood transfusion and I have heard these cases on weekends and evenings, so I would certainly make myself available on these.

* * * * *

[57] BY MS. BENSHOOF:

Q Judge Oleisky, do you believe that the statute dissuades some minors from having an abortion?

A Yes.

Q Why?

A Because I think that it takes kind of a forthright courageous youngster to travel two or three hundred miles, to come to a court in an alien city to get permission, and I think sometimes when they call up the clinics and they realize that they have to come to court that it may dissuade some of them from coming.

* * * * *

TRIAL TESTIMONY EXCERPTS OF H. P., MINOR

[DIRECT BY MS. PINE]

[CROSS BY MR. ACKERBERG]

[28] * * *

Q Okay, H., how old are you?

A I am fifteen.

Q And have you ever been pregnant?

A Yes.

Q And did you have an abortion?

A Yes.

Q Did you go to court in order to avoid notifying your father?

A Yes.

Q How old were you at that time?

A Fourteen.

Q So it wasn't too long ago?

A It was July 25.

Q Now just to start, explain to the judge what was going on in your life, did you have a regular boyfriend at that time?

A Yes.

Q Do you remember whether you were using any contraception?

[29] A Yes and no. I mean, when we had it we used it, when we didn't we didn't.

Q Tell Judge Alsop the story of how you first suspected that you were pregnant?

A Well, I didn't really suspect that I was pregnant.

THE COURT: You did not, you say?
THE WITNESS: No.

It was about a month before I found out that I was pregnant. I thought I was pregnant and it was just a close call. Then, one day—it was in the summer now, and I had bronchitis and I had

the flu and I was really coughing really bad so my mom took me into the doctor and the doctor said that I needed an X-ray of my lungs.

So I walked into the X-ray room with the lady, whoever gives the X-ray, and on the wall was a poster saying if you are pregnant or maybe, please notify the doctor because it can harm the baby or something, you know, something like that and I just went, you know, it hit me right there. So then I told the nurse I might be pregnant and I am not sure and she said well, just a minute, I will talk to the doctor.

A little while later she came back and said why don't we give you a pregnancy test, but the doctor said to go ahead and give you the X-ray, you know, just uncover and cover my chest or stomach or abdomen or something. They did that and I went and gave a urine specimen and he came in, told my mom and [30] me—I told him not to tell my mom that I was getting the test because I didn't want her to know at that time and I just—he told me that I had bronchitis, prescribed a prescription and we were walking out of his office and my mom walked out first and he stood right at the door and he flashed a piece of paper to me saying, p-o-s-s, period. I will never forget that—

Q Meaning?

A Positive, I was pregnant, and at that time my boyfriend was there and he happened to be out in the waiting room and I don't remember what was the situation, and I told him and I did not tell my mom at that time.

THE COURT: When is this, in the summer months sometime?

THE WITNESS: Yeah, the summer months, I don't remember the date.

THE COURT: June, May or June?

THE WITNESS: Yeah, June most likely.

BY MS. PINE:

Q What was your first reaction, do you remember the first thing?

A Well, I went out and I told him, I said, I am pregnant, I just went, "I am pregnant," I mouthed it to him so my mom

wouldn't hear it and they got in the car and I just cried, I mean, not out loud, but I just, you know, cried, and I was just [31] really sad and my mom, she kind of noticed something was bothering me and she thought it was because she should have taken me to the doctor sooner to get checked for bronchitis because I was sick, so she didn't really realize it and I was just really—I didn't know what to do at that time, when it hit me there is no way out, I mean, it is either I have to have this kid or I have to get an abortion.

It was just like I would—I didn't know, you know, going through an abortion scared me to death because I didn't know anybody who had been through one and having a baby at my age didn't make any sense to me.

THE COURT: What is your birthdate?

THE WITNESS: 6/12/70, December 6.

BY MS. PINE:

Q Let's talk a little bit about you and your mom.

Can you tell me a little bit about your relationship with your mother? What your relationship with her is like?

A Well, right now we are really close. I talk to her about everything, everything you can imagine. She is just like my best friend.

Q Were you pretty close to her before?

A No, uh-uh.

Q Can you tell me—tell me about the reasons you think you are real close.

[32] A When I was 12 or so, I was younger than that, I was sexually abused by my mom's boyfriend and after it had gone on for every day, maybe two years, and maybe not every day, for a long time, I finally told my mom and she called the police and got him out of our house and stuff like that, and he went to court and got sentenced and everything like that and my mom protected me from him.

She stood by me. We had been through counseling together. We have talked about everything, we have cried together, we have been through—I mean, we have been through just so

much together, and that is what makes us, you know, get along so well.

Q So those are the reasons that made you feel like you could talk to her?

A Yeah. Yeah, because before that we weren't really close and in a way I kind of felt that I am fortunate because that happened to me because I am close to my mom now.

Q You talked to her about—

A I wish that would have never happened, but—

Q You talk to her about things like sex and menstruation and things that are—

A Yeah, yeah, yeah.

Q —personal?

A Yeah.

Q You said that when you first learned you were pregnant [33] you didn't want to tell your mom that you were on that very first day.

Tell me why you started to think about telling her and how that came about?

A I didn't really think about telling her at all. I didn't know what to do. I was so sick because I had bronchitis and all of a sudden I have this morning sickness and I would wake up and throw up every single morning, a couple of times I threw up on my dog, it was terrible, and I hate being sick.

I was really crabby, I thought, hey, if I let it go it will go away and it didn't go away. I kept getting sicker and sicker and one day I was talking to my mom on the phone and she was at work and I thought, hey, this may be the easy way out, you know, because, I mean, I didn't really know if I should tell her or not because I didn't know what she would think of me, you know, I didn't know if she would, you know, think, God, what a slut, you know, I didn't know.

So she was talking to me, she said, H., you haven't had your period in a long time, have you, and I said no, and she said, well, you are not pregnant, she said, when are you going to get it, and I said not for about nine months, and, you know, that was totally ridiculous the way it happened, I mean, I admit I took the easy way out, but I guess I couldn't face her. I could not face her to tell her that. I was really embarrassed.

[34] Q So when you first told her, what did she say, do you remember?

A She was not mad at all. She said, oh, H., oh, H., I am so sorry this happened to you. Why didn't you tell mom sooner, you know, just kind of motherly things, you know.

Q Do your mother and father live together?

A No, my mom and dad were divorced when I was four.

Q How often do you see your father?

A Depending on the year, he is an ex-alcoholic, whatever you want to call it, was an alcoholic when I lived with him, we lived with him. I remember him hitting my mom a couple of times and hitting us kids, not beating us, but when we would get spanked we would get spanked real hard and I guess that that just kind of left something in my head to always not be able to talk to my dad, not be able to feel like he was my parent.

Q Uh-huh.

A And we don't talk.

Q Now can you give the judge an idea of how often you see him now, over the different years, tell us what you can?

A Maybe two or three times a year. He lives in Waseca on the farm, which is not my lifestyle, so it kind of makes it hard to relate, you know, it has been a long time.

Q How does it usually come about when you see him; do you [35] call him, he call you?

A He will call us, I don't call him. He is not a very caring father, in my understanding, he doesn't ever ask about our grades, he just doesn't ask about things that parents would care about, like my mom. My mom is always concerned about our grades, how you doing, how is everything going in school, how has your life been.

Nothing like that. He doesn't even—it is just like he doesn't care to ask and when we would go up to his house maybe for a day or two he doesn't even pay any attention to us.

Q So when he calls to ask if he can see you or whatever, what do you usually feel or think about seeing him?

A I think I say, hi, dad, that would be great, whatever—I am putting on this big act and I tell my mom, "You have got to get us out of this," you know, just don't—make up something, mom, just, you know, but—

Q Has he ever been supportive to you when you have been in trouble or upset?

A He has never been there for me, no, never, and I expect that he probably never will. He just doesn't, you know, he is not around so he doesn't know.

Q And just to go back over something you were talking about a little before, you were saying he was an alcoholic?

A Yes.

[36] Q And can you just describe what little you might remember about his violence?

A He would—I was only four and I remember he would hit her, he wasn't around much, he would spank us for the dumbest things, we are kids, we would go put on our mom's shoes, we are girls, you know, get into that kind of stuff and instead of saying, hey, no, no, it was like come here, I am going to spank you.

Q Was he ever violent toward your mother?

A Yeah.

Q Do you remember any of that?

A Not really. I really don't.

Q Has he remarried?

A Two times, surprisingly enough.

Q Do you know anything about his relationship to his new wife, and wives and new kids?

A Well, the first one after my mom he had three stepchildren and a wife and I didn't—I saw him a lot at first and things started going wrong in their marriage because he was still an alcoholic and I didn't see him for a long time and I guess he put his ex-wife in the hospital, you know.

Q That is what you were told?

A That is what I was told.

Q Were you told that that happened more than once?

A I am not sure.

[37] Q Did you ever think about telling your father you were pregnant? Or about your abortion?

A No. My father doesn't—I don't even think about my dad. My dad is like someone that is not even there. I consider my parent my mom, you know, I think about him maybe a couple of times a year.

Q If you had told him what do you think he would have said or done, if for example, you had been required to tell him in order to get an abortion?

A You see, I have never been through anything like that, never said anything, you know, we have never gotten into anything. My guess would be he probably would want me out of his house, you know, I don't know.

Q What was the first thing that you think he might do to you?

A I doubt he would hit me. I doubt he would hit me because he knows that I am really close to mom and I would tell mom and mom would automatically take him to court or something, even though he is my dad, saying he shouldn't have touched me.

Q He doesn't have custody of you, right?

A Uh-uh.

Q Your mom has custody?

A Yeah, I suppose, yeah.

Q We will talk to her about that.

A Yeah.

[38] Q Do you think your pregnancy and abortion were things [illegible] would want to know about?

A [illegible]

Q Do you think he should know about them?

A No, definitely not.

Q Do you think he would have been supportive or helpful to you at all if he had known?

A No, I don't think he would have cared less. I mean, not that he wouldn't have cared less, but maybe he would have cared but he doesn't know how to show it.

He has a real tough way of showing us that.

Q How would you have known if you had to tell him—I asked you before what you think he would have done—

A How I would have felt?

Q Yeah, what would you have felt if you went—

A I would have felt extremely embarrassed; I would have felt scared, I would have, you know, I can't even imagine it.

Q Uh-huh.

A I would just be totally—I would feel like I was being shamed by having to do something like that.

* * * * *

BY MR. ACKERBERG:

[51] * * *

Q I thought you said before that you doubted he would hit you?

A He might have, you see, I really couldn't say that he would or I couldn't really say that he wouldn't, you know, but because I have seen him when he gets abusive then I guess I wouldn't want to chance that.

Q Does he call you occasionally?

A Yeah, maybe when he wants to see us.

Q You were hesitant to tell your mom at first of your pregnancy?

A Uh-huh.

Q Because you thought you didn't know what she would think of you?

A Uh-huh.

Q You thought maybe she would think you were a slut?

A Uh-huh.

Q But when you finally did tell her that was not her reaction, right?

A Right.

Q So you misperceived what her reaction would be?

A I guess I did that because that is the way I kind of felt **[52]** being 14 and getting pregnant, I guess I kind of felt like that after being sexually abused and all of that I guess I really did.

Q You felt like what?

A A slut.

Q You thought your mother would reject you?

A No, I did not think that. I didn't think that she would reject me.

Q You thought she would think of you as a slut?

A She may—I mean, she may have thought that in her own head. She wouldn't have said that, you know.

Q But actually she was very supportive?

A Oh, yeah.

Q And she helped you through this experience?

A Yeah.

* * * * *

TRIAL TESTIMONY EXCERPTS OF D. P.,
MOTHER OF MINOR

[DIRECT BY MS. PINE]

[58] * * *

A I was afraid of him. He never wanted to do anything with the children, he never paid any attention to them.

Q Were those basically the reasons for the splitting up or were there other reasons?

A I think we just didn't communicate. We had grown apart—

Q Uh-huh.

A —from one another.

Q What was the separation process like, was it—

THE COURT: I am sorry, what was the what?

BY MS. PINE:

Q The separation process like, was it very angry, was it, between the two of you—

A Before the divorce, you mean?

Q Leading up to the divorce.

A Leading up to the divorce there were some angry times, yes, there were a lot of angry times. He wanted me to sell the house and I fought him on that and said, no, I am going to get a job and I am going to work and I am going to keep the house to raise the children in and that was our biggest battle, it was over the house.

Q Can you give one example of the kind of abuse that was symptomatic of him and his relationship to you and the children?

[59] A Oh, sure. He not only yelled and screamed at the kids, if we were in the car he would start driving very fast, just

drive, and it just frightened me to death. When he became violent he was violent.

Q Like what?

A Oh, he would abuse—to me, you mean?

Q Uh-huh.

A Oh, he would just hit me all over and throw me down or the same thing to the children.

Q What has your relationship with him been like since you split up?

A We talk on occasion, only if he has anything to do with the children, which is usually Christmastime, he does always make an effort to see the children at Christmastime. Other than that they may see him once or twice a year.

I really have no contact with him.

Q How often would you say you speak to him a year?

A Maybe twice.

Q What is the occasion?

A Christmastime, it is always at Christmastime.

Q Do you share anything about any personal matters with him?

A I will tell him about how the children are doing—he never initiates anything, he never does ask, except would the girls like to come down for a weekend, you know, something of that nature, otherwise, no, we don't get into a lot. Usually **[60]** I will tell him how the girls are doing.

Q Does he ask?

A No. No, he doesn't ask. In fact, I will always say, call the girls and say dad is on the line, why don't you say hello, and, you know, they go like—what do I talk about to this stranger?

Q Why is it that you don't share personal matters about your life with him?

A About my life; I don't think it is any of his business. He has remarried. What I do in my personal life is my business.

Q To what extent do you consult with him about decisions having to do with the children?

A I asked him if he would help me pay for H.'s braces because at the time I didn't have the insurance or dental insurance coverage, and he said no, that he would not.

Otherwise the contact is just, oh, how the children are going to get down to Owatonna, which is where he lives, and how long they are going to be there and when they are coming back.

Other than that we really don't have any communication. When he married, shortly after we were divorced, I did speak with that wife or his wife on occasion because she was always interested in the children and it was after their divorce that she told me what it was like for the girls when they went down to visit.

[64] • • •

Q There were other reasons you didn't want to tell your husband besides not thinking it was his business that you testified.

Can you just summarize those for us, what was it again you were afraid of?

A His violence. His last marriage ended where she ended up in the hospital a couple of times and he also did physically abuse their three children and that just—it just frightens me.

TRIAL TESTIMONY EXCERPTS OF KATHERINE WELSH, EXECUTIVE DIRECTOR OF WOMEN'S HEALTH CENTER

[DIRECT BY MS. BENSHOOF]

[CROSS BY MR. GALUS]

[156] • • •

Q You stated that you have had one denial. Could you explain the circumstances of the denial?

A The denial was—it was our 100th case that we had taken in and the young woman was in foster care, her father was dead and her foster mother was there and apparently she was a Wisconsin resident and the social worker was also there. So it was the foster mother and the social worker and they did not want, nor did the young woman want to notify the mother. It was like they had had a very difficult time placing this kid and she had been through numerous things and he did not grant permission.

At that time we were going to appeal and the public defender who I think was Heather Sweetland on that particular case, we talked to the young woman and we talked to the social worker and to the foster mother and what we decided to do was that we would just send a letter of notification to the mother. To my knowledge the mother never reacted, you know, to that notification, and there was no harassment to the minor.

I think that is what they were worried about.

Q So you accompanied the minor to this court hearing, did you?

A I went.

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[158] * * *

Q You described that you have minors come in at least an hour and a half before you meet the 11:30 or 1:30 schedule, is that correct?

A Yes.

Q Are there any particular days of the week that court is heard or is it any 11:30 or 1:30 scheduling?

A It is any day of the week.

Q And have you ever had the court heard minors outside of those two time periods?

A Yes, we have.

Q And how many times?

A Well, how many times, we had that at 5:00 after the courthouse had closed not long ago.

Q Why did you hear it after the courthouse closed?

A Because the father of the mother, the grandfather of the client was so well-known in the courthouse that there was just absolutely—the mother did not want to go to the courthouse during the working hours nor did the granddaughter, so the judge agreed to meet them after 5:00 o'clock when the courthouse was cleaned out so they wouldn't run into somebody.

Q Are there any other instances?

A Yes. Judge Sweeney not too long ago, we found out a mother was lying to us and what she was was a stepmother and the daughter was not really adopted and so we called up Judge Sweeney **[159]** because Judge Martin was gone and we told him

that we had this problem and we really felt that the only way we could comply with the law was to put her through the court bypass system because they did not want to notify the natural mother and so Judge Sweeney did hear them, you know, within a matter of, you know, an hour or so.

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[171] * * *

Q When you get back from court are minors relieved at the decision? Do they expect that some of the petitions would be denied?

A Yes. And, you know, that is one of the things they always ask us, is he going to approve or is he going to deny and we always just say, you know, each one is individual and you know we can't answer that for you.

You see, they are always relieved that they have been granted and we never give them the percentage of how many have been granted because I just think that would be a real false hope for those young women and so we don't do that.

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BY MR. GALUS:

[355] Other than the fact that you now go in greater depth with your patients as to why they have elected not to notify their parents, and other than information concerning the source of financial support, are there any other—is there any information that is called for by this report to the court that you did not—that you did not, or that you do not routinely obtain in the normal course as the provider of abortions?

A No.

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[371] * * *

Q Okay. You had a hearing on a Friday after Thanksgiving one **[372]** year, didn't you?

A Yes, I did.

Q And the petition was granted?

A Yes.

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TRIAL TESTIMONY EXCERPTS OF CYNTHIA DALY,
ASSISTANT RAMSEY COUNTY PUBLIC DEFENDER

[DIRECT BY MS. LYNN]

[CROSS BY MR. ACKERBERG]

[244] • • •

Q And approximately how many minors did you represent during that period of time?

A My guess is between 150 and 200.

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[253] • • •

Q Did you always ask her questions about why she didn't want to notify her parents?

A Yes.

Q What sort of questions would you ask about that?

A I would ask her why she didn't and I told her that I was going to have to ask her in front of the judge why she didn't want her parents to know and I think it is really intrusive, but I thought it was necessary for the hearing.

Q Was there a requirement that minors had to have counseling in the clinics prior to coming to the hearing?

A Not initially. Later on we instituted that.

Q And approximately how long would an interview with a minor, prior to the hearing, take?

A Both I and the guardian would have to interview the kid prior to going to court and I would talk to them anywhere between ten and twenty minutes depending on how nervous they were and how long it took me to calm them down and get them to understand what was going on.

[254] • • •

Q So how were you able to recognize the minor that you were supposed to represent that day?

A The girls for these hearings stood out like a sore thumb from the various other people sitting there. They didn't look like the delinquents.

Q Can you—

A You can tell.

Q Can you describe how you could tell?

A They were generally, when I was doing them, almost **[255]** exclusively white middle-class, upper middle-class, always dressed nice and had their hair nice and they looked different from my delinquency clients.

• • • • •

Q And what would you talk to the minor about?

A The first thing I did was try to calm them down and explain to them what they had to go through, what the court proceeding was, who the people were involved; just try to calm them down and get them so they weren't quite so nervous.

Most of these kids had never been to court before and didn't have an understanding of what the court system was like or what a hearing was like or what the documents were, so I really tried to explain things to them, introduce—not introduce, but tell them about the personnel involved, try to tell them Judge Petersen was nice and rides a motorcycle and tried to humanize them so they weren't as scared of the judge.

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[257] • • •

Q And at the bottom of that form I noticed that it must be petitioner, that is the minor's signature must be notarized, is that correct?

A That is correct.

Q Did you ever have problems getting that petition notarized?

A Some of the women in the clerk's office would not notarize them because of their opposition to abortion. Finally Judge Petersen's reporter got a notary stamp and then the problem was solved.

Q But there was a time when it might be it was difficult, there were times when it was difficult to find a notary who was willing to sign?

A Correct.

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[260] * * *

A Just prior to Judge Petersen's first vacation, the first vacation after we started doing these hearings, I went and I talked to several of the district court judges kind of to sound them out as to whether or not they would be willing to hear these cases.

Some I didn't talk to because I felt fairly confident I knew the answer. Some were willing to do them and some wouldn't touch them with a 10-foot pole.

Q Would you say that you sometimes then had difficulty finding another judge when Judge Petersen wasn't available?

A It would take a lot more time. There was never an occasion where we could not find a judge but it would take a lot of time.

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[262] * * *

Q How would describe the emotional state of those minors prior to the hearing?

A Scared. They were scared, most of them had never been in court before so they were facing a court proceeding, they were being talked to about some of the most intimate details [263] of their lifes by a bunch of strangers, and they thought that whatever Judge Petersen did would affect the whole rest of their lives, which it may well have. I think they were very scared.

Q Those parents who accompanied the minors that you talked to, what were their reactions to the court process?

A I think some of them—typically they were mothers—but I think a lot of them were angry, either at the other parent who might not have been involved, that they had to go through this process.

I think they were angry, they were worried about their kid and they were nervous too. A lot of these parents had never been in court. You know, it is a mixed reaction, concern about the kid.

Q Can you describe the kind of minors you saw in terms of where they came from or their socioeconomic status?

A They were typically middle to upper-middle-class kids, most of them, the vast majority of them were in school, the vast majority had plans for the future. Typically they were white.

Q Could you make any general observations about their status in school or their grades or where they were employed, did they tend to be employed in any way or—

A They tended to be really neat kids, actively involved, fairly responsible in a lot of areas of their lives. They [264] were a real contrast from what I saw in delinquency court. It was refreshing to see neat kids. They were typically very bright kids. I don't know whether it was the dummies couldn't figure out how to get to court or whatever, but they were typically very bright kids.

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[270] * * *

Q Given your experience representing minors in these parental notification hearings, do you think that the court bypass process benefitted the minors in any way?

A No. I think it was another hoop to jump through and a very damaging and stress-producing procedure that didn't do any good.

Q How did you view your role as a lawyer in these proceedings?

A I would hope that I was able to make it easier for the girls I represented.

I oftentimes felt like a peeping Tom—

THE COURT: I am sorry, felt like what?

THE WITNESS: A peeping Tom, looking into these real private issues that were, of necessity, raised.

I hope it made it easier for the girls.

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[279] * * *

BY MR. ACKERBERG:

Q In your experience how has Judge Petersen interacted with the minors who appear before him in these proceedings?

A He has been kind, thoughtful, made every effort to put the kids at ease, but to carry out his role as he perceives it.

He is a fine judge and he made every effort to make that kid comfortable.

• • • • •

TRIAL TESTIMONY EXCERPTS OF DR. LENORE WALKER, CLINICAL PSYCHOLOGIST

[DIRECT BY MS. BENSHOOF]

[CROSS BY MR. ACKERBERG]

[296] • • •

Q Dr. Walker, what is the definition in your field of the term violence?

A The term has a number of different definitions in terms of family violence. It would be defined as any kind of physical, psychological, or sexual abuse towards another member within the family.

Q And how would you describe the term battered woman?

A A battered woman would generally be somebody who is in a relationship with a man who commits that kind of violence. My definition is that it has to be physical, very serious psychological abuse that is life threatening, or sexual abuse within that relationship committed by a man to get her to do something that he wants her to do without any regard for her rights or her feelings about it.

Q Are you familiar with any studies about the prevalence of such violence in American families and in Minnesota in particular?

A Yes, I am. The prevalence in American families has been estimated by Murray Strauss, Richard Gillis and Susan Steinmetz in their epidemiological study at occurring in a little less than two million families in the United States.

In Minnesota, studying a report that was issued in 1985, I believe, it estimates that there are on the average 31,000 homes—31,000 women where violence takes place. These data,

as I understand it, appear in a particular report that is **[297]** based on the Minnesota mandatory reporting law.

Q When you said 31,000, you mean 31,000 acts a year?

A They averaged 31,000 incidents per year. So, there could be more than one act within an incident.

Q Do you know how such acts of violence relate to other violent crimes in Minnesota in terms of proportion?

A There is a statement in this particular report that suggests that domestic violence is perhaps the most frequent occurring crime in the State of Minnesota.

Q Are reports such as this regularly relied upon by experts in your field?

A Yes they are, both by mental health professionals and I believe that reports such as this one are also relied on by funding agencies so that they can allocate the distribution of state monies to help combat this problem.

Q Have you, in the course of your work, studied the proportion of homicides that occur between family members?

A Well, I certainly work a lot in the area of homicides. It is very difficult to get the exact numbers that occur within families. The FBI statistics estimate that perhaps as many as 25 to 30 percent of homicides, all homicides, occur between family members.

Q You stated that you did a comprehensive study interviewing 400 battered women. Do you know from that study or from other studies in your field, where there is a relationship with a **[298]** battered wife, how frequently there is also violence to children?

A In our study we found that the women reported in 55 percent of those cases the man who battered the woman also battered the children. When she was living in a violent situation she was likely to batter the children 25 percent of the time. For those women who were out of the relationship, that figure went all the way down. It was eight times higher for violence to occur when they were together in the relationship, against the child, from the woman's point of view.

The violence did not go down, according to the women, for the man to the child, whether they were living together or not.

Q You mean when the man was separated from the family his violence to the child stayed the same, but her violence to the child went down?

A That is correct. In my research, I may add also, my figures are compatible with other researchers in the field, that there is a very high relationship between all forms of family violence.

Q You mentioned in describing your expertise the term dysfunctional families. In your field do people describe families in different ways? Are their categories of families that psychologists in this area depend upon for their classification?

A Yes. In fact there are a number of studies, including one done by a researcher named Gerald Patterson and his colleagues **[299]** in Oregon where they have looked at dysfunctional families, abusive dysfunctional families and normal families, and what they have found is that there is a very different kind of communication pattern in each of those three families.

In the normal family they took a lot of observational periods in these families, they sent observers into the home and they quoted interactions. They found in a normal family the ratio of positive kind of interactions between the members is much higher than the negative interactions.

In a dysfunctional family that switches and there is a much greater rate of negative interactions than the positive kind of interactions between people.

In an abusive dysfunctional family there is still a higher level of negative interactions but there is also the—the pattern is different. There tends to be a blast of negative kinds of interactions and then a period of calm rather than the regular one, two, three, more even tempered interactions and then perhaps a—perhaps a blast of nice kind of loving interactions. That is very similar to the work my research has uncovered, that in battering families there is a three phase cycle with tension building and then an explosive incident which is equivalent to that blast of negative behaviors and then a period of no—either no tension or kind of living behavior.

Q And their definition and category of dysfunctional violent families, and that dysfunctional family, is accepted by others **[300]** in your field?

A Yes, it is.

Q Could you describe the relationship between the husband, wife, and children in a dysfunctional family?

A In a dysfunctional family communication patterns are interrupted in that family, it is probably more negative kinds of communication, but there is also a whole lot of—of just inability for people to understand one another; a lot of misperceptions go on.

In an abusive dysfunctional family the system becomes a very closed system. There is a lot of isolation, there is a great deal of fear that someone is going to find out the terrible secrets that go on in that home, and there is also a lack of—there is a greater sensitivity to each other, but a lack of communication with the outside world. Helpers are not seen as being important in that kind of an abusive dysfunctional family, and they are less likely to seek help.

Q In a violent dysfunctional family there is a difference in the way they communicate not only with each other but with the outside world?

A That is correct.

Q And you stated there is reluctance for family members, even those who are abused, to seek help or to communicate this to the outside world?

A That is true.

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[305] * * *

Q Has your research developed a psychological portrait of the characteristics of a batterer?

A Yes. I have done clinical work with batterers. Although I have not done specific research with them, my research has been more what women say about the men, and there is a great deal of overlap between my clinical work and what the women say.

I also work with other researchers in the field who actually do study the men and we are finding great areas of agreement for them, for what we now know about men who abuse women.

Q And what is the psychological portrait of a batterer?

A Batterers tend to have low self-esteem, they tend not to [306] have any self-confidence within themselves. They are described as having more than one personality, often a Dr. Jekyll-Mr. Hyde. It is not a clinical kind of diagnosis like a multiple personality, but rather I see many sides of a batterer and it is because he has what we call emotional mobility, he can go from one mood to another with very rapid mood swings and you cannot often predict how soon his moods will change. In addition he is very jealous, often pathological jealousy. There is a great deal of sexual abuse we are discovering with batterers, also sexual insecurity, a high level of sexual—confusion between sexual intimacy and emotional intimacy.

There is also a lack of boundaries for batterers so that they believe their families are their property and that people within their families are not treated as individuals. In communication patterns within those families, and the communication of a batterer is almost impossible in a human way because he decrees that he has the right to make all decisions and isn't always interested in what other people think or feel or will do.

Batterers tend to be isolates at times, although they can be very charming at work. They range from all different socio-economic classes and have all different kinds of educational levels as well. We have not found any patterns in that particular demographic grouping, but we have in their personality patterns.

Q Is there any—you described the characteristics towards the wife and children. Does this cease when the family, when the [307] husband and wife become divorced or separated?

A No, it does not. In fact that has been one of the most interesting areas in the ten or so years that I have been working in this field. There was a belief at first that if you helped couples to separate that that would end the violence. In fact we have learned that that does not happen, that the violence and the harrassments continue well beyond the divorce, especially when there are children involved.

Q And have you studied any homicides that have occurred during the period of separation or divorce?

A Yes. The most common time for a homicide to occur is at the point of separation. Batterers have a fear of abandonment and when they feel that they are losing their family they are most likely at that point to become homicidal or suicidal or actually both.

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[308] * * *

Q Would you say that adolescence, as compared to other stages of childhood, is a particularly vunerable point insofar as a battering home?

A It is really a very vulnerable point, one, because there is a great deal of sexual abuse and a lot of sexual jealousy for the batterer, so just the very being of at that time adolescent sex such as dating, a prom, they don't want their wifes to go out and certainly not their children. They want to keep everybody inside that home and that causes a great deal of violence and conflict in those homes.

In addition, I find that in the violent homes adolescence increases the amount of physical abuse; that when you study families over the life span you find two specific times when violence is the highest. One is in pregnancy and the very early stages of a child's life, the first few months; and the second is at adolescence, two points, and we don't really understand all the causation, but if you plot that all out on charts that is what it shows.

Q Have you or others studied any correlation between pregnancy and violence?

[309] A I have studied some in my research program and we found about one third of our subjects were submitted to terrible violent battering incidents during pregnancy. Richard Gillis (ph) another researcher from Rhode Island also studied it and found a very high rate of violence that increased during the period of pregnancy.

Q You are talking in terms of pregnancy of the wife?

A That is correct.

Q What about pregnancy of the teenage daughter?

A There has been very little research that I have seen about pregnancy during—of an adolescent daughter. However, the theoretical implication would be that it would be very high were we to study it and that would be part of the high figures of child abuse and general high levels of violence that increases when children are adolescents.

Q What would you expect the effect of notice of a daughter's pregnancy to have on a batterer?

A I think it would absolutely enrage him. It would be much like showing a red cape to a bull. That kind of information just plays right into his worst fears and his most vunerable spots.

The sexual jealousy, his dislike of his daughter going out with anybody else, would make him very angry and would probably create severe abuse as well as long term communication difficulties. In some cases the man may not react impulsively **[310]** and may hold on to that kind of information. But during the next fight it would certainly be used as a weapon and would continue to be used for years.

Q Have there been studies on the kind of information or the kind of incidents that do provoke this family violence?

A Well, most of the research shows it doesn't matter what kind of behavior goes on, that the violence comes from within the man himself; that his inability to control his anger whenever there is frustration or stress will cause a violent episode. It is inability to communicate effectively that causes the violence.

Q But pregnancy is a factor that has been correlated to provoke violence?

A That is correct. There is no—when scientists talk about correlation we don't talk about cause and effect. But the association of pregnancy has been found as one of the factors that causes an increase in violence.

Q Have you done any studies correlating the violence in a dysfunctional family and sexual abuse?

A Yes, I have. I have done most of my—most of my work has been clinical studies in that particular area and I found there is a much higher incidence of child sexual abuse and adolescent sexual abuse in battering families, particularly in those families where the man is known to also have sexual problems with his wife, where he is also sexually abusive towards her, that

he may have a much higher risk for children to be incested upon in those **[311]** particular families.

Q And you have personally studied families in which there is incest?

A Yes, I have.

Q And does the knowledge of this incest coming out provoke violence in the families?

A Yes, it does. In fact in twelve of the 91 homicides that I have worked on the exposure of incest has actually caused the violence to escalate to such a point that the woman killed the man. In one of those twelve cases, there was actually an incident where the daughter became pregnant and that is how the wife found about the incest and the emotional upheaval in that family pushed the man to come at the woman with a knife and her to take a gun to defend herself against him and shoot and kill him.

Q What was the name of this woman who killed her husband because she found about the incest?

A This particular woman who found out that the daughter was pregnant was Nellie Glenn (ph) and that was a trial that took place in Fort Wayne, Indiana, and she was found not guilty by justifiable homicide. It was a self-defense acquittal.

Q And you testified in that trial?

A Yes, I did.

Q And you examined this woman?

A Yes, I did.

[312] Q And you found that the knowledge of the incest pushed her over the brink?

A Yes, I did.

Q You found that the pregnancy knowledge pushed her over the brink?

A That is correct. That is how she found out about it.

Q Are you familiar with the Minnesota Statute 144.343?

A Yes, I am.

Q I would like to draw your attention to Subdivision 4, Subsection (c).

Dr. Walker, this section says that there is an exception to mandatory notice or court bypass if, "the pregnant minor

woman declares that she is a victim of sexual abuse, neglect, or physical abuse".

In your opinion is a minor who is pregnant and seeking abortion, and is a victim of sexual or physical abuse, likely to declare that she is when asked?

A In my professional opinion that would be a very unlikely occurrance, that it is very rare for children who are either physically or sexually abused to tell anybody about the abuse in any event. With the addition of pregnancy it would make it even less likely; there may be some who would, but it would be a very small percentage who would tell.

Q So minors who are given this option of exception would not likely be able to take advantage of it psychologically, is that **[313]** correct?

A I think it would be almost impossible for most of them to take advantage of it psychologically.

Q In your opinion is a minor who comes from a dysfunctional family likely to be psychologically able to choose and carry out the court bypass procedure?

A I think it would be exceptionally difficult.

* * * * *

Q In your opinion is a minor who comes from such a dysfunctional family likely to be psychologically able to choose and carry through the court bypass procedure?

A In my professional opinion it would be unlikely for a minor to be able to carry through such a procedure. The rules of those families are secrecy, and not to tell anyone. Going to court would be an exposure of a risk of—an exposure that would create a higher risk of any kind of abuse and it would be very difficult for a minor to do that.

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[314] * * *

BY MS. BENSHOOF:

Q In such families—

THE COURT: Dysfunctional families?

MS. BENSHOOF: Yes.

BY MS. BENSHOOF:

Q —is a minor's judgement that she cannot notify one or both parents because of what would happen likely to be a correct perception?

A In my professional opinion, yes, it is likely to be an accurate perception. In abusive, dysfunctional families particularly a hyper-reluctance to discuss any potential violence develop and that sensitivity is a very acute and real sensitivity and I think her judgement, a minor child's judgment that this might—telling her parents might create a dangerous situation is very accurate.

THE COURT: Do you feel the same way about a functional family?

THE WITNESS: It is less sensitive in a functional family than it is—I think—yes, that minors tend to understand their parents in many situations, particularly in this situation, but their perceptions may be less accurate in function **[315]** families.

In dysfunctional families it can't be less accurate because that is what saves them from a lot of abuse growing up so they have a much more finely tuned understanding of how their parents will react in a situation.

THE COURT: In the dysfunctional?

THE WITNESS: In the dysfunctional.

THE COURT: In the functional family are you of a mind that the minor could accurately predict the reaction of the parents?

THE WITNESS: I think at times they can but they won't have the sensitivity that a child who grows up in a dysfunctional family would have.

THE COURT: They are not as likely to be correct in a functional family as they are in a dysfunctional family as you understand?

THE WITNESS: I can't say that they wouldn't be apt to be correct, because they might. I don't really know. I just know that the sensitivity in abusive families is much more sensitive and they are correct.

THE COURT: Sensitive to what the reaction is going to be?

THE WITNESS: That is right. That is correct.

BY MS. BENSHOOF:

Q In such dysfunctional families where a mother makes or [316] believes there will be violence if the father learns of the daughter's pregnancy, is her perception likely to be an accurate one?

A Yes, it is, again for the same reasons.

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BY MS. BENSHOOF:

Q For those minors coming from dysfunctional families who cannot psychologically envoke the court option, what is the likely reaction in those families when they learn of her pregnancy?

THE COURT: All right, you may give your opinion.

THE WITNESS: In my professional opinion the most likely reaction is a greater dysfunction within this family. Communication patterns will be severed and there is a much higher risk of future violence.

BY MS. BENSHOOF:

Q Do you think that such involuntary notification could result in a positive effect on the family communication patterns?

A No, I do not. There is no evidence, either clinical or research data to suggest that that would happen.

[333] * * *

BY MR. ACKERBERG:

A The best epidemiological estimate is in Murray Strauss, Richard Gillis and Sue Steinmetz study that they conducted that was funded by the National Institute of Mental Health. They knocked on 2,000 doors in a random way according to research procedures, and they simply asked questions about—a lot of questions about the family and one set of questions was on whether or not there was a physically abusive incident; and they

found 28 percent of those homes. Then they, of course, extrapolated from that some kind of sample they can generalize to the American population. They only knocked on married families doors and so in single families where there was abuse, and some of that abuse is still continuing even though they are single, they did not include those data. They also didn't include the data for people who might be living together and not be married, or dating and being abused, and so they say that that 28 percent is a very low estimate of the number of physically abusive families.

They did not ask questions about sexual abuse within the marital relationship so that would add to it; or very severe psychological abuse. In my research we use the definition that Amnesty International uses for psychological torture.

When we talk about psychological abuse that is a low estimate and that is where the figures come from.

[334] MR. ACKERBERG: Thank you.

THE COURT: Do you conclude from that that 25 to 50 percent of the married women are suffering from Traumatic Stress Disorder?

THE WITNESS: No, you can't do that. First of all you can't do it unless you see them you can't diagnose them, that would be unethical procedure. They also say it is at least one abusive incident. For me you need—and you could use Post Traumatic Stress Disorder for that—for me I think you need to have at least two.

THE COURT: To diagnose the Post-Traumatic Stress Disorder?

THE WITNESS: And you also have to see the symptons of it there. It is entirely possible there are people who are battered who we have not seen who don't have the symptoms of Post-Traumatic Stress Disorder and then you couldn't diagnose them.

MR. ACKERBERG: What proportion of the families are dysfunctional?

THE WITNESS: I don't know. I don't know, but we know the divorce rate is up to about 50 percent in this country, so it is pretty high.

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TRIAL TESTIMONY EXCERPTS OF JUDGE GERALD MARTIN, FAMILY AND JUVENILE COURT JUDGE OF ST. LOUIS COUNTY

[DIRECT BY MS. LYNN]

[396] * * *

Q And do you know approximately how many you have presided over?

A Personally I have presided over almost exactly 225, it is either 225 or 226. The total number of cases in Duluth has been about 275.

Q So you are in fact the judge with the major responsibility [397] for implementing this statute?

A Yes.

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[399] * * *

Q Have you ever talked to somebody from the Clinic about scheduling an appointment yourself?

A Yes. I believe so. That is rare but I can remember one occasion where I was called by the Health Center staff about a girl driving from the Michigan Peninsula and in order to arrange that it would have to be in the middle of the afternoon as a matter of convenience. So she called me directly to see if that was all right. There may have been some other occasions, but I can't remember any other occasion.

Q What was your response to that?

A Yes, we arranged a time that would meet her needs.

Q All right. Under what circumstances will a minor's abortion petition case be referred to a judge other than yourself?

A If I was out of town or on vacation or just not available. Otherwise I would hear it.

Q Are you available for hearings Monday through Friday?

A That is correct.

Q How about weekends?

A No, not as a regular matter.

Q Has anyone ever requested you, or your court, through the court reporter, that a hearing be held on the weekend?

A No.

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[407] * * *

Q What is your understanding of the standards set out by Minnesota Statute 144.343 to be used in either granting or denying these petitions?

A We are to decide whether the petitioner is mature and capable of giving informed consent to an abortion. If we find that either of those do not apply, then we have to make a decision as to whether it is in the best interest of the petitioner to proceed with an abortion without first notifying her parents.

Q What is your understanding of the term parents in this statute?

A Well, the statute only refers to parents and I assume they are referring to natural parents, although I would interpret that to also include adoptive parents.

Q Would you include that to—would you interpret that to include a situation where a parent has had their parental rights terminated?

A I have not confronted that. I would interpret it as excluding parents who have had their rights terminated, but it is not clear.

Q What do you think the statute means when it says mature and capable of giving informed consent?

A Well, I don't really know. To be quite frank about it, I [408] think your guess would be as good as mine. I have read U.S. Supreme Court Decisions, this is back in '81, to see if they gave any guidance, and some of the Justices talked about strain within the family relationships as somehow applying to the issue of maturity or whether a petitioner should be permitted to go ahead without first notifying the parents. So, that is a factor I consider, although it is not logically related to maturity.

Beyond that I try to make a subjective judgment as to whether the petitioner is mature, is she articulate, is her reasoning adult like, reasonable. By definition anybody under the age of 18 is immature and yet obviously the legislature presumes that many people below the age of 18 are mature; but they don't know, there is no guidance within the statute to assist the court in determining what the means or how to make that kind of determination.

Q How do you think, or do you think that mature differs from capable of giving informed consent?

A I don't really know. I think that—I think it might be possible for an immature person to give informed consent so I am not sure that they are the same thing.

In the sense that informed consent means that you have gotten the information you need in order to consent—you could argue that maybe someone who does not have maturity cannot give reasonable consent, but the only term in the statute is informed consent, so, you know, I have never had to confront that directly, **[409]** but if I had to I am not sure what the answer would be.

Q What do you think the statute means when it refers to the pregnant woman's best interest?

A That part of the statute could be given either a narrow or broad interpretation. It can mean should she be able to go ahead without notifying her parents, period; or it might mean that the court should make a decision as to whether she should have an abortion or not, and if so, whether she has to notify her parents. It means one of those two things, either the narrow definition or the broad. Which one it is, I don't know.

• • • • •

Q And in the approximate 225 hearings that you testified you have presided over, in how many did you find the minor to be mature and capable of giving informed consent?

[410] A All but one.

Q And in that one in which you found the minor not to be mature—excuse me, strike that.

So in all of the cases that—where you granted the petition you did so on the grounds that the minor was mature, is that correct?

A That is right.

Q And in the only petition that you denied you found that she was not mature and I take it that it was also not in her best interest not to notify her parents, is that correct?

A Yeah. In the one I found that she was not mature and capable of giving informed consent. Then I found that it was

not in her best interest to proceed with an abortion without going through the notification process.

Q Can you describe the circumstances of that one case?

A Well, it was a 14 year old girl and a very immature 14. Her mother had been consulted, was at the hearing, and approved of her decision to go on with an abortion. The father had been out of contact with either the mother or the child for at least seven years. His whereabouts were unknown. The last known address was from about seven years before.

The statute requires that a reasonable effort be made to make contact with that parent in that case.

Q And why did you make a finding that her best interest—that it was not in her best interest not to notify her father?

[411] A Well, this was not against her best interests—wait a minute, you have got—

Q I am sorry—

A I know what you mean anyway.

Q You know what I mean?

A I saw no reason not to send a certified letter, return receipt requested, to the last known address seven years ago. There is no—there was really no doubt in my mind that they would never make contact with the person anyway. There were no reasons given as to why it would be detrimental if contact were made. He was not a threat, there was no past history of abuse or that sort of situation that you normally see in these cases.

Q So when you decided that petition, Judge Martin, you had no reasonable expectation that sending that letter to the last known address would result in actual notification of the father, is that correct?

A That is correct. There was no doubt in my mind that contact would actually—actual contact would not be made.

• • • • •

[412] • • •

Q What kind of reasons do the minors give for not wanting to notify their parents?

A It is almost always a case of very unhealthy family situation. It is frequently a physically and emotionally abusive

father, usually; alcoholic parents, it might be a parent that physically abuses the petitioner, or would blab all over town **[413]** about the situation and we have a lot of small towns around that area. There is often--you see a case where one of the parents is extremely ill, heart condition, or in some sort of nervous situation, receiving treatment for a very nervous disorder, and it is felt that if that parent learned about the pregnancy it would be detrimental or even life-threatening for that person.

You often see a case where one of the parents has had very little contact with the child for years after a divorce, maybe they see that parent once a year for the last five years, and never discusses anything important with that parent and doesn't want to have to consult that parent about this.

Those are the most common cases.

Q Can you give any specific examples of these kinds of situations?

A Well, the ones that would stick out in your mind are the abusive situations and it is probably the most common type one. In one case about a week or two before the hearing the father had broken the petitioner's mothers wrist and had frequently physically abused both the mother and the petitioner. Another case that I can recall from the range, the father frequently beat the petitioner and she had no doubt in her mind that the same would occur if she notified the father about her pregnancy.

Other than that there is no individual cases that stand out, but that, I think, is a very common situation.

Q And when the petitioners tell you that they are afraid of **[414]** abuse from their parents, do you believe them?

A Oh, yes. For sixteen years I have seen a great deal of that and there is no reason for me not to believe that.

Q What have been your observations regarding the minor's reactions to being in court?

A Well, I think everybody, I assume, who has to be a witness in court, it is a nerve wracking experience and I think particularly for these juveniles it is a very anxious time; and particularly with the personal issues involved. I think they find it a very nerve wracking experience.

Q Well, based on those observations do you have any opinions as to the impact on the minor in having to go through this court proceeding?

A I am sure it is an ordeal for them.

Q What have you observed, anything about their reaction after you have signed the order?

A Oh, when the hearing is over they show a great deal of relief and they proceed out of the chambers with a great deal of speed and, you know, that is what I see.

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TRIAL TESTIMONY EXCERPTS OF CHAR BAKER, EXECUTIVE DIRECTOR OF MIDWEST HEALTH CENTER

[DIRECT BY MS. LYNN]

[476] * * *

Q All right. What effect do the court requirements have on Midwest's scheduling of minor patients for abortions?

A It always includes a two-day appointment and in some extreme situations maybe even three days because we are **[477]** required to counsel the patient prior to going to court; also do a lab workup and examination, and then the court appointment has to be set and once court approval has been made then she comes back for the procedure.

Typically the young woman would have the counseling session take place one day and then be scheduled to go to court the day of the procedure. So then she would be going to court on another day and then coming back for the procedure.

Q Now you mentioned that sometimes it is a three-day process.

Can you explain when that would happen?

A That would happen if the court situation was such that the minor did not get back in time for the doctor. So then she would have to come back on a third day for the procedure.

* * * * *

TRIAL TESTIMONY EXCERPTS OF MARIA HONKALA, FORMER TEEN ADVOCATE AT MIDWEST HEALTH CENTER FOR WOMEN

[DIRECT BY MS. LYNN]

[CROSS BY MR. GALUS]

[526] * * *

Q Did you ever have any minors that you accompanied to court run into anybody that they know?

A Yes, several times the women would know one of the employees at the court, whether it be the judge or the public defender or the guardians. That was a problem and also, just running into or worrying that the parents worked in downtown, worked in the government center.

I also had one woman, I also had a woman that her school was on a field trip while she was at court and saw her and asked her what she was doing there.

* * * * *

BY MR. GALUS:

[538] Q You mentioned in your direct testimony certain problems you have observed with confidentiality of those of your patients going through the court process in Hennepin County, didn't you?

A Yes.

Q Okay. And I believe you mentioned on one occasion or on more than one occasion, perhaps it was your testimony, that one of your patients, court minors, knew some court personnel?

A Yes.

Q How many times did that occur?

A Just the court personnel or including—

Q Let's take the court personnel.

Let me ask you that first.

A I would say at least 10.

Q Okay, who—could you identify the court personnel who the minor was acquainted with?

A Judge Oleisky, George Widseth, one of the public defenders, a couple of the guardians.

Q Were the majority involving Judge Oleisky?

A No, I would say the public defenders.

Q The majority involved Mr. Widseth?

A And also David Knutson.

Q These were situations where the court minor was acquainted with Mr. Widseth or Mr. Knutson?

A Yes.

[539] Q Do you know what the nature of the previous acquaintance was in connection with Mr. Knutson and Mr. Widseth?

A Neighbors.

Q How about the occasion—when Judge Oleisky had been previously acquainted with the court minor, do you recall that was once or more than once, that occurred, to your knowledge?

A I believe it was twice.

Q And on those two occasions do you recall what the nature of his prior acquaintanceship had been between the judge and those two minors?

A Judge Oleisky friends' daughter was one of them and I believe the other one was a woman just knowing the judge from seeing the judge before for something else.

Q That child had appeared before Judge Oleisky's juvenile court previously?

A Right.

Q And on how many occasions, to your knowledge, have court minors become involved with guardian ad litems with whom they were previously acquainted?

A I would guess about three times.

Q Okay, that is your best estimate, three times?

A Yes.

Q Do you recall the names of the guardians involved?

A No.

[540] Q And do you recall the nature of the prior acquaintanceship?

A Neighbors.

Q On any of the occasions where the minor had a prior acquaintance or acquaintanceship with public defender Knut-

son, do you have any reason to believe that Mr. Knutson violated confidentiality of that proceeding by communicating anything about it to any third party?

A No.

Q On the occasion when one of your—one of the court minors had a prior relationship with public defender Widseth, do you have any reason to believe that Mr. Widseth violated the confidentiality of that proceeding by communicating it in any respect to any third party?

A No. I would do a couple of things: If the women showed up at court and knew them, I would let them know ahead of time that she was concerned about knowing them and also if the minor expressed to me that she knew, say, Judge Oleisky or knew somebody that worked there, I would call ahead of time and make sure that that person, you know, tried to make sure that that person is not seen by that person that she was—

Q I think I may have misunderstood you on the two occasions where the young woman had been acquainted with Judge Oleisky, did you call ahead?

A On those two women I am talking about they—no, they found **[541]**—I found out when we were at court.

Q Okay. So there was no forewarning of the acquaintance?

A Right.

Q And on the occasion involving Mr. Widseth did you know in advance that the young woman was acquainted with Mr. Widseth?

A No.

Q And on the occasion with Mr. Knutson?

A No.

Q So the approximately 10 occasions that you described were occasions where they actually confronted each other?

A Right.

Q Now you are telling me on other occasions you may know in advance that the minor may be acquainted with a public defender or a guardian?

A Right.

Q How would you know that?

A By her asking me, you know, is Judge Oleisky the judge that would be seeing me.

Q Okay. And on those occasions you have indicated yes or probably yes?

A I have called to find out.

Q Okay. And you have inquired of the minor whether she had any objection to proceeding before Oleisky?

A Right.

Q And on occasion there has—had there been an objection?

[542] A Yes.

Q Or—

A We have scheduled her to come in when Judge Oleisky would not be there.

Q Okay. Other than the minor forewarning you about preferring not to appear before Judge Oleisky has any other minor forewarned you about preferring not to be represented by a particular public defender or be involved with a particular guardian?

A Just not somebody specific, but just saying that they know certain lawyers or whatever that worked at the government center and I don't know whether or not, you know, they worked there or whatever.

Q Okay. You mentioned a field trip, the occasion of a field trip where one of your patients was awaiting court when a field trip from her school came by.

Did I understand you correctly?

A Yes.

Q And she was seen by one or more of her classmates?

A Yes.

Q And it happened more than once?

A No.

Q Other than the field trip and the occasion you have mentioned one of your patients was acquainted with a public defender or a judge or a guardian ad litem, have there been **[543]** other problems with confidentiality that you are aware of?

A Other than when the woman is sitting in the lobby and there are other women that are there for the same reason that know each other, feeling uncomfortable and that other woman that is there for the same reason goes to her school.

Q You have clarified for me before on certain occasions you were able to be forewarned about a possible acquaintanceship and would call ahead.

I think I was in the course of asking you whether or not on any of those occasions when the young woman was acquainted with a public defender, do you have any knowledge whether that public defender breached any confidentiality in the sense of communicating the proceedings or any aspect of those proceedings to any third party?

A No.

Q On the occasion when the young woman was acquainted with the guardian ad litem, do you have any knowledge that those, any of those guardian ad litems breached the confidentiality of the proceedings by communicating the proceedings to any third party?

A No, other than a few times, I would say three times that I was there while the women were sitting in the lobby, one of the—this is with the receptionist—one of the employees would walk in and ask why the women are sitting there and the employees would, like, let that employee know why the women are **[544]** there.

Q That is the Hennepin County Public Defender's Office you are talking about, correct?

A Yes.

Q With respect to the guardian ad litem, with whom some of your patients have been acquainted, there has been no breach of confidentiality coming from those guardians, to your knowledge, has there?

A No.

Q Okay. You don't have any involvement with the Hennepin County Public Defender's Office anymore, do you?

A No.

Q At least in terms of—

A Right, the location.

Q —where the young women wait?

On any of the occasions involving a compromise of confidentiality in terms of the court personnel being acquainted with the young woman or someone in Hennepin County the public defenders' reception area inquiring why the young women were

there or on the other occasion of the field trip, in any of those instances to your knowledge have the parents been made aware of the proceedings?

A No.

* * * * *

[547] * * *

Q Okay. And do you know, based upon your observations, what fraction of your patients do in fact come back for two-week checkups?

A I would just say most.

Q More than half?

A Yes.

Q And for the others you have no idea or no personal knowledge as to whether or not they have in fact received a checkup, correct?

A Yes.

* * * * *

[556] * * *

Q Okay. Did you ever—I take it from your testimony that you have been successful on a number of occasions in getting scheduling accommodations from Judge Oleisky, correct?

A Yes.

Q And also from Judge Albrecht?

A Yes.

Q Okay. In a particular circumstance it was exceeding the five or six limit per day?

A Yes.

Q Did you ever ask Judge Oleisky if he would hear these matters at 4:00 o'clock p.m.?

A Yes. He has a couple of times seen women privately.

Q After 4:00 o'clock p.m.?

A I am not sure if it was after 4:00 o'clock p.m. or not.

Q Have you ever asked Judge Oleisky to hold court for these purposes after 4:00 o'clock p.m.?

A No.

[560] * * *

Q Okay. And at one point someone on behalf of the court system indicated that the court was willing to treat anything of a gestational age of 12 weeks or greater as an emergency [561] for scheduling purposes?

A Right, and then they switched it to be 11 weeks because I was asking them—I was trying to figure out who was an emergency patient to them.

Q For purposes of the court deviating from its normal scheduling practices, right, as far as hearings?

A Right.

Q Okay. And they at first said we will treat anything over 12 weeks as an emergency for these purposes?

A Right.

Q And you urged them to make 11 weeks the emergency definition?

A Right.

Q Correct. And they agreed?

A Yes.

* * * * *

[564] * * *

Q Do you ever talk to Susan Smith about getting an earlier date in order to avoid a second trimester procedure?

A I have talked to her a couple of times.

Q Well, how has she responded to requests in those couple of situations?

A She made the appointments.

Q She has accommodated you or accommodated your patients?

A Well, for the last time she didn't return my phone call.

Q When was that?

A I can't find the date. I would say about six months ago.

Q But on a couple of occasions you have actually spoken with her concerning the needs for an earlier appointment to avoid a second trimester situation, correct?

A Right, uh-huh.

Q And on all of those occasions she accommodated you?

A Yes.

[568] * * *

Q Other of your out of town patients have been late to some extent, to a lesser extent?

A Yes.

Q And have you asked the court to fit them in a little bit later?

A Yes.

Q And has the court accommodated that?

A Yes.

* * * * *

[581] * * *

THE COURT: But the average case you would handle by yourself?

THE WITNESS: Right.

THE COURT: What was your age at that time?

THE WITNESS: I believe 17.

THE COURT: What was your formal education at that time?

THE WITNESS: Just the experience of it would have been—I was still in school and—

THE COURT: What was your highest grade achieved?

THE WITNESS: At that time?

THE COURT: At that time.

THE WITNESS: I was still in high school.

THE COURT: What year in high school were you?

THE WITNESS: I was a senior.

THE COURT: You were a senior in high school, 17 years old?

THE WITNESS: Right.

THE COURT: And you were the person who was counseling and advocating for the teenage patient at the Midwest Health Center?

THE WITNESS: Right.

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TRIAL TESTIMONY EXCERPTS OF THOMAS WEBBER, EXECUTIVE DIRECTOR OF PLANNED PARENTHOOD OF MINNESOTA

[DIRECT BY MR. PENTELOVITCH]

[618] * * *

BY MR. PENTELOVITCH:

Q Mr. Webber, who testified on behalf of or what organizations had representatives testify on behalf of these bills in the house and Senate, House or Senate?

MR. GALUS: Objection, irrelevant.

[619] THE COURT: Objection sustained.

MR. PENTELOVITCH: Offer of proof?

Would you answer that?

THE WITNESS: The organizations before the Senate included Minnesota Citizens Concerned For Life. Before the Senate and the House organization it tended to be quite similar and Minnesota Citizens Concerned For Life, the Minnesota Catholic Conference and Health Care facilities, the St. Paul—Minneapolis-St. Paul Archdiocesan Council of Catholic Women, the Human Life Alliance, Citizens for Community Action, Minnesota—I can explain who these groups were if they mean anything to you, Citizens for Community Action is a group that opposes Planned Parenthood's provision of abortion care.

Minnesota Citizens Concerned For Life is the largest antiabortion organization in the state.

The Human Life Alliance is much smaller but somewhat more strident antiabortion organization. All of them testified. In addition to them a group, Minnesota Legal Forum, which at that time, 1981 was Minnesota's local affiliate of Phyllis Shafley's group organized to oppose—

THE COURT: ERA? Minnesota Equal Rights?

THE WITNESS: The Minnesota Eagle, the bird, forum, the Minnesota Eagle Forum; CALM, the acronym stands for Citizen Alert for Liberty and Morality; a group organized by the pastor of the Fundamentalist Church in St.

Paul, initially **[620]** to oppose antidiscrimination efforts against gays in public housing in the City of St. Paul—

THE COURT: Citizens Alert for what?

THE WITNESS: Liberty and Morality, CALM, it is a group that effectively repealed the St. Paul ordinance which prohibited discrimination by reason of moral preference in St. Paul.

THE COURT: Whatever happened to that gentleman, is he still—I forgot his name; is he still in St. Paul? I haven't read of him lately.

THE WITNESS: I haven't either.

THE COURT: What is his name again?

THE WITNESS: Richard Angwin; he is a pastor, he did leave his pastorship about a year and a half ago, Your Honor.

Those are the organizations. There were also some individuals, relatively few in number, who gave information in support of the bills. Those are the organizations that presented testimony either before the Senate Health, Welfare, Corrections Committee or the House Social Services Subcommittee on those dates that am giving you.

BY MR. PENTELOVITCH:

Q Now with respect to those groups—I am still on my offer of proof, by the way—with respect to those groups, did any of the spokesmen testifying for those groups, or any of the **[621]** individuals you heard testify in favor of the bill, present any empirical evidence in the way of studies or statistics or offer any opinion testimony based upon studies or the like to the effect that a bill of this nature would in fact enhance and improve family communication?

A None whatsoever.

Q Or family love?

A None whatsoever.

Q Would you—I am still in the offer of proof—would you please tell us who testified against the bill in either the House, Senate or both?

A The organizations testifying against both of the bills included the Minnesota Medical Association, the Minnesota Public Health Association, the Minnesota Nurses Association, Planned Parenthood of Minnesota, the Division of Adolescent Medicine at the University of Minnesota, the St. Louis County Health Department, the American Association of University Women, which introduced a very understanding study into testimony; the Lutheran Social Services—the list went on, it was quite a lengthy list of all of those organizations who did in fact testify along with some individuals.

The opponents of the bill, not all of them would sign the testimony register those evenings weren't permitted to testify because of time restraints. There was a rather substantial list beyond that.

[623] • • •

The Lutheran Social Services testified—it was a long-tenured social worker who represented them that evening—that on the basis of their clinical work with families in trauma that unfortunately the parents of minors that were involved in counseling sessions with LSS often became more concerned with parental reactions, parental desires, than they were concerned with needs and problems of youth, their own youth, their own adolescence, and it was their professional judgment and conclusion based on clinical practice that the law was doomed to failure if in fact the law's intent was to enhance harmony, love, communication and support within the family structure.

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TRIAL TESTIMONY EXCERPT OF M. J., MINOR

[DIRECT BY MS. PINE]

[631] • • •

THE COURT: Were your folks separated?

THE WITNESS: No, they were living together. We were very close.

BY MS. PINE:

Q You and your father?

A Yes.

Q What was your relationship with your mother like before your father's death?

A Very distant. We found it very hard to communicate with each other, did so very, very rarely.

As far as close things, as far as deep feelings and things that are important to me were not really said between us. It was basically general conversation, the weather, the food, how it was that night, things that we were going to do that weekend, go to the football game or whatever.

Q Do you remember how you felt when your dad died?

A I was very shocked, it was a sudden thing. I had just lost my best friend which is very painful. I felt very alone and I looked around me and I had my brothers and sisters who were all living out at the house at that time and my mom who was a complete stranger to me.

[632] Q Do you remember how your mom reacted when your father died?

A She was also very deeply hurt as was the whole family but she managed to live through it like all of us did.

Q How did your relationship with your mother change after your father's death, or did it change?

A Oh, it changed drastically in the sense that here is a mother and a daughter living with their father and then one day dad dies and mother and daughter look at themselves and at each other and say who are you, I lived with you for 12 years and now under the circumstances we are forced to get to know each other and to get through this burden together of dad's death; and try to be supportive to each other, try to be there for each other.

Q And it was like starting from scratch?

A Yeah, it really was. I didn't know her at all. We were not very close at all because of her drinking.

Q Why don't you tell the judge a little bit about what your mother was like?

A Okay, my mother was an alcoholic at the time. She had been to treatment prior to my dad's death and was doing very well.

Q What happened when your father died?

A Then she did hit the bottle, not as much, but did go back to drinking because she just couldn't handle it.

[633] Q Was she ever hospitalized for the drinking problem?

A Yeah, she went to Abbott-Northwestern Hospital, I committed her myself and my brothers and sisters.

Q Was that after your father died?

A Yes.

Q Why did you commit her at that time?

A Because I could not handle living in that situation, for the sake of my protection, also hers. I could see her health deteriorating, I could see her attitudes changing. I could see our communication shutting off because of her drinking.

Q Could you give some examples of things that would happen when your mom would drink?

A Yes, she would take on major tasks, she would want to clean the house, do things that would require good judgment and good movement like vacuuming and such and there have been times, one incident in particular, where I came home early one evening and found that she had taken the window panes out of the window and was washing them and had set them up against her bed and stumbled forward into the glass cutting her hands and wrists and her feet and I had to have my brother come and get her and take her to emergency; and generally things like burning the furniture and things like that have happened too.

Q Were there other times that you can remember taking care [634] of her, sort of picking up the pieces?

A Yes, all the time I was like her babysitter. Many nights I stayed home instead of going out for fear that she would hurt herself because she was already so drunk by the time I was supposed to leave the house I couldn't leave her alone because I knew she would hurt herself or was scared that she would.

Q Up until the time of your pregnancy did you ever talk to your mother about personal matters after your dad died or before?

A No. No, like I said, we did not have a really close relationship. We couldn't—she couldn't tell me things that really upset her and really concerned her and I couldn't either.

Q Were things better at all at the time of your pregnancy?

A No. No, they were pretty distant.

Q Did you ever consider telling your mother about your pregnancy and abortion?

A Briefly I considered it but—

Q And you decided—

A I decided not to.

Q Why did you decide not to? What did you think would happen? What were you afraid of?

A I was afraid that if I told her she would start drinking, getting back to her habits before when my dad died and get back into the pattern of drinking every night heavily and that she [635] might hurt herself in that respect. I was afraid that it would ruin all of the communications that her and I had been struggling for up to that point to get to know each other better.

Q What were the reasons that you thought that those kind of things could happen?

I mean, were there other things that had happened between you and your mom that gave you a reason to believe that things would sort of fall apart if you told her, other times in your life or—

A Well, when my mom was in treatment the first time I went to group therapy with her for a week, every day for roughly seven hours, and was in the room with her and we discussed her problem, her drinking problem, and with the supervision and help from a counselor we were able to get to know each other better and I felt that it would destroy all that we had struggled for, to get to know each other better, as far as why are you drinking, and what can I do myself to be there for you to support you and keep you from drinking, because I don't want you to drink anymore because I see it ruins your health; I see it ruins—I see it ruins our communication with each other and it ruins the family structure.

I felt that if I told her that it would crumble the bridge that we were trying to cross to a better understanding of each other which was very important to me because I love my [636] mother

and I wanted to be closer to her and I was trying very hard to establish a close relationship.

Q Was there ever another time in your life when she found out about things going on for you and instead of reacting supportively things sort of fell apart?

A In high school I had an incidence of chemical abuse which I cured by myself, but when she found that out she started drinking very heavily so I saw her reaction to that and thought if she found out, that she would go back to drinking basically a self-destructive like she had.

Q Do you remember on the morning of your abortion and court appointment how you felt when you woke up in the morning?

A Yeah.

Q How did you feel?

A I was terrified. I was scared first of all because I had to make an excuse to get out of school and—

Q Do you remember what—

A I was wondering if that was going to go through. I had to lie about that, for obvious reasons. And I was worried that I was going to get caught in that and having to explain myself. I was just worried about all the people that I would talk to and what they would say to me and how they would think of me, how their reaction to me would be. I was scared of the actual procedure itself but I was very, very upset about having to go through numerous people to have to get permission to [637] have the procedure done. I felt very terrified to talk to strangers about such a personal thing. I felt in a way it was a violation to my personal life and that I was sharing things with somebody that I didn't know at all which made me very terrified.

I was very upset about it all.

Q Did you wait long at court before you saw the judge, do you remember?

A I waited about 45 minutes.

Q What county were you in; Hennepin or Ramsey, Minneapolis or St. Paul?

A Minneapolis.

Q Do you remember any of the things you were thinking while you were sitting there waiting? What did you think?

A I was very nervous. I was wondering if the judge would even give me permission to do this, which made me very nervous and very scared, just anticipating the procedure, having to wait to go through all of this before I could finally go back to the clinic.

I was worried about if I would say something wrong to influence the judge's decision, to maybe say no to my case, for whatever reasons he may have thought, I don't know.

Q Do you remember how long you were in with the judge?

A Roughly twenty minutes to half an hour.

Q Do you remember anything about what the judge asked you?

[638] A He asked me how old I was, what my name was and if anybody had influenced my decision to have the procedure done; if I felt really sure about my decision, which I told him yes and one thing that he said to me which to this day really still upsets me when I think about it, he asked me if I knew who the father was, which tells me what he thinks I am a whore and I sleep around and he didn't bother to ask me how long I had been going out with this guy which had been a year and a half at that time.

I got real cold signals from him like he didn't really think too highly of me because of the situation I was in and that put a lot of pressure on me because I felt that was a violation to me to say that, nobody can pin that on me, and I took it as an accusation that I was a "sleep around" and I didn't know who the father was, which I did. I didn't need that coming from a total stranger, for one thing.

I felt he could have been more sympathetic to my situation, which I didn't feel he was at all. He was a very cold man, made me very nervous, more nervous than I already was.

I didn't feel that was necessary, that question at all, that was a total violation to me.

Q How were you feeling by the time you got to the clinic for your abortion procedure?

A Well, having to go through all of that, my appointment was [639] scheduled at around 2:00 o'clock that afternoon and it took all of that time to go through this, just waiting for the judge and getting to the courtroom, getting a legal guardian and

I was a bundle of nerves. I was terrified. I was emotionally exhausted already from having to open up such confidential things about myself, very personal matters, as a female, to total strangers, and by the time it was time for the procedure I was a basket case.

I had been put though emotional stress not only by the judge, but by the time lapse, by strange faces, by accusations that were pinned on me which I felt was unnecessary, which upset me even more and I was worse off that afternoon when I went in for the procedure than I was already in the morning.

Q Did anything the judge do help you with your decision to abort without notifying your mother?

A No.

Q Do you think there is anything the judge could have done to help?

A No.

Q You said you were a bundle of nerves when you returned to the clinic. Did that affect in any way your abortion procedure?

A Yes, it did, very much so. In that procedure you have to be very relaxed.

* * * * *

TRIAL TESTIMONY EXCERPTS OF S. L., MINOR

[DIRECT BY MS. PINE]

[CROSS BY MR. ACKERBERG]

[712] * * *

Q S., how old are you?
A Seventeen.
Q That won't help, you have to talk louder.
A Seventeen.
Q Are you in school now?
A Yes.
Q Do you work?
A Yes, I do.
Q You work after school?
A Uh-huh.

Q Where do you work?
A Midwest Health Center for Women.
Q Have you ever been pregnant?
A Yes.
Q Have you ever had an abortion?
A Yes.
Q How old were you at that time?
A Fifteen.

[715] * * *

Q Let's talk about your mother first.
A Okay.
Q Can you describe to Judge Alsop what your mother is like?

A Well, my mother is a sweet, gentle, caring woman but she is very, very unstable. She has a documented past of severe mental illness. She has been hospitalized several times during my lifetime and many times before I was born.

Q And what is her diagnosis, at least as you understand it?

A There are several labels they have stuck on her; one that sticks with me is schizophrenia, manic-depressive. I try not to pay too much attention to things like that, but those are some that stick with me.

Q What did those—the fact that your mother was—had a history of mental illness, what was—what did that make her like as a mother?

In the family what was your relationship with her like because of that?

A Very unstable. No one could predict how her moods would swing from time to time. There could have been the possibility that she could have reacted totally supportive and caring and **[716]** motherly, but on the other hand it could have just broken her down emotionally and mentally and she could have completely slipped out.

Q Uh-huh. Is she in need of a lot of care at home?
A Yes.
Q In what way?

A She is heavily medicated and that is to prevent severe depression and she needs to be taken care of. She needs to be

reminded to take her medication. She doesn't—she is very—she hallucinates a lot, she hears voices and she is very sure people are out to get her and if she goes out people are staring at her and talking about her when they probably don't even realize she is there, but she is sure of that and she is really sure a lot of people are out to get her.

So she doesn't go out.

Q Have you ever talked to her much about personal matters?

A Sometimes, when there is a time when she is maybe in the mood, but then it is always so hurtful to me because it gets turned around, she will stab me in the back with it later when she is in more of one of her more typical moods.

Q What are her views on sex and abortion and things like that?

A Oh, that is just unheard of. The upbringing that she has had is that it was even taboo to talk about your menstrual cycle. Her mother never explained it to her, it was the curse, [717] when she got it she was terrified, she was bleeding all over the place, that kind of thing, and then when it came a time for me and I was becoming aware and I wanted questions answered I knew you were supposed to go to your mother even though I wasn't so sure I was supposed to go to my mother, I was going to ask her anyway and she just freaked out. She got real angry with me, and said, no, I don't want to talk about that, you are not supposed to know about that yet.

You will learn somehow.

Q Why, given all the things that you have told us so far, why did you decide in the instance of your pregnancy not to tell her about it and not to tell her that you were thinking of having an abortion?

A I knew she wasn't mature mentally enough to handle that situation. It would have been too much for her to concede that her 15-year-old daughter was pregnant.

Q What effect do you think it might have had on her?

A I think it could have easily put her back in the hospital again. It could have upset her and it would have upset my father that I told her and that would have been a conflict between my parents.

* * * * *

[719] * * *

Q Did you ever have a sense that there were things your mother didn't want to know about?

A There were things that my mother didn't want to know about?

Q Did you—was there ever a time that you sort of felt like she didn't want to know certain things, that she would be better off if she didn't know?

A Underlying—yes, because she would say, well, I want to know everything, but I think if she really did, had known like that I was sleeping with my boyfriend it would have been too much for her.

Q Has she ever been helpful to you in dealing with something that was difficult for you in your life?

A My brother's death, we helped each other a lot.

Q Now let's talk about your father for a minute.

What is your father like?

A He is very, very, very overprotective, very caring in a kind of screwed-up, mixed-up way.

Q Does he have a temper?

A He has a violent temper.

Q When you say caring in a mixed-up-screwed-up way, what [720] do you mean? When he is showing his affection how does he do that in a way that is sort of mixed-up?

A When he gets upset about something he will come at me just with a violent angry temper and he becomes an animal. He gets—he likes to kind of show his teeth and he will get real close to my face and he likes to get very violent and physical.

Q What is your relationship with him like?

A Turmoil, constantly. Ever since I entered my teenage years it has been one fight after another.

Some things are more serious issues, we practically fight about what kind of toothpaste to use, just about anything. We are just at each other's throats.

Q Do you talk to him about personal things at all?

A No. I avoid it because I know that he is the type of person that, like I am saying with my mother one time maybe in a mood where he might be sort of understanding to listen to that,

but on the other hand, later he will take it and turn it around and use it against me and put me down because of it.

Q Can you describe in more detail why you decided not to tell your father about your pregnancy and abortion?

What did you think he would have done or said or—

A His initial reaction would have been violent and angry and he probably would have hit me. He probably would have gone berserk. He would have just gone mad to hear that his little [721] baby, the youngest daughter could be so—

Q Was there ever another time in your life when he found something, he learned something personal that was going on and that he reacted in that kind of way?

A Yes.

Q Can you tell us about that?

A He is extremely bigoted, extremely prejudiced. He found out that I was dating a black boy and when he found that out he went bananas.

Any little thing, there was $10 missing off the dresser one morning so he decided that I had stolen it from him and he went through my room and he started reading my diary and he slapped me for the first time in my life and he never apologized for it and it went on like that until I ended the relationship.

Everyday there was a threat of physical harm and constant yelling.

Q Do you think—so you don't think your father would have been helpful to you—

A No.

Q —in dealing with things?

* * * * *

[725] * * *

Q When you told the clinic that you didn't want to tell your parents did they explain the court procedure to you?

A Yes.

Q Do you remember anything about what your reaction was that you were going to have to go to court?

A Well, in a way I was relieved that there was some way that I wasn't going to have to tell my parents. I was at least relieved to know that. But I was also very confused because this

word, "court", comes out to you and you think, "Oh, my God, a judge up on a pedestal, and he is going to tell me, yes, he is going to tell me, no." A lot of scarey pictures come into your mind that first moment.

Q Do you remember anything about how long you waited for a court appointment, like between the time you called the clinic?

A I would say about a week, week and a half.

Q What time did you get up in the morning of your appointment?

A The same time I get up for school, 4:30.

Q Did you eat, do you remember?

A I did not eat breakfast, I knew I couldn't keep it down.

Q How did you feel?

A Nauseated.

* * * * *

BY MR. ACKERBERG:

[733] * * *

Q S., what do you do for Midwest?

A I am a pregnancy counselor to teens.

Q When you found out you were pregnant in a certain sense you were glad because you felt that this was confirmation of your ability to become pregnant?

A Right.

Q And you were a little—you were even proud of it?

A It was just a comfortable feeling to know that my body was able to do this, with that confirmation.

Q Before you discovered your pregnancy you were not using contraceptive methods?

A No, not regularly, not consistently.

Q Had you thought about the possibility of becoming pregnant?

A Yes.

Q And what did you think?

A I had always thought all along this is what I am going to do if I ever did get pregnant, there is no way I am going to have a baby when I am 15 years old.

Q Why did you not use contraceptives?

A The idea of going into a drugstore, a pharmacist and a sales clerk and going to a clinic and getting a prescription for birth control pills I think I knew was the only truly **[734]** effective method of birth control, terrified me. The idea of all of these adults, you know, well, look at how old she is and she is doing this—my, my.

Q How long were you sexually active before you became pregnant?

MS. PINE: Objection, Your Honor.
THE COURT: Objection overruled, you may answer.
THE WITNESS: Two years.

BY MR. ACKERBERG:

Q Since you were 13?
A Uh-huh.
Q With more than one boyfriend?
A Yes.

* * * * *

[738] A Well, they have in two years they have witnessed me grow up and just show them a lot of maturity and responsibility. I mean, they gave me a car and I have taken care of that and I have taken care of putting gas in it and I have done well in school, I have been on the honor roll and I have gotten this job and I have done responsible things, concrete proof that I have grown up.

Q So you think that would affect their reaction?
A Right.
Q And how seriously it would affect them?
A Right.

BY MR. ACKERBERG:

Q S., what training did you have to be a counselor at Midwest?

A I am going through training right now with Helene. I watch her and several other counselors go through counseling sessions with minors and other women.

Q Have you taken any courses in counseling?

A No, I have not.
Q And you have no practical experience in counseling?
A No.

* * * * *

TRIAL TESTIMONY EXCERPTS OF SUSANNE SMITH, SUPERVISOR OF GUARDIAN AD LITEM PROGRAM IN HENNEPIN COUNTY

[DIRECT BY MS. BENSHOOF]

[CROSS BY MR. ACKERBERG]

[13] Q What do you consider the difference between maturity and capable of informed consent to be?

A I don't see there is a difference.

Q Isn't it true that your report to the guardian relies heavily on the minor having been given informed consent counseling by a provider?

A Yes, it does.

Q Now I see on question 10 of the report that you ask whether or not the minor has received counseling as to pregnancy alternatives. What if the minor replies no?

A We haven't had that happen.

I would expect if they couldn't talk about what alternatives were we might have some question about whether or not she was making an informed decision.

Q Have you ever had minors who are pregnant because of incest?

A I recall one situation that I interviewed a teenager who reported that she was pregnant as a result of a rape by a stepbrother.

Q Do you think that it would be appropriate for a minor who a counselor knew was pregnant by incest to be counseled as to marriage?

A No.

Q So that for some particular minors counseling as to pregnancy alternatives such as rape and incest, some of these **[14]** might be inappropriate questions?

A That is correct, it may be.

* * * * *

BY MS. BENSHOOF:

Q Looking at question 14, when you asked if she lives with her parents, do you ask if it's biological parents, or is that made clear to the minor?

A I believe when we asked that question if the teenagers say yes we say is that both of your parents, but I don't think we use the term biological.

Usually they explain yes, my mother and stepfather, whatever, so we have some idea of what the situation is.

[15] Q So if a minor lives with a mother and a stepfather she might consider them to be her parents and answer it yes?

A Yes.

Q And on question 22 the minor elects not to notify her parents because: Is that always filled out in a narrative form by the guardian?

A Yes.

Q On the last page where it states recommendation of the guardian ad litem, is there a section which relates to emancipation?

A Yes.

Q Why is that section in this report if emancipated minors are not required to go through court?

A That is part of the difficulties that we run into. The statute has language that refers to an emancipated minor which leads to many problems that there is such a thing as an emancipated minor. All of the attorneys and judges that have been working with us tell us in Minnesota juvenile court there is no such thing.

However we put it in because of the reference to it and also because when we do have these teenagers who might be married, who have had a child, who are living apart from their parents, it seemed like information that was useful in terms of making a recommendation to the court, things we wanted the court to know about the particular teenager.

[16] Q So that a guardian may check number A that the court should authorize due to emancipation even though technically emancipated minors are not supposed to go through the court process?

A I think that is the difficulty. I think in this situation emancipation is an anomaly in the sense of not being a legal process but a generally understood lay person's term, she is out living on her own. But all the instructions I have been given on this particular issue is there is no such thing as emancipation.

Q If a minor is living on her own, married and has a child, you don't go through this and say you can go home now, you are not required to go to court under the statute, or do you take it to a judge?

A We would take it to the court. Many of the questions we get from the clinics describe these kinds of situations and since we don't have any guidelines they go to court, so that there aren't any chances taken.

* * * * *

[19] * * *

Q About how many minors have you personally acted as a guardian for?

A Approximately 200.

Q How many minors have gone through the Hennepin County system and also through your guardian's office?

A Since August of 1981 through January 31 of 1986 the count is 2264.

* * * * *

[31] * * *

Q And have you ever made a recommendation that the petition not be granted?

A Yes, I have.

Q On what grounds?

A Well, it was a unique situation of a young woman, I believe she was 13, perhaps 14, who insisted on going to court but was not able to talk at all. She was either so scared or so frightened or I don't know what the problem was, but she could not give us any information or answer any of the questions.

Q So that was more that she couldn't participate in the judicial process, would that be a correct assessment?

A Yes.

Q You couldn't find out about best interest or maturity?

A That is correct.

* * * * *

[32] * * *

Q On the guardian's report form in question 22, I am not sure if it is—yes, 22, there is a space there for why the minor elects not to notify her parents.

Could you describe what are some of the general reasons that are noted on that form?

A The minors tell us a number of things. They may talk about being fearful of damaging a good relationship with their parents or having a bad relationship that they fear would get worse.

A number of the teenagers have talked about dysfunctional family situations where there may be alcoholism [33] or marital problems or battering, physical abuse, mental illness, unemployment, a number of different kinds of situations that at that time at least they don't believe that notifying their parents would help the situation at all.

We have had teenagers who talked about the fact that their biological father hasn't been seen for years. They may not know where he is. There may be a very hostile or unsupportive relationship. We have had teenagers who talk about the fact that they have been told specifically by their parents and that they would be kicked out of the house and we have had teenagers who have told us that has happened to them or they have seen that happen to older sisters.

We have had a lot of teenagers talk about older sisters in the family who have become pregnant and what damage that has done to the relationship with the parents.

We have had teenagers talk about the fact that they know that their parents are morally, on religious grounds, opposed to abortion and would not be at all supportive of them in this process; a number of reasons.

Q Ms. Smith, you have been in juvenile court for ten years and dealt with abused and neglected families and minors for ten years.

Do you believe them when they list these reasons?

A Yes, I do.

THE COURT: Believe them in the sense that they [34] think it is true, or it is in fact true?

THE WITNESS: I believe certainly that they believe it is true.

The scenarios that they are describing are not atypical of other kinds of families that we see in juvenile court, and so it seems to ring very true.

Q Are you familiar with the exception in the statute that says that if the minor declares she is a victim of abuse or neglect she should be exempted from the requirement?

A Yes.

Q Do you see teenagers coming to Hennepin County who report that they are victims of neglect or abuse, I guess it would be abuse?

A Yes, yes.

Q Why do they make it to the court system and not just be exempted from the statute, do you know why?

A What I have heard from teenagers that I have specifically asked, as well as the clinics, when the situations have occurred, is that the teens do not want this reported. We deal with teenagers from all counties as well as other states where people are not sure what would happen if something was reported. I think some teenagers are so fearful of their parents' reaction that they don't want this reported and would rather go to court than have it reported which would mean that their parents would find out that they were pregnant and [35] planning to have an abortion.

Q Based on your experience with the abuse field, do you think that child abuse is generally unreported?

A Yes, that is what all the people in the field strongly believe.

Q And you personally believe that?

A Yes, I do.

Q So it is your testimony, is it not, that those teenagers who are in a situation where there has been family abuse are not able or do not avail themselves of that exception in the statute?

A With the teenagers we have seen in court, that is true.

Q Do you have an opinion as to whether you believe going through the court process and seeing the guardian—now you

have interviewed the teenagers personally—is difficult for teenagers?

A It appears to be very difficult for them, yes.

Q What is the basis for your opinion?

A The teenagers that we see in the guardian's office are very nervous, very scared. Some of them are terrified about court processes. They are often exhausted, particularly if they have been driving around Minneapolis looking for the building. There are a lot of problems that they have just in terms of finding us. They are upset about and tell us that they are upset about the fact that they have to explain very **[36]** intimate details of their personal lives to strangers.

They talk about feeling that they don't belong in the court system, that they are ashamed, embarrassed and somehow that they are being punished for the situation they are in.

I had a teenager tell me last week when I was describing to her the location of the building, when I said the word Juvenile Justice Center she said I feel like a criminal and I think that is pretty typical of the reaction that the kids have when they find out they have to go to court.

They see court as a place for teenagers who have done something wrong.

* * * * *

[37] * * *

Q Do you feel you are seeing a selected group of pregnant teenagers who you described how you instantly can recognize them in the waiting room?

A Yes, we are.

Q Would you say that the select group are the more educated middle class?

A Yes.

Q Wealthier minors?

A One of the things that has been commented on by most of the people working on this calendar is that these are a unique group of teenagers compared to the other teenagers we see in juvenile court and of course in the other guardian ad litem cases. We see a lot of teenage mothers and the differences have

to do with their plans for the future, education, their self image, their self concept, what they want to do with their life.

They are very, very sure that they are doing the correct thing and also very sure that they don't want to involve their parents.

Q So you have been the guardian in situations involving teenage mothers?

A Yes, I have had teenage mothers down who have said I **[38]** already have one child and I do not want another.

I have had teenagers talk about the fact that they have had a child and placed this child for adoption and do not want to go through that procedure again.

Q Outside of the parental notification, you also see minors or are appointed as a guardian for minors who are mothers and who are mothers themselves?

A Yes. These would be situations that come into juvenile court on the abused and neglect process.

Q You mean these are teenage mothers who abuse their children?

A Yes.

Q Do you find that to be a frequent occurrence?

A I don't know how I could answer the frequency question. When they come into court there is a problem that has been recognized and that is why they are in court, so we wouldn't see situations where there isn't abuse or neglect.

Q And do you interview these—you are not only the guardian for the child but you interview the teenage mother as well?

A My guardians do, in the process of the routine work, yes.

Q Do they do any assessment as to whether they consider teenage mothers mature?

A No.

Q When a minor is reporting for the interview with the **[39]** guardian, if the guardian hears then about an abuse situation, is she required to report that or does this court bypass law somehow undermine that legal requirement?

A It made it extremely difficult because of the laws saying that this is confidential and she is entitled to absolute confidentiality. So what we do with that is inform the attorney and the court.

Then we make a decision based on the individual circumstances of the case.

Q So you feel that this law exempts you from mandatory reporting if you hear about abuse in the guardian interview?

A We don't have clarity. I don't know how to answer, you know, that question.

We report it to the court.

Q And you don't know whether or not the court then reports it to the local authorities?

A In some situations that has occurred.

Q Do you have any opinion as to about how many minors who come to court come with one parent?

A About a quarter, 25 percent of the teenagers that we see are accompanied by parents. There are also additional numbers who tell us that they have informed one parent and there are also teenagers who appear with a parent and a step-parent who they consider to be their parenting parent.

Q Have you conducted interviews with these parents as well **[40]** as with the minors?

A Yes, I have.

Q What reasons—do you ask the parents why the absent parent cannot be notified?

A Yes.

Q What reason does the one parent tell you why the absent parent cannot be notified?

A We hear a number of descriptions of fathers who are long gone, basically abandon the family; problems with child support payments, lack of that, fathers who have had no contact and no conceivable parent interest in what is happening with their daughter. A lot of anger and resentment at that point, that they should be brought in when there hasn't been any contact for a number of years.

A lot of fears when the family might be currently involved in a custody battle, that somehow this is going to be brought into that process.

* * * * *

[43] * * *

THE WITNESS: Based on the teenagers we have seen that have been accompanied by their parents, we have heard from both the teenagers and the parents stories about family situations where it does not seem in my opinion appropriate for notice to be given to the absent parent. We have had parents that have been extremely angry about the fact that they have had to take time off of work and have wanted to be supportive of their daughter but are involved in this process because a parent **[44]** who has no contact or perhaps for a number of years or for some reason should not be notified is required by this law to be notified.

I recall two specific incidents, one was of a teenager who was I believe 16 accompanied to court by her mother. Her mother was in the process of getting a separation. The mother and the daughter both said that they felt that if the father knew that the daughter was pregnant that the daughter would be assaulted and so would the mother. That is what they believed.

We had another situation with a teenager who was 17, her father was institutionalized in a western state. She took the initiative to call the psychiatrist that was working with her father to ask whether or not she could have a notice sent and they said absolutely not, it would be detrimental to his particular care.

My opinion is based on the fact of the children, teenagers and the parents that we have seen talk about so many unique family situations where we are dealing with single parents and one parent who is assuming all of the parenting responsibility, that there just seemed to be a lot of situations where notice to one parent would be sufficient.

BY MS. BENSHOOF:

Q Do you believe that going to court is a burden to the parent?

[45] A The parent tells us that it is.

THE COURT: How would you figure out the cases where you feel notification of both parents is appropriate and where it is not appropriate except by providing for a court bypass procedure in the case where it is not appropriate to any one parent?

THE WITNESS: That is one of the difficulties with the process and if we are being asked to determine whether or not the teenagers are mature—

THE COURT: Or it is in their best interest it not be given to one parent?

THE WITNESS: Yes, what we are seeing consistently is the greatest majority of these teenagers are mature so it leaves us constantly asking what purpose we are serving.

THE COURT: You are talking about the whole statute, but your opinion related to notifying one parent.

You are saying your opinion was it is not appropriate to give notice to the absent parent in all instances or a number of instances?

THE WITNESS: Yes.

THE COURT: I guess my question is how does the—how can the law differentiate between those cases where you feel it is appropriate to give notice or it is not appropriate to give notice?

THE WITNESS: Well, based on what I have seen I [46] would like to see the law require notice only to the custodial parents, which would presume that the parent who is providing custody for the child, I presume in two-parent custodial situations, maybe that would apply to both of them.

* * * * *

Q I will rephrase the question.

The law has never worked in classifying a class of immature minors where there is no best interest, is that true?

A Yes.

* * * * *

THE COURT: Tell me what you—other than "yes", [47] what have you just told me, that the law has never done what?

THE WITNESS: We have never identified a group of teenagers that we felt were immature.

BY MS. BENSHOOF:

Q No best interest?

A And no best interest. We have not seen those teenagers.

Q So in the nearly 3000 minors in five years of the statute the law has never operated to identify any minor for whom the court would say that there should be parental notification?

A No, not in Hennepin County.

Q That is fine.

Do you have an opinion as to whether or not this law has deterred some minors from telling at least one parent?

A We have had situations reported to me by my other guardians as well as teenagers that I talked to myself who have said that they will consider telling one parent, usually mom, sometimes dad, but since they would have to go to court anyway, because they are absolutely sure they don't want the other parent to know, they don't tell either one.

Q So in some instances the law has lessened parental involvement with a parent the minor might have thought would have been helpful, is that correct?

A In those situations, yes.

[54] * * *

BY MR. ACKERBERG:

A In the process of setting up the procedure, we got agreement from the people who were running the 24-hour child abuse hotline, which was the 24-hour hotline that we had to take calls of an emergency nature, we notified the clinics that that was available if there was an emergency.

We notified the clinics how to get ahold of Judge Oleisky who, because of what he is required to do, is always available and he is usually contacted through the juvenile center.

* * * * *

[55] * * *

Q When you sent the minor back for counseling, was it required that the minor go back to a clinic for counseling?

A No.

Q Is there any requirement that the minor be counseled at a clinic?

A No, just that she receive counsel.

[56] * * *

Q You mentioned on direct examination the case of a minor who was unable to respond to any questions posed to her by the guardian's office or perhaps it was the court.

Could you further describe that case?

A This was a situation of a very young teenagers; I believe she was 13 or 14. During the process both the guardian, which happened to be myself, talking with her as well as with her attorney, we couldn't get answers to any of our questions. She would just shrug her shoulders. she didn't want to talk, [57] couldn't talk, was too afraid to talk. We didn't know, we didn't feel we had enough information to be able to proceed with the hearing.

Q What happened to that minor?

A We went into court at her insistence and the judge at that time did not grant her petition.

Approximately a week later there was a rehearing and I believe in the interim she had been to the clinic, received some counseling and some information and had apparently gotten over her fear of the court process and was able to talk to us.

Q Was her petition approved?

A Yes, it was.

Q Do you know of any other denials in Hennepin County?

A There were two others that I am specifically aware of. There may be others but I certainly haven't heard about them. One was a teenager who told us that she did not want her petition granted because she thought if it wasn't her boyfriend would marry her.

The other was a 13-year-old who could not tell us that she wanted the abortion and was not being coerced. It appeared

that her mother was doing the talking for her and in both those situations the guardian recommended the petitions not be granted.

THE COURT: Were the petitions denied?

[58] THE WITNESS: Yes, they were.

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TRIAL TESTIMONY EXCERPTS OF JUDGE HENRY ALBRECHT, JUVENILE COURT JUDGE OF HENNEPIN COUNTY

[DIRECT BY MS. BENSHOOF]

[CROSS BY MR. ACKERBERG]

[7] * * *

Q And do you know about how many cases you have heard?

A I would estimate approximately 500.

Q In these 500 cases that you have heard have you ever found a minor to be immature?

A No, I have not.

Q And have you ever found a minor entitled to have an abortion solely on best interest grounds?

A No, I have not.

Q So you have granted all of the petitions on maturity grounds?

A Yes, I have, and I think probably additionally on best interest grounds.

Q Sometimes after finding them mature you would also check the best interest?

A Correct. I have checked our form, which I am sure the Court has probably seen in evidence, it has three boxes to check and in all of the cases I can remember I have checked the box regarding finding that minor to be mature, as well as the third box finding it to be in the best interest of the minor.

But I think my decisions have been based primarily on the finding of maturity.

Q You don't remember any case that you found it to be solely on best interest?

[8] A I cannot recall such a case.

* * * * *

[9] * * *

A I find them to be generally above-average in appearance and in intelligence. I cannot state a general category as to what their appearance is, as to their emotional state I found their emotional state varies considerably and that some appear to be at one end of the spectrum, almost flippant, and others on the other end of the spectrum. On the surface appearance some are sad and crying and scared and they fall within that range.

Q Do you ever reassure them about the court process during the hearing?

A I always do.

Q Do you find that necessary?

A Only necessary with those who appear to be frightened. If I were to define necessary as what is needed for the child, I think it is an important part of the hearing to reassure them whether they appear frightened or not. So I do it in all cases, whether they appear to need it or not.

* * * * *

[10] Q What is your understanding of the meaning of the phrase mature and capable of giving informed consent, both phrases, or the same if you think they mean the same.

A I think that maturity and capability of giving informed consent are essentially the same. I think there may be some slight distinction but I treat them as essentially the same and my perception of what is meant by those phrases is that the child would possess the necessary judgment to make as important a decision as that is in her life; as far as her maturity, that she would have that judgment that I think she ought to have in making such a decision without consulting her parents.

As far as informed consent—

Q Capable of giving informed consent?

A I think that goes not only to maturity but necessarily depends on what she has been told at the clinic and so in almost

every case I am informed by the lawyer that she has been to a clinic, she has been informed of the risks and dangers and the procedure and so forth and I think it necessary that she has that knowledge before she is capable of giving informed consent.

In other words, I interpret it as more than a mental status in a vacuum, I apply the knowledge that she has been given in interpreting that term.

Q How do you interpret the term best interest?

[11] A I interpret that as being the minor's best interest and it almost seems self-defining to me, that it is best for her to have the abortion and I obviously separate that from what might be best for her parents or for the fetus or society and I tend to interpret that phrase as to what would be best for her under her circumstances in this point in her life.

Q So if the teenager chooses to have the abortion and that is her decision and she is able to give that and has reasons for that, then you would find it in her best interests to do so?

A Yes, depending on what reason she has given. In almost all cases the reason she gives do support a finding that it is in her best interests.

Q So your interpretation of the phrase best interest is best interest to have an abortion as opposed to continuing the pregnancy?

A Correct.

BY MR. ACKERBERG:

Q You are available to hold a hearing on a petition even though you are in the middle of a trial, correct?

[12] A That is correct.

Q You have been available to hold hearings on Wednesdays which were outside the normal hearing schedule, correct?

A I don't recall being asked to hear a hearing on Wednesday but I certainly would hear one and I would consider myself available even though they don't normally schedule them on Wednesday.

Q Are there any days of the week you would not be available to hold a hearing, hear a petition?

A There are no weekdays, no court days that I would not be available.

Q It is extremely rare when you see a minor who is visibly upset, isn't it?

A I don't think so. It seemed to me that in each group of six to ten that come through there is usually one that seems physically upset or if not every group I would say every other group.

I would say one out of twenty appear visibly upset to one degree or another. The degrees of their being upset obviously can vary, but something I can perceive as a lay person of their being upset.

* * * * *

[15] * * *

Q Are you aware of any minor whose confidentiality has been breached under the bypass proceedings?

A I am not aware.

* * * * *

TRIAL TESTIMONY EXCERPTS OF HEATHER SWEETLAND, ASSISTANT PUBLIC DEFENDER IN ST. LOUIS COUNTY

[DIRECT BY MS. LYNN]

[CROSS BY MR. ACKERBERG]

[750] * * *

Q And when they come accompanied by a parent, is it usually the mother?

A Yes, it is. In fact I have never seen one of my clients come accompanied by a father.

Q Now have you had occasion, when the young woman has been accompanied by her mother, have you ever had occasion to talk to the mother?

A Yes.

Q And what have been the mothers' response to being in the court system?

A Two specific cases that I can remember; both of them were divorced from their husbands, the fathers of the minors, that they had been divorced for a lengthy period of time. One specifically was at least ten years. The father had had no contact with the daughter for that entire period of time and they

felt had gotten that man out of their lives a long time ago, why do we have to have him involved at all.

That was the mother's point of view.

Q And aside from those two circumstances, what general sort **[751]** of reactions have you observed in the mothers who have accompanied their daughters to court?

A They are nervous and I believe they are somewhat embarrassed because I had one mother that said, "I wish my daughter had not gotten into this 'trouble'," but they are embarrassed that they have to be there.

Q And how would you describe the emotional state of the minors you represent immediately prior to going into the hearings?

A I think they are very nervous because they don't really know what to expect, even though they have been told by myself and I am assuming the counselors from the health center what to expect; they are very nervous.

You have the sweaty palms, the looking off into space, the very nervous tics and habits that you might see in just about anyone who might have to go through a nervous experience.

* * * * *

[755] * * *

Q And now you cited physical violence within the home. Is that one of the main reasons the minors give you?

A Yes.

Q How common would you say that that response is?

A It is hard to put a percentage on it, but I would say at least a quarter of the time someone will say my dad hits me or my mom gets very upset and will slap me and that they are afraid that the parent would become violent as a result of this information.

Q And when they tell you this do you believe them?

A Yes, I do, in part because they are so reticent about telling me; they are embarrassed to tell me, but they feel they need to tell me so that they can get the judicial bypass or the order allowing them to have the procedure.

The other reason I believe them is that I handle [756] kids, you know, minors every day of the week in juvenile delinquency court and I like to think that I can tell the difference between someone who is lying through their teeth and someone who is not. Kids can be very good liars but most of them are not, and, you know, I can be fooled, I am not infallible, but I think these women are telling me the truth.

Q What are your observations about the minors' reactions to being in court?

A I think they are very nervous. They don't necessarily understand why they are there. They only know they have to be there if they are going to get an abortion without first notifying their parents.

They, as I have described, they don't understand why they are nervous. In fact, I had a parental notification hearing last week in which a woman was three weeks shy of being 18 and she had to go through a parental notification hearing. She was a straight A student from a local high school in Duluth and she was just a nervous wreck and I tried to calm her down and we appeared in front of Judge Nord who is a very kind person, very nice, and in fact at the end of the hearing he said to her, now that wasn't so bad, was it? I didn't bite you and she said, I guess not, scampered off out of the courtroom because she was nervous and afterwards mostly these women feel relief like, "I am done." It is like the big obstacle is [757] over, is done with.

* * * * *

BY MR. ACKERBERG:

[767] * * *

Q There has been at least one occasion where there was a possible confidentiality problem because the minor knew someone who worked at the courthouse, right?

A There have been several problems, yes.

Q And on at least one occasion you made arrangements to have the hearing in another courtroom than the usual courtroom to avoid recognition of the minor by a third party?

A Yes, that is correct.

If I might explain, there were three minors that were coming in that day; one of them was the stepdaughter of a probation officer, another was a niece of a judge and they were both frightened about being seen by relatives. Therefore, I moved it from third floor up to fourth floor and I kept them in the ladies bathroom awaiting the court appearance which is down the hall in a small courtroom.

Q And confidentiality was reserved?

A To the best of my knowledge. We took them down the back stairway.

* * * * *

TRIAL TESTIMONY EXCERPTS OF LAURA HUNTER, COUNSELOR AT PLANNED PARENTHOOD OF MINNESOTA

[DIRECT BY MR. PENTELOVITCH]

[CROSS BY MR. GALUS]

[836] * * *

THE COURT: My question is do you have an opinion?

THE WITNESS: I have an opinion, yeah.

THE COURT: As to whether or not the statute has resulted in—has or has not resulted in some minors talking to their parents who would not have talked to them, but for the statute?

MR. PENTELOVITCH: Do you understand the question he has just put?

THE COURT: If you don't tell me.

THE WITNESS: You are asking if I—

THE COURT: I am asking you first if you have an [837] opinion on whether or not—now, I can't even tell you what I am asking—whether or not the statute does or does not result in some minors talking to their parents about their pregnancy and their abortion who would not have talked to them but for the statute?

THE WITNESS: Yes.

THE COURT: You have an opinion?

THE WITNESS: Yes.

THE COURT: All right.

BY MR. PENTELOVITCH:

Q What is your opinion?

A My opinion the way you phrased it is that the ones who by the time they talked to me had talked to the parent, both parents or had told one parent, then I have told them about the law, that has often, it seems to me, precipitated the minor to telling the other parent or to definitely telling the other parent, so I think that has made a difference there.

The majority of minors though, I think, already decided pretty much even before I tell them about the law if their parents are going to know or not, you know, if they did know anything about the law I asked them if they told their parents, either yes or no, but I am going to, or no, they are not going to.

* * * * *

[1097] * * *

BY MR. GALUS

THE COURT: When you counsel these folks, Ms. Hunter, they have already been scheduled, most of them have already been scheduled for the abortion procedure by the time you get to what you call your abortion counseling?

THE WITNESS: Right.

THE COURT: After you go through these alternatives, how often does it happen after you go through parent, single parenting or marriage or whatever the alternatives are, that you speak of, how often does it happen that the patient cancels the appointment and says I changed my mind, I am going to go out and carry to term or I am going to go out and get married or whatever the other alternatives are?

[1098] A Absolutely.

Q She is sufficiently mature to make the decision?

A Maturity is a hard thing to determine, I think—

Q Well—

A —in my opinion. Even a young woman going through the whole process of deciding what to do with that unplanned pregnancy and the stresses that incurs, it is a maturation process in itself. I think that they are mature enough to make the decision, that we absolutely make sure. Whether they are mature generally in life is not for us to say.

Q But one of the purposes of your counseling, and not the counseling imposed, ordered, required by a court, but the counseling you as professionals believe you should engage in, one of those purposes is to determine whether the minor is sufficiently mature to make the abortion decision, right?

A Right.

Q And now in the numbers of young women in the age group 13 to 17 that you have counseled have you ever turned one away on grounds of immaturity?

A We have had women in that age group come back for another counseling session before either court or the abortion because we didn't feel they were firm, because there was ambivalence.

Q My question is really directed to maturity. Have you ever refused to perform an abortion in the age group 13 to 17 one the grounds that you believed as a result of your counseling that **[1099]** the youngster was not sufficiently mature to make that decision?

A Not unless the immaturity was tied into ambivalence, you know.

Q Is ambivalence in your professional view a sign of immaturity for purposes of a decision whether or not to have an abortion?

A No.

Q What's then the connection between ambivalence and maturity?

A Someone can be ambivalent and immature and in that case I guess that would come into it. But I don't think being ambivalent itself is a sign of immaturity, no, no.

Q So you have turned away one or more youngsters on grounds of ambivalence?

A Correct.

Q And have you turned away any youngsters on grounds of immaturity?

A No.

MR. GALUS: Thank you.

THE WITNESS: None that I recall.

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TRIAL TESTIMONY EXCERPTS OF ELISSA BENEDEK, DIRECTOR OF RESEARCH AND TRAINING AT THE CENTER FOR FORENSIC PSYCHIATRY, ANN ARBOR, MICHIGAN

[DIRECT BY MS. LYNN]

[CROSS BY MR. GALUS]

[904] * * *

BY MS. LYNN:

Q Dr. Benedek, could you define what a dysfunctional family is?

A Ye. A very simple definition of the dysfunctional family is a family where there are serious problems. Those problems can be either in terms of communication, in terms of control of emotions, in terms of abuse, either sexual or physical abuse; in terms of alcoholism, in terms of emotional disturbance. It is a family that has problems in coping with day-to-day functioning. That is a very simple definition but I think understandable.

Q What would you say characterizes the communication between various members of a dysfunctional family?

A The communication between various members—first, let me say dysfunctional families exist in all socioeconomic levels. It is not just the poor or the middle class or the rich where there are dysfunctional families.

All socioeconomic levels have them and in fact I primarily treat families in my private practice of an upper middle or upper socioeconomic level. All educational levels have dysfunctional families. It is not a function of the poor or the uneducated.

Now in regard to problems of communication there are a variety of different kinds of problems. Sometimes there **[905]** is too much communication in a dysfunctional family, for example, in a family that is dysfunctional because of divorce, in some cases the adolescent knows much too much about the parents' dating, sexual behavior. The adolescent knows too much about the parents' problems of daily living and is too burdened so there can be too much communication.

* * * * *

[911] * * *

Q Could you talk a little bit about the effect of separation and divorce on family relationships, specifically in terms of communication?

A Yeah, okay. The question deals with the effect of separation and divorce on communication.

After a divorce there is generally a custodial parent and a noncustodial parent. More than likely the custodial parent is still the mother. Unfortunately for hosts of **[912]** reasons the noncustodial parent often has very little contact with the child. It may be that the mother keeps the noncustodial parent away, it may be because of sadness and depression, the noncustodial parent chooses to stay away; it may be that there is physical separation. But generally there is very little interaction between the noncustodial parent and the child.

So there is not much communication and certainly not much communication about important issues.

The literature, Wallenstein & Kelley(ph), some of the material I have written, Lamb, hosts of authors have talked about the quality of communication between the noncustodial parent and the child. Both are, even when they see one another, extremely awkward and communication is around superficial issues, where will we go today, where will we eat today, when will I see you next, that sort of thing.

* * * * *

[927] * * *

Q What about a judge who saw an adolescent for fifteen minutes?

A Again one of the things that I need to stress is that it takes education, training and experience to interview an adolescent. It isn't something that you can do just because you have known adolescents.

It is sort of like saying I can do brain surgery because I have watched somebody do it. There are levels of skill in talking to an adolescent and you need training and experience and supervision to do it. So talking to somebody for fifteen minutes will not give you valid and reliable information.

* * * * *

[983] * * *

BY MR. GALUS:

Q Now you use the term dysfunctional family?
A Yes, sir.
Q You contrasted that with a normal family?
A Yes, sir.
Q Are those, as you see them, regular psychiatric terms or lay terms?
A I try to define them with lay language.
Q What is a normal family?
A In lay terms a normal family is a family where there is reason, functioning reasonable communication, reasonable amount of trust, those sort of things.
Q What is a normal family in nonlay terms?
A Pardon me?
Q What is a reasonable—excuse me, a normal family in nonlay terms?
A A normal family is non—okay, let me add, in lay terms one of the other things that seems to be considered, a normal family or an ideal family, is a two-parent family, a non-structured family, a family where there has been no divorce or no separation, a family that is somewhat—well, the typical family picture of a family is a two-parent family with several youngsters with no fracture, no dissolution, okay?

A normal family in terms of a professional opinion—

[984] Q Let me back up then, did I understand you just to tell us that you equate normal with ideal family?

A No, I did not.
Q But a normal family in lay terms, a divorced family is abnormal?
A Many lay people believe that a divorced family, per se, is abnormal. That is not the case.
Q Well, do you believe that?
A No, I do not believe that.
Q What are your beliefs as to a normal family?
A My belief as to what is a normal family is a group of adults and children living together in a reasonable amount of harmony with reasonable communication, with reasonable trust, with mutual dependence on, and independence on one another.
Q Now is a dysfunctional family as you have testified to it in your direct testimony, the opposite of a normal family?
A A dysfunctional family can have some normal parts into it, but it could have some one of those areas that are disturbed.
Q Are there normal dysfunctional families?
A Are there normal—are there normal families with some dysfunction, how is that—
Q You used the term dysfunctional families, didn't you?
A Yes.
Q When you used that were you contrasting those families from normal families?

[985] A Yes.
Q How does a dysfunctional family differ from a normal family?
A A dysfunctional family has impaired communication, impaired trust, impaired dependence, impaired independence from one another. It may be dysfunctional in other ranges.

There are families where there is physical abuse, where there is sexual abuse, where there is alcoholism, where there is incest, where there is too much communication among the generations and so forth, so there are a wide variety of parameters in which a family can be dysfunctional.
Q As you use the term, how many families are dysfunctional?
A How many families are dysfunctional?

What is the percentage?

Q Do you have an opinion?
A No, sir, I do not.
Q It could be as infrequent as less than one in a thousand?
A I have no opinion.

* * * * *

[995] * * *

Q I notice from your resume that you have written to some extensiveness on issues of custody?
A Yes, that is correct.
Q And have you testified in connection with such proceedings?
A Yes, I have.
Q In what circumstances have you testified, generally speaking—
A Well—
Q —in custody matters?
A Well, in regards to the establishment of custodial environment, who should be the custodial parent; in regards to the issue of joint custody, in regard to changes in the custody, in regard to visitation arrangements, those sort of things.
[996] Q Have you ever testified in support of visitation arrangements for the noncustodial parent?
A Of course I have.
Q I presume in your—on those occasions you rendered your professional opinion that the child's best interest was involved in continuing in some manner the—
A Yes, I have.
Q I take it in your professional view the noncustodial parent in—even in cases of divorce has things of value to offer to his or her child?
A I believe it is the child's right to have contact with the noncustodial parent, if there is no physical, sexual or emotional abuse, that is correct.
Q Well, have you testified on occasions in the child's best interest to have continued involvement with a noncustodial parent?
A Yes, I have. But then that has to be qualified. You are giving me very general statements, I do not think it is in the child's best interest to have visitation with a noncustodial parent around simply the issue of pregnancy and what to do about a pregnancy. I believe it is important to have an ongoing relationship if possible with the noncustodial parent for the child.

* * * * *

[997] * * *

Q You indicated even in a normal healthy family communication about sex is very sporadic and incomplete?
A That is correct.
Q In the mother-daughter situation it tends to be limited to menstruation and matters of hygiene?
A Often that is correct.
Q Development of breasts?
A That is correct.
Q And not often, if ever, concerning abortion or pregnancy?
A I didn't say if ever, I said not often.
Q Not often?
A Yes, sir, that is correct.
Q Okay. Well, if this incomplete communication is the result, even in normal healthy families, how can we predict that children accurately know how their parents will react to issues of abortion and pregnancy?
A Oh, that is a very good question and the answer to that—
Q Thank you.
A —is that communication is not always verbal. A lot of communication is nonverbal.

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TRIAL TESTIMONY EXCERPTS OF GARY MELTON, PROFESSOR AND DIRECTOR OF LAW-PSYCHOLOGY PROGRAM AT UNIVERSITY OF NEBRASKA, LINCOLN

[DIRECT BY MS. LYNN]

[1114] * * *

Q All right. Dr. Melton, in what ways has competency to consent to medical treatment been defined in the psychological literature.

[1115] A Well, most of the studies have looked at several different sorts of models of competency; one being simply whether or not a person is able to express a preference, to make a decision.

That is obviously the lowest standard.

A second standard is an understanding which is usually thought out in terms of knowing the nature and consequences of a procedure, its risk and benefits, and the alternatives and their nature, consequence, risk and benefits.

THE COURT: Once again, knowing the nature—

THE WITNESS: The nature and consequences and risks and benefits of a particular procedure and its alternatives.

THE COURT: And you added a third to that too when I interrupted you.

THE WITNESS: Well, nature of consequences, risks and benefits of a procedure, and the same for its alternative, the alternatives that one might choose.

THE COURT: That is the alternative part.

THE WITNESS: Right. Sometimes there is also discussion within that of appreciation, which adds an emotional component in some people's minds of sort of having a gut feeling about it as well as cognitive understanding.

Other times that is thought about in terms of understanding how a particular procedure or decision applies [1116] oneself. So that somebody, for example,—a good example is in terms of adult mental patients who may be able to describe very well all of the—or major risks and benefits of medication, but then say I am not crazy, it is somebody else this belongs to.

There is a question then about how one views that. Obviously you can have different levels of understanding but that is an approach to understanding competency.

A third way is in terms of focusing on the process of decisionmaking so that not only do we look at whether or not an individual understands the attributes of a particular decision, but also whether or not they weigh the risks and benefits rationally, whether they take what seems to be the salient aspects into account and can balance them.

That sometimes is talked about in terms of the reasonableness of the decisionmaking process. Then the final way that it is looked at is in terms of the reasonableness of the outcome of decisionmaking, that is the actual decision that one would make consonant with what at least some people think a reasonable person would make. Usually in research that has been defined by getting expert judgments as to what the best decision is and then comparing the actual decision that someone makes or says they would make with what experts think the reasonable thing is to do.

BY MS. LYNN:

[1117] Q And these, I think it is four—

A Right.

Q —tests you have laid for lack of a better word, are they alternative ways of looking at competency to consent or how do they work together?

A Well, yes, they are essentially alternative standards and usually when psychologists have attempted to understand competency to consent they develop data that is relevant to each standard so that the law can then take what they will in terms of what the appropriate standard is in a particular context and look at what it is children, adolescents, adults can do.

THE COURT: You mean there is a different standard or approach to competency to consent depending upon the context, is that what you are saying?

THE WITNESS: No, no, no.

THE COURT: Depending upon the type of decision it is?

THE WITNESS: No, sir.

What I am saying is that the law might—or as a matter of policy we might decide that what competence to consent means in different contexts is different and what I am saying is a psycholgist's approach, we don't make that judgment, we simply say that this is what we can say about whether or not minors express preferences; this is what we can [1118] say about how well they understand a decision; this is what we can say about how well they reason about a

decision; and then what we can say about what minors in fact do when given a decision.

THE COURT: You have given me four ways, as I understand it, to—which are models of competency as you call them?

THE WITNESS: Right.

THE COURT: I guess what I am trying to figure out is do you apply the same model in the context of any type of decision or does the model that you apply depend upon the nature of the decision that is having to be made?

THE WITNESS: The research has tended to look at all four sorts of approaches within different kinds of decisions.

THE COURT: Okay.

THE WITNESS: I should add not all studies look at all four, but in terms of how they have been reviewed they tend to get compartmentalized that way and some studies in fact look at all four.

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[1121] • • •

A What I was starting to say is that what we—what we also know is that most people don't, in their making decisions in most contexts, systematically weigh risk and benefits, that it is not like taking a probability of a harm and a probability of a benefit and adding them all up and then doing Bassian(ph) equations to see what you are going to come up with in the end or what the right probability is: that people usually end up making estimates of base rights that are wrong and that is true for professional too, I might say, and part of it is because we tend to focus on what is really in our memory, the jargon term that is used is "available," and the things that are most available are those that are most emotionally charged, that are most recent, or that happened most frequently in our own experience. What happens in our personal experiences may not be representative of the real risks and benefits across time, so that the sort of short answer is most people make pretty good efforts to make decisions; most of the time they make decisions that are reasonably in their benefit, but that most people, most adults, [1122]

don't systematically and rationally weigh risk and benefits, that there are lots of things about cognitive processes that get in the way of our making fully reasoned decisions.

The other sorts of things are ones that are perhaps more commonly known in terms of very high or very low levels of anxiety affecting performance and sort of situational variables affecting decisions.

An example of that in terms of consent would be what we popularly call the foot-in-the-door technique, so that to give an example, studies on organ donations and tissue donations find that you get fewer people saying they will donate organs if you just say will you donate your organ; but if you first say, may I prick your finger and then say may I take some more blood and then may I talk to you about this and so forth to finally asking, well, now, will you donate your organ, you will get much higher compliance rates.

So that there are factors that affect how people decide that depend on the way in which the question is framed.

• • • • •

Q And now, still talking about competency to make decisions in general, how do adolescents compare to adults as you have just described them?

A In general adolescents look pretty much the same as adults do, that is—

THE COURT: You had better give me your definition of adolescence so we are talking about the same focus we have [1123] heard from others.

THE WITNESS: Sure. Most of the studies that have tried to compare adolescents and adults have compared 14-year-olds against 18 and 21-year-olds. But the discussion, when people—when there have been reviews of the literature about comparing various age groups, they tend to talk about adolescence beginning somewhere at 13-14 and moving usually to legal maturity, although psychological adolescence can sometime continue after that.

11 to 14 is commonly seen as a transition period.

THE COURT: How are you using it when she asks you about adolescence?

THE WITNESS: Again, most of the studies I am going to talk about have used 14 years old as a comparison group or they have used junior high and senior high students if they go across age groups.

MR. GALUS: Excuse me, if the witness is going to respond to questions about adolescent decisionmaking I would appreciate it if we could have questions framed so we know when we are talking about 14-year-olds or other groups.

THE COURT: Well, I don't quite know, your studies deal with 14-year-olds, but you are talking 14—13-14 to—

THE WITNESS: Well, they are both kinds, they are studies—most of the real life studies across age groups, in other words, as I said, they will have elementary school **[1124]** children versus junior high versus senior high and do correlational kinds of things in looking at when kids begin to form different kinds of skills or competencies.

The cross-sectional studies, those who take out age groups have tended to use 14-year-olds as a comparison group against legal adults, usually 18 or 21, and against elementary school children, and that is often, in some of the studies it has been like 9-year-olds.

THE COURT: Tell us what you are going to be opining about, when she says tell us the difference between adolescent competency—

THE WITNESS: In general for adolescence we are talking about by the time a youngster or a person is 14 they have crossed into most of the cognitive and emotional characteristics that typically get used as adolescence.

THE COURT: Just tell us which group you are going to be referring to, if you can, doctor, when she said compare adolescents to adults, what are you talking about?

THE WITNESS: I am basically talking about junior and senior high age.

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[1128] * * *

THE WITNESS: All right, by age 14 in both real life studies involving clinical populations as well as nonclinical

populations, and involving general groups of adolescents, say from a school population, adolescents are not differentiable from adults, according to the four tests; that is that adolescents are just as likely to express a preference, just as likely to understand the nature of the decision; just as likely to weigh risk and benefits systematically; and tend to make or at least to say they would make decisions that are like those that experts think are reasonable.

THE COURT: I want to ask you about that standard a little later on.

BY MS. LYNN:

Q Dr. Melton, what does maturity mean as opposed to competency to make decisions?

A Maturity is not a term of art in psychology. As I understand it, the way it is used colloquially it would mean something like what psychologists often talk about in terms of adaptation or of higher levels of development.

So that it would include being able to form real—exchanging relationships, ones that are psychological as well as based on activity. It would include ability to weigh to make complex decisions, to weigh risk and benefits; to

[1129] THE COURT: Okay.

BY MS. LYNN:

Q Would it be possible, doctor, to have someone who is immature, and using that phrase in the colloquial way that you have described it, would it be possible to have somebody who is immature and at the same time consider them competent to make certain decisions?

A Yes. To stick with the understanding standard, for example, a particular kind of decision may be a very simple one, it may be that there are essentially no risks and a clear benefit and what is going to happen is not complex at all.

In that instance, obviously someone who is not a very good reasoner in general terms still could have a good understanding of what was going to happen in a particular context so that that

competency and that decisionmaking need to be thought about in terms of a general competency, the sort of thing we were just talking about, about how people—their sort of general reasoning style and abilities to reason, but also in terms of ability to handle a particular kind of decision and in fact the correlation is nowhere close to perfect in that.

Q What do you mean when you say the correlation is nowhere near—

A Well, if you look—you use some sort of general measure **[1130]** of competency, generally adaptive, nonpsychiatric adults, for example, and compare them to people whom we believe to be impaired in their general reasoning, many people who have general incompetencies can still be quite competent to make specific decisions.

My example earlier about knowing all the risks and benefits of medication and thinking through and having pretty good reasons for why you are going to take it or not take it, but also not dealing very well with demands of everyday life would be an example of that.

By the same token, you could have someone who is very together, very competent, but in a particular context has a mental block about it for emotional reasons, or simply lacks the information that is necessary to handle the decision because of its complexity, and it being foreign to one's experience.

* * * * *

[1137] * * *

Q And in general how do adolescents compare to adults in their capacity to make informed decisions about medical treatment in general?

A As I have already said, there is no difference in all the existing studies.

Q What is the importance of the parents to the adolescent decisionmaker in general, what is the parents' role?

A Well, it depends on the kind of decision and also on how far along in adolescence we are talking about. Older adolescents in particular tend to go to make their own decisions, but to get information that is relevant from anywhere including parents.

Younger adolescents or junior high age tend not to go to parents very much but they also value parents' opinions about serious matters. There is a classic study by Brittain that found that when we were thinking about sort of trivial sorts of decisions, hairstyle, for example, that early adolescents conformed primarily to a peer group, but when you think about more serious decisions like choice of school **[1138]** curriculum, for example, that early adolescents defer primarily to parents in making those decisions so that across the range of adolescents most adolescents tend to look to parental information.

Obviously it depends in part, and I am talking in general terms, it also depends on what the specific relationship is between the adolescent and his and her parents.

Q If an adolescent is found to make one decision regarding medical treatment is it reasonable to think that she or he would not be competent to make—would be competent to make decisions about other kinds of medical treatment?

A Could you repeat that?

Q Do you want me to repeat that question?

A Yes.

Q Okay.

If an adolescent is found to make—competent to make one kind of decision regarding medical treatment, it is reasonable to assume that he or she would be competent to make other decisions about other kinds of medical treatment?

A The odds are they would be, the caveat to that is what I have already said, you have to look, with each particular decision, but in general people who can make one kind of medical decision also can make other kinds of medical decisions when they are presented with sufficient information.

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[1144] * * *

Q Dr. Melton, are you familiar with Minnesota Statute 144.343, the Parental Notification Law?

A Yes, I have read it.

Q And in your opinion is there any empirical basis for the Minnesota legislator's determination that minors are competent to make all decisions regarding pregnancy-related services by

themselves but are not competent to choose to abort by themselves?

MR. GALUS: I object to the form of the question; it is assuming facts not in evidence, namely the opinion of the Minnesota legislature.

MS. LYNN: Your Honor, I would ask you to take judicial notice of the fact that the Minnesota law allows minors to self-consent to all pregnancy-related services except for abortion. It is right there in the statute.

THE COURT: Yeah, I think I understand that. I understand what your question is. I think the objection is overruled and you may give your opinion.

THE WITNESS: I don't see any basis in the research literature for making that decision.

THE COURT: Your testimony is in your opinion **[1145]** there is no empirical evidence for the distinction between medical services generally and abortion services in particular?

THE WITNESS: Right. Only as I have heard mentioned, the only thing that makes the abortion decision a bit different is the nature of the moral and social considerations that apply and those presumably also apply to pregnancy decisionmaking more generally.

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[1146] * * *

Q Do you have—what is your opinion regarding the differences between those adolescents who choose to abort and those who choose to carry to term?

A There have been several studies comparing general psychological wellbeing of teenagers who have chosen to carry to term and those who have chosen to abort. All of the studies have simply given a personality inventory and looked at how the adolescent compares against national norms. In general the three studies that have been done; two involve the California Personality Inventory, which is a personality test that crosses a variety of different personality traits, and then an eroticism scale, in all three studies the adolescents who had chosen to

abort looked healthier than those who had chosen to carry to term.

THE COURT: Do they use the Minnesota Multiphasic for that?

THE WITNESS: Not in these particular studies. They have problems with the adolescent norms in the MMPI, so there is some good reasons not to.

THE COURT: When you say healthier, what does that mean?

THE WITNESS: They are closer to their—not closer to the extremes, in other words, in general those personality scales which are intended for research and personality **[1147]** in general, generally it is assumed that closer to the mean you are on a given scale, that is closer to the average the healthier you are; and the further you go out on the extremes, the more unusual your attitudes or feelings or behaviors that you report the less healthy.

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[1155] * * *

Q Now you testified earlier, Dr. Melton, that you are the chair of the American Psychological Association's Committee on Adolescent Abortions, is that correct?

A That is right, or the Divisional Committee, Interdivision Committee, yes.

Q Could you explain what the interdivisional committee is?

A It is the committee that was established by four of the divisions of APA. The divisions are groups of psychologists that vary in number but usually are around a couple of **[1156]** thousand, that chair particular professional interest in research or practice. The divisions that sponsored this particular committee were the Division of Child, Youth and Family Services; the Division of Population and Environmental Psychology; the Division of Psychology of Women; and the American Psychology Law Society.

The committee included representatives of the various divisions that were involved and was charged with doing two things—

THE COURT: What is the name of your committee?

THE WITNESS: Interdivisional Committee on Adolescent Abortion.

THE COURT: All right.

THE WITNESS: The committee had a dual charge. The first was to review what was known and what needs to be known about psychological assumptions that have underlay policy and law on adolescent abortion and, secondly, to provide some guidelines for psychologists that were involved in research or counseling with respect to abortion by minors.

BY MS. LYNN:

Q And who wrote that report?

A I did with input from other committee members.

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[1160] * * *

Q Now turning to that part of the report that concerns itself with examining the assumptions courts have made about minors faced with abortion decisions, can you go through and summarize what the report concludes about each one of these assumptions?

A Yes. In respect to the quality of the decisionmaking, the general sort of conclusion of the committee is one I have already alluded to in my own testimony with respect to there not being a great deal of literature on abortion decisionmaking per se, but to the extent we have got that, plus the treatment decisionmaking literature, suggests that minors are not differentiable from adults or adolescents, I should say, are not differentiable from adults except with respect to some of the particular factors that they consider; notably again the social effects of their decision, how it is going to affect their **[1161]** family, and perhaps other critical people.

The major issue with that is in terms of the somewhat different approach that adolescents tend to make to the decision than adults do is that adolescents tend to delay in making the decision, delay in seeking health care and so on.

And we discussed whether or not requirements for parental involvement would be likely to increase the reasoning or the quality of the reasoning of the decision; and generally concluded in our opinion that it would not. We were concerned about increasing the delay and therefore increasing risk, both physical and psychological.

With respect to the psychological sequelae of abortion in adolescents, again many of the studies have not separated the samples by age. To the extent that they have the findings have been generally consistent with the general conclusions in the literature on the effects of abortion which is that there are—there is some short-term anxiety and depression, not clinical depression, to distinguish it from the testimony earlier this morning, that is sadness as opposed to being a depressed person.

And that over time, that that tends to extinguish itself. That there are slight age trends, that is, that minors are slightly more apt to have some negative sequelae than adults are. But the magnitude of the effects is small. **[1162]** So their responses are just about unheard of, and the age trend can be accounted for by other things.

Again the tendency to delay, the fact that adolescents who have abortions often are, if not coerced into doing it, at least it appears to be somebody else's decision when parents bring them to have an abortion. In that sense having less support, but that when there is adequate support there is no reason to believe any more effect on the adolescent than adults.

Then we also looked at the assumptions about the relative effects of abortion and carrying to term and concluded that in fact there is much more risk in carrying to term in part because of the untoward social effects of adolescent parenthood which are well documented in terms of failed marriages and if there is a marriage, interrupted education, family discord and so on.

So that to summarize the general conclusions were that there is no special reason to be concerned about adolescent decisionmaking about abortion as opposed to adults; that they are—that notice, not necessarily notice statutes, statutes which mandate parental involvement are not necessarily going to result in more reasoned decisionmaking and may, in fact, have some deleto:y side effects and that the assumption of markedly

severe effects of abortion on minors isn't substantiated by any of the available literature.

[1164] * * *

Q In your opinion, Dr. Melton, is there any empirical basis for the assumption that young women under the age of 18 who are given the necessary information and given an opportunity to explore alternatives need to be protected from making hasty or ill-informed decisions about abortion?

A I am not sure what—could you spell out what you mean by needing to be protected?

Q Well, okay.

In your opinion is there any empirical basis for the assumption that young women under 18 who are given the necessary information and who have explored the alternatives are in any sense less competent to decide for themselves whether to have an abortion or not?

[1165] A There is no evidence to differentiate adolescents on that point from adults.

TRIAL TESTIMONY EXCERPTS OF K. M., MINOR

[DIRECT BY MS. PINE]

[CROSS BY MR. ACKERBERG]

[1235] * * *

Q Why did you ulimately decide to have an abortion?

A Well, I wanted to go to school, I felt that R was old enough; I felt I was mature enough to raise a child but I didn't think that the child would benefit from me being a parent. I did not feel in myself that I could carry a child to full term and be able to give it up for adoption. Then I thought I would want to keep it and I knew it would have been better with somebody else.

I decided that because I wanted to be what I am now, going into my third year of nursing and I wanted to be a nurse.

Q Did you ever consider telling your father?

A Well, not really, no, I didn't. I considered him but I never considered the fact of telling him. I was afraid. I was always afraid. The first thing was does my dad have to know,

when I told my mom, you know, I said I want Bert to know but I don't want Ed to know.

Q What did you think would happen, Bert is your stepfather?

A Bert is my stepfather.

Q What do you think would happen if he knew? What were you afraid of?

A I was afraid he would come right to Minnesota. I was **[1236]** afraid he was going to take me away from my mom because he always used to send her letters and send us letters that said she was crazy and just things—I was afraid that he was going to blame it on her, that she was nuts and didn't raise us good enough because I ended up getting pregnant and it wasn't—I was fearful for her and for me because he was such—

Q Was there something that had happened in the past that made you worry that he would come to Minnesota and take you away from her?

A When he came to visit us one time and said that he was going to shoot my mom, he threatened to shoot my mother and on several occasions wrote letters saying she was dead and he was going to get his kids.

On one occasion when me and my sister were down visiting him during the summer he wouldn't let us come back to Minnesota but we were under the impression, he told us that my mother had written and we could go to school down there and everything was okay but we never had contact with her and we didn't know what was going on.

THE COURT: Slow down a little bit.

THE WITNESS: I am sorry.

THE COURT: It is okay, go ahead.

THE WITNESS: We didn't know what was going on until the court came and got us and we were brought back and all this time he was holding us against our will and, I am sorry, I **[1237]** am really a fast talker—holding us against our will and that was what was going on, but we didn't know about it.

My father wanted us back. She never gave him permission and at the beginning of the marriage I remember him

coming to our first house that we lived in and actually being in the house visiting with us but he was not allowed any further than the door for fear that my mom had because she wanted us to have the right to see him, you know, but after that, after he threatened to shoot her we didn't even want to see him. We were really afraid of him.

Q Were you afraid? Did you think it would change your relationship with him in any way?

A Oh, yeah, I figured that if he knew that I was pregnant it was just going to be a matter of, you know, you are just a slut, that was the biggest thing that sticks in my mind because of all I went through recently with that living together situation and I felt that is what he was going to say. I thought the relationship would be over, whatever little we had, it was going to be over for sure if he found out.

Q Did you ultimately decide to go to court to avoid telling your dad?

A Yes, I did.

Q Let me ask you one thing, if you had had to tell your father how would that have affected your abortion decision?

A I would have carried it to full term.

[1238] Q It was that important to you?

A Yes, I would have carried it to full term if it would have been something, if there was no other option I would have, just to avoid that fear because I just—I am really terrified of him.

Q At the time you decided to go to court to avoid telling your father, did you and your mom talk to a private lawyer?

A Yes, we did.

Q What was it like when you went to court, can you remember how long you had to wait?

A Well, I think that from the time that we saw our lawyer until the time we got the court date it seems like it was five days, three to five days, and we didn't even have the judge we were supposed to have and the aroma when we walked in the room, the way—I thought he was a really prejudiced judge, I called him "Prejudiced Plunkett" because that is exactly what I thought of him.

I walked in the room, he treated me like an infant when he questioned me, it was repeated questions, you know, it was really stressful and I went through, you know, trying to get into the court for a week and I was just really stressed out and he was asking me questions that, you know, were just—I considered him making his decision before I even walked in.

I felt his personal views and it scared me when I realized who the judge was. I go to school with his son and I am in school with his son.

[1239] Q So you were worried?

A I was wondering how far it was going to get.

Q You were worried that his son would learn that you were in court about this matter?

A Yeah, uh-huh, and was really stressed. That brought a lot more stress out knowing it could possibly, you know, get around school.

I wasn't embarrassed about it, I didn't think that I needed to go through this kind of hassle for the simple fact it is clearcut that my father would have just, if he would have found out, I suppose—

Q Also were you pretty involved with a lot of activities relating to your church at the time? Was that somewhere near the time when you were confirmed?

A Oh, yeah, I was confirmed a week later and he walked in with his son for confirmation, he was his sponsor, and he looked at me and I looked at his son and I was wondering exactly what goes on around the family table at night and it worried me but I was confirmed right after that and I could see him looking at me, going, you know, wondering if I was still pregnant or how I could get confirmed considering I was seeking an abortion. I knew this was going through his head because he was a Catholic and my mom was.

Q What do you think would have happened if somehow his son had learned about this and that got out in your circle of **[1240]** friends connected with the church?

A It would have been—I would have probably—I know for one thing I went to a strict Catholic school all twelve years and I would have been out. I would have been out of the school I know for sure. It was run by nuns and fathers and I would

never have been allowed in there if they would have found out and it would have gotten around, it would have, you know, how fast things spread in high school.

Q Did you have to wait for the judge's decision?

A Yes, we waited three days I believe for the decision but we knew what it was before it ever came back. We did, you know.

Q How did you feel while you were waiting for the decision?

A It was terrible, I was sick, I was up all night wondering what I was going to do and—

THE COURT: He didn't sign it right at the hearing?
THE WITNESS: No.

BY MS. PINE:

Q How did you know what he was going to do?

A I knew—if you would have been there you would have known; he was really prejudiced. When I walked in you could see anti-abortion written all over his face.

Q What did he decide?

A He decided that I couldn't have it without my father's consent.

[1241] Q So he denied the petition?

A So he denied the petition.

Q Did your lawyer then explain to you that you had a right to appeal?

A Yes, he did and we felt that with his attitude toward it and as long as he waited that it was going to be the same.

Q So that made you feel like you didn't trust the appeal process?

A Yeah.

THE COURT: Wait a minute, you are both talking at the same time; you have to wait until she is through.

BY MS. PINE:

Q So you didn't feel like you trusted that you would get a fair hearing on appeal?

A No. I felt there was no fair hearing.

Q That is the way you felt.

Were you also worried about time?

A Yes, because it was—it seems to me like I had one week before the first trimester was over and so that was a lot of stress too, I mean.

Q What did you and your mom decide to do?

A We ended up going to Mason City, that is what I decided to do; we ended up going to Mason City which was two days in Mason City, Iowa, excuse me, which was two days, and it was probably $200 more.

[1247] • • •

BY MR. ACKERBERG:

Q So the judge asked one question, the judge asked you what made you think you were mature enough to make that decision?

A That is kind of how he worded it.

Q Was there another question he asked?

A There was lots of them and I really cannot recall them, I am sorry.

Q What did your lawyer tell you about appealing Judge Plunkett's denial of your petition?

A From what I can remember that I had the right to appeal, just that I had the right to appeal, which would be—I have no idea, I think that I had the right to appeal which would mean that I would go through the process again. I am not sure.

MS. PINE: Just what you remember.
THE WITNESS: Yeah.

BY MR. ACKERBERG:

Q Your lawyer advised you not to appeal?

A No, he didn't advise us that; that was my decision. That was my parents' and mine.

Q Why did you decide not to appeal?

A It was because he was totally prejudiced and I didn't think if I ever appealed to him he would change his mind.

Q What was your understanding about who would hear the appeal?

[1248] A I assumed, I guessed that he would again because at that time there was two juvenile judges and one of them had been out of town; that is why I didn't have him the first time and he was going to be out of town for some time, for some period of time.

Q Were you advised that you had an opportunity to submit your petition to another court?

A I don't remember.

Q What is the name—what was the name of your lawyer who represented you at the hearing?

A Mr. Donald Rysavy, I believe it is Donald.

Q Do you know how to spell his last name?

THE COURT: R-y-s-a-v-y, maybe?
THE WITNESS: Maybe.

BY MR. ACKERBERG:

Q Do you know what the basis of the judge's decision was, do you know if the judge determined that you were not mature enough to consent to the abortion?

A That I never found out. I don't remember ever finding out why I was denied. I don't remember finding out. I don't remember the reason why I was denied. I can't believe it was because of my maturity level, but I can't remember the reason why it was denied.

Q Did you at one time know or did you at one time know what the reason was for the denial?

[1249] A I am sure I did at one time.

Q How many days was it your testimony that you found out, about three days later?

A Uh-huh.

Q After the hearing that it had been denied?

A Uh-huh, yes.

Q That would have been approximately October 6?

A Yes, I think, I would say—

Q When did you make arrangements to go to Mason City, Iowa to terminate your pregnancy?

A I believe we had to look for a place that it could be done without having my father's consent which I think took about a

week and that is when we found Mason City and we made an appointment immediately.

I don't know if I should say this but for the simple fact that I was far along, but now that it was even going to cost more money if I waited any longer.

Q Well, do you know how much along you were at the time of the hearing?

A Seven to eight weeks, I believe.

Q And two weeks later you had the procedure in Mason City?

A After the hearing?

Q Yeah.

A I am trying to remember. It is really hard, I want to say like around the 20th or the 21st.

TRIAL TESTIMONY EXCERPTS OF S. L.,
MOTHER OF MINOR

[DIRECT BY MS. PINE]

[1253] • • •

Q And what was your daughter's relationship like with her stepfather?

A It was a close relationship, they were able to talk and they got along good.

• • • • •

Q Where did your ex-husband live at the time of her pregnancy?

A Oklahoma City, Oklahoma.

Q And in the years between the divorce and the time of her pregnancy how often did your daughter see your ex-husband?

A About five times.

Q And did she speak to him any more on the phone? How often did she speak to him on the phone?

A She visited him twice and spoke to him on the phone probably five times in that eight years.

Q Okay. How often were you in contact with your ex-husband at that time?

A No more than I had to be. I suppose there were four or **[1254]** five incidents of harrassment that he did, and which I was in contact with him by phone most of the time.

Q Maybe you could describe the incidents for us?

A Okay. The first summer we were divorced, in August of '73, the next summer he came up with a brand-new wife that was three years older than our oldest daughter. He took the two youngest daughters back with him and wanted to keep them the entire summer, which was fine with them and fine with me.

At the end of the summer when it was time to return them he refused to return them. He wanted to keep them. So after trying to talk to them on the phone and convince him to send them back he still wouldn't do it so I contacted my attorney and we got a writ of habeas corpus and within two days I had them back.

Q Uh-huh.

A The next summer while I was working he called me on the phone and he was in Austin and he told me he was going to come out and shoot me; he knew where I worked and he was going to take the four kids and take them back to Oklahoma and I would never see them again because I was an unfit mother.

Also that first summer our 16-year-old took the divorce very badly and she attempted to take an overdose of drugs in order to get some attention from her father and while she was in the hospital he called her and told her that the reason she took—did all of this was because she had an unfit mother and not a decent home life, et cetera, and wanted her to come down and stay with him a few days or for a couple **[1255]** of weeks. She agreed to do this and I agreed for her to miss a couple of weeks of school and go down and see him and see if they couldn't get their relationship back together again.

She went down there and during the course of the four days she was there she was kept locked in a bedroom at all times. She had a close friend down there who came to visit her and that close friend, I tried during that four days to get ahold of my daughter and could not reach her. I was told she was out or shopping or whatever and was not around.

Her close friend went over and saw her one day and found she was locked in the bedroom and my daughter was in hysterics wanting to get out of there and told her best friend to please contact me to send her some money so she could leave. If I didn't send the money she was going to leave one way or the other and would rather come home, have a decent way of getting home rather than hitchhiking.

I wired the money to her best friend and in the middle of the night she stole away from the house and got on the first bus she could find and started coming to Minnesota.

During the course of the whole time she was on the bus she was terrified because there was one time when they crossed the Oklahoma border they were stopped by the police and she thought for sure he had found out she was missing and was after her but it was for somebody else.

After she got home I received a phone call from him and the language and the abusiveness on the phone, the things **[1256]** he was going to do to both me and her was just horrible. I finally hung up on him.

Q Can you describe a little bit about what your relationship was like with him when you were married to him?

A He was a very domineering man, a very military-minded man. He spent 22 years in the military. I was a very dependent wife. I had lived in Austin most of my life and had left the town—my dad died when I was very young so I had really no male relationship to deal with. When I got married I was very much in love and I wanted to do everything to please my husband. I had children right away from the time I was 18 until 26 I had four of them. He told me what to wear, what meals to fix, whether I could go somewhere and when I couldn't go somewhere, I learned to live with that. The children became the same way.

Q Was he abusive to you in any way?

A The only way he was abusive to me verbally, he slapped me only once in the years we were married and that is when I called him an SOB so he did slap me across the mouth but otherwise he was not physically abusive to me but verbally.

I was called a no-good bitch and a fat bitch so often after a while I began to believe it. I became, "no identity" at all.

Q What sort of precipitated the divorce?

A Well, he for the last six years of the marriage had been **[1257]** drinking quite heavily, was a real bad alcoholic, his health was going down the tubes. There was even a period of about three months when I decided I would join him in this. I loved him; I wanted to keep the marriage together. I did not want to break up this family. I was terrified to raise four children alone, that was probably half of it. So I attempted to kind of join him for three months and see. I couldn't handle that. I figured that the children had to have at least one solid parent. So I don't know, it was just one night in Oklahoma City he made one of his nasty comments and I said you can have your divorce. There was also many women and it was getting to the point where they were coming to the home and they were having their affairs there.

I had no control over anything. It was just a bad atmosphere and a bad influence on the children.

Q Was it a contested divorce or you ultimately agreed?

A No, it wasn't. There was no contest. He wanted the divorce and I finally gave it to him.

I had had it and he did want to have the children very badly so he did several things within the next three months in Oklahoma, I had to wait three months before I could leave the state with the kids, and he did a couple of things in those three months in order to try to drive me insane because he wanted the children very badly and he told his attorney that is what he was going to try to do. I hear him **[1258]** on the phone telling him that.

Q In the years between the divorce and the time of your daughter's pregnancy you said you only spoke to him or saw him a handful of times relating to these harassment incidents that you talked about?

A That's right.

Q How would you characterize your relationship with him?

A No good at all. He was very verbally abusive. He wanted to harm me, he wanted the children in any way he could get them. The one time he was going to shoot me I had to take the four children and take them to a friend's home and leave them there for three days while he was in town but I had to be at my

parental home in order to talk to him. If he wanted to talk I did have a policeman there with me because the man does own guns. Twice during the last six years of our marriage when he was in a drunken stupor he put a .45 Magnum (sic) to my head and was going to blow my head off. So I knew he was capable of it and I had no qualms he would do it. He wanted me dead.

He told my attorney I was dead and just killing me was a matter of just finishing it.

* * * * *

[1265] * * *

Q Uh-huh.

A Because when we actually had the abortion she was very close to 12 weeks, we could not have waited any more time—

Q Uh-huh.

A —you know, because there would have been much more of a procedure, and—

Q Uh-huh.

A —and I felt that if that was her decision I wanted to have it as safe and easy for her as possible.

Q Uh-huh. Could you describe how long did you wait when you went through the courthouse with your lawyer for the court bypass procedure to avoid notifying your ex-husband?

How long did you wait around the courthouse and can you describe what you were feeling while you were waiting?

A I suppose we had about a 15 or 20-minute wait. I was angry, I was very angry that we had to be there. I thought to some degree we had been violated. I didn't know why we had to go into court and ask for this, her father not to be notified when for the last eight years he had such little contact with her and never called her, never knew what was going on with her everyday life, and I really felt we were not going to get a fair judgment out of the judge that we were seeing.

Q What were your feelings about going before a judge who you knew personally in the community you were in?

[1266] A I was scared, apprehensive; I thought perhaps, you know, something might—he might say something to his son or something and it might get into the school.

If the school would have found out what K. had done, what K. had done, I am sure she would have been kicked out. In fact I am positive she would have been.

She was getting an excellent education there and I just felt that her education would have gone down the tubes.

Q Can you describe what happened when you went to the courtroom, what your first impressions were?

A The judge was very aggressive with his questions. I don't remember totally all of the questions, there was many of them on why I felt she was mature. He asked K. why she felt she was mature. We went over and over again the incidents that my ex-husband did. He was just very aggressive and—I just did not get a real comfortable feeling. I felt he had basically made his decision before he walked in there. He many times asked her, "You are Catholic, you are doing this and you are Catholic," I mean—

Q Was there anything else that was asked or anything else that was said that made you have that feeling, that it was set against you?

A No, I can't think of anything right now.

Q How long did—let me ask you one other question about this; do you think that her father could have added anything to **[1267]** the decisionmaking process?

A He would have made her—have made her carry the baby to term and raise the child. I don't think he could have added anything. I don't think he had any right to, really.

Q If you had been forced to notify him what do you think the decision would have been? What do you think?

A We would not have notified him. She would have had the child. We would not have notified him, there would have been no way, no way.

Q How long did you, to the best of your recollection, how long did you wait for a decision from the judge?

A We went into court on a Thursday, I believe it was the 8th. I do have the report here, and if I remember right it is dated the 9th, which is a Friday.

My attorney didn't call me until Tuesday afternoon which was the 13th and he said he had just heard from the judge then. My attorney knew how desperate we were waiting for this

answer so the only thing I can come up with is that it must have been mailed because that is when I heard the first time, five full days with the weekend, it was five excruciatingly horrible days.

* * * * *

TRIAL TESTIMONY EXCERPTS OF JUDGE GEORGE PETERSEN, JUVENILE COURT JUDGE OF RAMSEY COUNTY

[DIRECT BY MR. PENTELOVITCH]

[CROSS BY MR. ACKERBERG]

[1285] * * *

Q Do you know approximately or can you estimate approximately how many hearings you have held under the parental notification statute since it went into effect in August of '81?

I am just limiting to cases you have personally heard.

* * * * *

A Right around 700.

Q Now of those 700 cases do you have a recollection as to how **[1286]** many if any of the petitions you have denied?

A I have denied one.

Q And do you recall the circumstances surrounding that particular case?

A Yes.

Q What were they?

A The young woman came into the juvenile center accompanied by her boyfriend, the father, as many young women do. There are many of them that come with their partner. This particular fellow, however, was apparently being very forceful about this woman having an abortion. She did not want it but she was fearful and I felt that rather than just send her away and have her bear the brunt of the man's pressure, that it would be better for all concerned if the court took the responsibility, he could blame the court rather than her for the denial.

So I simply executed an order denying the request.

Q Do you recall whether this young woman had received counseling prior to coming to court?

A I cannot recall. I can only respond to you that I am confident that she did.

Q Okay. Well, have you required—you require counseling of the minors before they enter into the judicial process at that point, is that correct?

A I do.

Q Have you required that ever since August of 1981?

[1287] A There was a time when I expected it and it seemed to be happening and then there was a period of time when it was not happening, we were getting the message instead from these young women that they were told to come to court first and then come to the clinic, where they would receive their counseling and their information and be prepared to go right ahead with it immediately.

I guess the thought was that maybe they could save themselves an extra trip or they could save some time. There was a period of time when I became aware of the fact that they were not getting their counseling before coming to court.

Q And when you became aware of that did you take any steps to change that situation?

A Yes.

Q What were those steps?

A First of all, I tried talking with the individual clinics, telling them that this was our situation, I didn't like that. I felt it was neither the job of the attorney nor the job of the guardian ad litem to do that kind of counseling, to explain the options to them, to describe a procedure that would be used. I talked to them on the telephone; I would tell them that I wanted to have that done before the young women came to court.

It didn't have a lasting effect uniformly on all of the agencies so I wrote a letter.

[1288] Q If you would look at Exhibit 20, is that the letter which you wrote at that time?

A Yes.

Q And in that letter you indicated that you would hear cases where the clinics had not engaged in counseling, is that correct?

A That is correct.

Q And that you—

A Excuse me, let me interrupt; not just the clinics engage in counseling, I think you look at the second page, I talk in terms of—yes, the third full paragraph, "Prior counseling by some trained or experienced professional will be required." So I wasn't requiring that counseling be provided just by that clinic to which the girl was going, but there had to be counseling.

Q From the source?

A Yes.

Q And according to the letter this is something that you and Judge Oleisky had discussed and agreed would be the policy in both counties?

A Yes.

[1291] * * *

Q Now have the procedures which have been described in Exhibit 18 changed in any respect since the law went into effect?

A I don't know how many minors are coming to us through the child protection intake phone number.

In four and a half years I would guess all of the clinics and the agencies and hospitals and everybody knows the process to call the public defender so they may call the public defender immediately. I know that the public defenders still take turns being available on a beeper 24 hours a day.

* * * * *

[1292] Q What is her name?

A That is Charlotte O'Connell.

On page 2, under No. 4, court scheduling, you will see under paragraph 1(a) hearings will be scheduled during court hours Monday through Friday whenever possible.

In that respect they have changed now where the hearings are held Monday and Wednesday. It is still the case that I would hear a matter whenever it needed to be heard, it is just that we have a schedule we try to stick to now.

Q Can you think of any situations where you have heard cases outside of the Monday-Wednesday schedule since you have implemented it earlier in 1985?

A No. No, and there has never been a request for a hearing outside of business hours.

* * * * *

[1293] Q That is a letter that you sent to Senator Waldorf, is that correct?

A That is correct.

Q You provided him certain information about the way you had been handling—or cases had been handed in your court under the parental notification law, is that correct?

A I believe that is part of the letter, yes.

Q Now you mentioned in there that the average time required for hearing is about 20 minutes. Is that still true?

A That is still true, although it may be a little shorter in a lot of cases.

I think as the attorneys who handle the matters have grown more familiar with the process may be shortening it up now, but at least ten minutes, no shorter than that, 10 to 20.

Q Now on the second page of the letter you talk about some statistical information. You indicate that you had not found any of the 13, 14 or 15-year-olds who appear before you to be mature, that 95 percent or more of the 17-year-olds you find to be mature, and that you were able to give them an estimate or you only were able to give a best estimate of about 15 percent of the 16-year-olds were found mature.

You have not kept statistics in detail for the entire time period since the day of this letter, is that correct?

A That is correct.

[1294] Q Do you have, based just on your recollection, and impressions, have the statistics changed significantly? In other words, have you found any 13-14 or 15-year olds mature at all?

A I seriously doubt it. I certainly can't recall that I have.

Q What about 16-year-olds; is it still true that you are finding the majority of them not to be mature?

A I still find the majority of 16-year-olds not to be mature.

Q Is it still true that you find the vast majority of the 17-year-olds to be mature?

A Yes.

Q Could you—the statute does not define maturity, is that correct?

A That certainly is correct.

Q What standards or criteria do you apply in determining if somebody meets the maturity standard of the statute?

A I look at the young women; of course the same as I look at a witness who testifies, and I am trying to determine credibility for instance I am concerned about the manner in which the young woman is testifying, how she conducts herself on the witness stand, how she talks. More importantly, I am concerned with what it is she says. I am concerned about if she is in school, how well she is doing in school, what her plans are after school, her career plans or college plans. I am interested in knowing what kind of thought she has given to what she wants to [1295] do, how realistic her goals are, if you will.

I am interested in knowing if she is employed and if she is employed how long she has been employed, what she does with the money she earns, is she saving it for college or is she putting part of it away, is she helping to buy her clothes.

I am interested in knowing if she has a driver's license and if she has a driver's license does she have the use of the family car; is she trusted with the family car. Does she help pay for gasoline, insurance; what kind of community activities is she involved in, what kind of extra-curricular activities is she involved in, is this a person assuming some responsibility outside of herself, volunteer activities in the church, babysitting at a nursery school for church or doing candystriper work or nursing home visitation.

Part of the judgment about maturity is the thought that she has given to the reason why she is in court with me; the people she has talked to, a reflection of the concern that she has about getting information and other people's input in making her decision. Those are the types of things I am listening for.

At the same time I am listening to the manner in which she is testifying, both the substance and the manner.

Q Now the statute refers to mature and able to give informed consent. Do you equate those two?

[1296] A Yes.

Q Now the remainder of the minors are the minors whom you have not found mature with the exception of the young woman we have discussed, you have found best interest, is that correct?

A That is correct.

Q In your letter to Senator Waldorf you say you interpret best interest as not the best interest to have the abortion, but best interest to require that not—to not have her parent notified?

A Absolutely. I make no judgment as to whether it is in the best interest of the young woman to get an abortion.

[1306] • • •

BY MR. ACKERBERG:

Q Is the court prepared to hold hearings outside of the regularly-scheduled hours?

A Yes.

Q Under what circumstances?

A Where it is advised that she cannot wait until the next scheduled court hearing. I assume that the girl would tell us that the clinic advised them that that would be the case.

Q For whatever reason?

A For whatever reason.

[1307] • • •

Q When minors came into court, what generally is their demeanor?

A Normal.

[1308] Q Are they distraught?

A No.

Q Are they crying?

A No. I hardly have ever seen a young woman cry. I only remember a couple who have demonstrated that kind of emotion.

Q What kind of attitude do you attempt to take in your dealings with the minors when they appear in court?

A I think any youngster coming into court is nervous, regardless of the reason why he or she is coming to court. My main concern at the outset is to make them feel at ease and that they can trust the environment they are in.

Q How do you do that?

A I greet them, smile, make my opening remarks as explanatory as I can about why we are there, what the process is, what I am doing. I have a regular litany, I put myself on autopilot

and it comes out just about the same everytime explaining my record.

• • • • •

[1311] • • •

BY MR. PENTELOVITCH:

Q Judge Petersen, you related to me an incident where we spoke the other day, a minor came before you last week with both parents?

A Yes.

Q Would you describe the incident to the Court?

A Sure. The young woman came to court for the hearing that had been scheduled and the attorney and guardian ad litem came in and said to me, judge, this girl came in with both parents, mother and father are with her and I said are they her biological mother and father and they said yes. I said do they know why she is here and they said yes and I said why is she here—because one of the parents will not sign an acknowledgment of receiving notice.

I was upset because I thought it was the facility, clinic or the hospital whichever it was, that should have employed the service provision of the statute, simply service **[1312]** of a notice upon them, personally with an affidavit, and you could avoid the signature on the certified mail receipt for the notice that was sent.

But we will just take care of it. So I said, have the parents come up and we will all go into the hearing room together.

I asked my court reporter to type up a notice real quick, so I dictated over her shoulder a notice addressed to so and so and so on and so forth, the parents of the above-named minor, you are hereby notified that your daughter is scheduled for an abortion hearing at her request at such and such a time.

Q An abortion hearing or procedure?

A I am sorry, an abortion procedure. Operation, the operative word was operation, abortion operation, that is the word the statute uses, at such and such a place, here is the phone number to call if you need directions, and I signed my name to it.

I made two copies. I went into the courtroom, I asked my clerk to make up two affidavits of service for me to sign. She did. So I went in the courtroom and I handed each of the parents a notice of the abortion operation and then I filled out the affidavit of service as to each one of them. My court reporter notarized it and I had copies made for my files, gave the originals of the notice to the minor so she could **[1313]** take it with her to the clinic or the hospital as authority for them to go ahead.

As it turned out this was a case where it was going to be a two-day procedure so it was a case—then afterwards, the parents in the courtroom, the parents seemed pleased that they had been included in the proceedings. They found it hard to believe that it was the first time two parents had ever shown up and they said on the record we don't consent to this, judge, but we love our daughter so they wanted me to provide the authority rather than them being put in a position of seeming to consent to it.

Q And they had the impression that was required of them was consent, not merely being notified?

A I think that is absolutely true, that they were confused that their signing meant they were going to consent to something they didn't want to consent to.

Q And this was somebody who—a young woman who had apparently told her parents freely that she wanted an abortion and it was a situation where there was some confusion on their part as to how they had to go about it, is that right?

A Yes, sir.

• • • • •

TRIAL TESTIMONY EXCERPTS OF JUDGE PAUL GARRITY, SUPERIOR COURT JUDGE IN MASSACHUSETTS

[DIRECT BY MS. BENSHOOF]

[1318] Q Which?

A If I may refer to what you gave me, just as I came in the courtroom, it is General Laws Chapter 112, Section 12(s).

Q And is that a notification statute or a consent statute?

A It is a consent statute.

Q Is it a one-person or two-person consent statute for minors?

A Both parents are required to consent unless one parent is unavailable or if the parents are divorced or separated, then one parent is sufficient.

Q Do you know—is that currently implemented in Massachusetts?

A Yes, it is. Most of the so-called 12(s) petitions that I heard both parents were available to be consulted but the young woman, the girl, decided not to do it. On rare occasions there would be both parents who would be available and in some of those occasions the parent that was the one parent would come in to the lobby with me when I would be hearing a 12(s) petition with the young woman.

Q Let's step back one minute.

If a minor chooses not to get her parents' consent or cannot get her parents' consent is there a court bypass procedure provided for in the statute?

A I am not familiar with the jargon, but basically what happens is you have to get the approval of a superior court **[1319]** judge as opposed to other departments of the general trial courts, say the domestic relations, family court.

Q On what grounds can a superior court judge grant approval?

A That the young woman is sufficiently mature to make up her own mind to get an abortion or if the judge determines that she is not, the judge would have to determine that it would be in her best interest to do so.

• • • • •

[1320] • • •

Q And did you hear petitions under this statute in Massachusetts?

A Yes, I did.

• • • • •

[1321] * * *

Q About how many minor petitions did you hear of the Massachusetts statute since 1980?

A I have given that some thought. Over 100 and probably less than 200 or almost 200.

* * * * *

[1322] Q Do you have any opinion as to the reasons why there were so few judges hearing these petitions?

A Yes. My sense was and is that judges were disinclined to hear them on religious grounds, on moral grounds, and what has also been unfathomable to me, although we don't elect judges in Massachusetts, on political grounds.

Q Do you have any restrictions on the kind of petitions that you would hear from teenagers?

A Me, personally?

Q Yes, you, personally.

A I just had a—I am personally opposed to abortion, I just don't like it, and it is a moral gut sense, and I didn't hear cases where the young woman was more than three months pregnant and I let that information out early out. So they weren't sent in to me. It would have been pretty bad had they come in and then I would have gotten to hear the case and I determined that the young woman was three and a half months pregnant, I couldn't deal with it and it was very—tough enough for her to come in before me.

* * * * *

[1324] * * *

Q The statute says you are to make a determination as to whether she is mature and capable of giving informed consent. How did you define that phrase and did you define mature and [1325] capable of giving informed consent as two distinct concepts?

A I don't think I did.

Q You don't think you defined them?

A As two different concepts, no. What I did, I asked four or five or a dozen questions, depending on how nervous the young woman was, to put her at ease. I guess I would call them

throwaway questions and then I would get into the other questions of has she thought about this, why does she want an abortion, has she considered the alternatives, and in every case I determined that the young woman was mature.

Q So you in some 200 cases you heard you found maturity in every instance?

A There was never any question, it wasn't even a close call.

Q And you never reached the best interest standard?

A Never did.

Q And you equated maturity with capable of giving informed consent?

A Knowing what she was doing, that is my Boston way of putting it, and why she was doing it.

Q What age range of minors did you see?

A I know I had a bunch as young as 13. I might have had a couple at 12 and the ones who were that young were just as mature as the ones who were older. I think I, by the time they came, they were scared stiff and it was traumatic, but they knew [1326] what they wanted to do and I might have personally disagreed because of my own moral feelings about them, about the issue as to why I might have thought, gee, I don't think that is a good reason in my own mind, but it was an objectively good reason and articulated in a very mature way in my experience.

Q So despite the fact that you might disagree with abortion in general you found them capable of making that decision?

A Yes.

Q Describe the demeanor of the minors who came before you?

A Most of them were scared to death and I used to think about it; I didn't think about it that much, but I used to think about it and it is tough enough being 13, 14, 15, being pregnant and not wanting to tell your family because your family situation would blow up in your face if you told them, and then coming in before a middle-aged white male, and I think that to a great extent I was from a similar, the same background as many of these young women, but I am not anymore in terms of, you know, the class perspectives, and they were really scared.

They really were. I would ask them why didn't you tell, why don't you want to tell your parents and the responses would be

I am afraid to, they won't understand, I will never be able to live at home again, they won't let me get an abortion. It was all over the place. I am sorry, go ahead.

Q You were listing the reasons why they did not want to tell **[1327]** their parents.

Were they ever accompanied by another parent?

A On rare occasion there would be one parent, typically the mother, who would come in with the young woman and in those instances, and I have a vague memory of the mother volunteering on a few occasions that if the father found out there would be the devil to pay at home.

Q Did you believe her?

A Sure.

Q You testified when you observed the demeanor of the minors before you, that you had thought about it. Does that mean outside of the time that you were hearing these petitions you thought about their attitudes and demeanor?

A Yeah. I didn't give much thought to it but I did think about it and if a youngster was especially nervous on a particular day I would think to myself, you know, what did I do to cause that, which I might have done, I might have got up on the wrong side of the bed and just been a little bit short and abrupt and not have spent enough time with the youngster calming her down. But it was, you know, I hope I don't sound—I didn't lose sleep over it, I hope I am not sounding callous, but it did occur to me and I did reflect on how nervous these kids were.

Q Did you feel a legal procedure was traumatic and had this effect on them?

[1328] A Absolutely. You know, it was just—it was just another thing at a very, very difficult time in their lives.

Q Did you ever see any minors who had first approached their parents but couldn't have parental consent or were these minors who came because they didn't want to make the initial contact in the first place?

A I can't recall of a minor who had approached a parent and didn't get consent. There may have been but I can't recall any.

Q So in the minor's mind why they wanted to go to court was so they didn't have to tell the parents in the first place?

A That is correct.

Q Do you have any opinion as to what the law is accomplishing in Massachusetts?

A It just gives these kids a rough time. I can't think it accomplishes a darn thing. I think it basically erects another barrier to abortion and if abortion is legal, it doesn't seem to me to make any sense to go through this barrier which my sense is. I could be dead wrong, but my sense is that it has to be calculated to throw that barrier up.

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TRIAL TESTIMONY EXCERPTS OF DR. STEVEN BUTZER, PSYCHIATRIST AT ST. PAUL RAMSEY MEDICAL CENTER

[DIRECT BY MS. PINE]

[CROSS BY MR. GALUS]

[1337] * * *

Q Going back to your clinical experience, you have been essentially a full-time clinician for the past eleven years, is that correct?

A Not really. I have worn several hats during this career and as one of them I am still an academician, I am a full-time faculty member in the department of psychiatry at the University of Minnesota. I am an assistant professor rank, although I believe that will be changed at the end of this academic year to the college faculty. The other part of it is I have been **[1338]** involved in administrative roles in the Ramsey County Medical Center and Ramsey Clinic and as part of that have been involved in the design or management of treatment programs sometimes centering around adolescents.

* * * * *

[1341] * * *

THE COURT: You are going too fast for me and I know you are going too fast for Mr. Lindberg. You talk awfully fast and you have got 50 percent females had sexual intercourse in their 15th year, that is what your first number was?

THE WITNESS: That is correct.
THE COURT: And boys?
THE WITNESS: By their 15th birthday.

* * * * *

[1342] Q Judging from your clinical experience, from your experience with adolescents in treatment with you who are making reproductive choices, how capable would you say adolescents are with dealing with those decisions?

A I think capability gets us into two kinds of worlds; one is the capacity to make the judgment and the other is the competency to make the judgment. On both counts it is my belief that they believe they are both capable and competent to make the judgment.

Q Can you give any examples of the types or choices that are being made, and in choosing your examples, can you elaborate on your sense of competency capability in this area, from your clinical experience?

[1343] A Well, the patients I have dealt with are a full range of individuals so their attitudes and their values reflect pretty much a cross section of our society. I have had individuals as adolescents struggling over decision about the degree of sexual activity within a relationship, even being concerned enough to say how much kissing or petting they might engage in. I have had some individuals who were quite concerned about making an appropriate choice about the person that they chose to become sexually active with under the definition of sexual intercourse and seeking input or advice about that or in general thinking about the ramifications of it, both positive and negative.

Others are perhaps considered to be significant level decisions, but it is common practice dealing with adolescents to deal with abortion, certainly birth control; I have dealt with some individuals who have kept pregnancies to term and then struggled with decisions about keeping the infant or putting the infant up for adoption and one rather notable case in my memory dealing with an individual who put an infant up for adoption and then was struggling with the decision to pursue

acquiring parental rights again afterwards and so it is really a full range.

Q And without giving a theoretical definition, how would you articulate your clinical experience that they are making these decisions and grappling with these issues in a competent **[1344]** way?

A Well, they fulfill the underpinnings of the competency type assessment. They want to know what the range of options are, they usually have a very good understanding of that. They are looking at the consequences of those options and they are using a personal value system or set of facts to make the judgment.

When they are doing it with someone like me they are usually doing it because it caused them some anxiety or distress or it has been a particular reason for referral.

Q Let me backtrack for just a second back to your summary of trends in the counties surrounding the Twin Cities. You have talked about the age going up. Do you know where the age is now; how far up it is?

A Well, we measure it in terms of a year or months of a year depending on who is doing the research and from its low point several years ago it has drifted perhaps a quarter of a year for both sexes toward the upward side.

There is no way to know where that will go or how far, it is not likely to exceed what was perhaps a normal level, say, 12 or 15 years ago.

Q Which was what?

A At a point, that 50 percent point, the highest point since they have been doing the research early in the 50s has been at point around 17th birthday for girls about the 16th birthday **[1345]** for boys so it is about a year's variation or a year and a half at the most.

Q As a therapist what approach do you take when a patient who is a minor is grappling with a reproductive decision?

A Well, the approach is really to try to have them feel in control of the decision and reach the decision based upon their sense of what their options are and what their competence, or rather their understanding is of it.

Each individual comes in with their value system and their belief system, their social network, and the job of the counselor or the psychiatrist whoever is providing that service is to help them work that through so that they have a good understanding of what they have chosen and why they have chosen it.

They sometimes use us simply to reflect that, they bounce things off of us and sometimes they use us to answer questions. Sometimes they want to use the accumulated experience that the therapist has to ask about outcomes.

I think an interesting product of that is that most of them perceive us to have the same values that they have because of that process. They don't really understand what we are as people underneath it because of that reflectivity attitude or reflective process. They will often come back later and have a belief that I was one thing or another because that is the way they ended up with their decision.

* * * * *

[1353] * * *

Q Are you familiar with Minnesota Statute Section 144.343?

A Yes, I am.

Q And are you familiar with the statute's requirement that minors notify their parents or alternatively obtain a judicial waiver based upon maturity or best interest?

A Yes, I am.

Q Based upon your clinical experience, do you believe that some minors in the State of Minnesota involuntarily tell parents about abortion against their better judgment because they are too frightened to go to court?

A Yes.

Q Can you tell us what the basis of your opinion is?

A I have had a number of cases where adolescents and their parents have shared information that has not been voluntary for one reason or another. I have had some where adolescents have unwittingly left diaries out and parents have acquired information, others where they have been able to get services and a bill for those services has appeared at their parental home.

But more specifically I have had some pregnancy-related issues and a couple of cases recently that have reflected that. In one case I was treating a patient—

Q Let me backtrack one minute.

This is about your basis for your opinion that they are **[1354]** too frightened about court in particular. Has anything come up in clinical treatment of patients with regard to patients' perceptions about the court process?

A Yes, that has been discussed frequently because—

Q Can you give us the sense or the basis of this?

A When they become aware or if they have become aware that that process is there, they usually find it intimidating or frightening. Some stronger characters are just indignant or angry about it.

Q Parents have actually told you this—

A Yes.

Q —in the course of therapy?

Now can you pick up where I interrupted you and elaborate a little bit about the types of situations which parents find out about adolescents' pregnancy, abortion, sexuality, in some way that is involuntary in the sense that the minor did not share it with the parents deliberately?

A Well, the case that I was describing is that of a single parent family where the mother became a patient of mine because of her knowledge that her daughter was in the process of seeking abortion services. That information was provided by the doctor of the daughter who also was a family practitioner and was the mother's doctor as well. It was his mistaken assumption that the law required him to provide notification and he also perceived himself as being helpful by telling the **[1355]** mother that the child was facing an abortion decision.

The outfall of that was enormous in terms of conflict and difficulty in the family. That resulted in the mother also notifying the father, who was out of state and who had not maintained much contact with the family but appeared again in a rather punitive and angry role.

The difficulty with it is that the mother, even though working through the decision and ending up allowing her daughter to make the choice, ended up in treatment with me and had said

on a number of occasions that when all is said and done she would rather not have known it was happening, she didn't like the idea and the reason—that would be putting it mildly—she abhors the idea. The problem is that the mother is a member of a very conservative religion, very much opposed to abortion in concept and in practice, and the daughter saw abortion as a strategy and a reasonable way to deal with the problem she was having with her pregnancy.

Without getting into what those values represented, it represented the determination probably of a functional relationship between those two.

Q So you have actually had cases in which parents, mothers have said to you that they would rather not have known?

A In that case specifically, "I would rather not have known." In another case the daughter felt she was compelled to notify the parents; did not understand her options or choices and I **[1356]** think she was informed by her doctor that she had to do so. She was a patient of mine and still remains a patient of mine and ended up disclosing to her parents the situation she was in and that has created a fallout also of similar magnitude.

Q In that case was there any—was there any effect on the husband and wife's relationship?

A I think it is probably going to rupture the marriage. I doubt if their marriage will survive. The reason is the polarization there is between two points of view. The mother's opinion was again rather polarized towards one direction and the father toward another and they are unable to reconcile that.

They find themselves still fighting over the decision even though it has been made.

Q Have you had other cases in which you have seen some form of involuntary communication about these kind of matters to parents?

You were mentioning earlier about diaries—

A There are lots of ways that that occurs but in general this is information that is given to someone in a period or a state of duress or for reasons other than just simple disclosure and the resulting emotional fallout is usually tremendous. The more typical example is for the parent to come upon a communication, a letter or a diary and realize that their **[1357]** child is sexu-

ally active or that they have been involved with a birth control decision or an abortion-related decision.

I have had examples where former friends, after having an angry argument or disagreement with the teenager, felt compelled to disclose to their parents something about them in the sexual arena and do so as a retaliatory measure, knowing what the parents' response would be.

Q Do you have an opinion from the entire range of your clinical experience with accidental or coerced in the sense of a doctor making the communication, of the effect of such involuntary communication of matters such as pregnancy or abortion to parents on a family or relationships between adolescents and their parents?

A Yes, I do. In my experience when disclosure is not voluntary it is almost universally negative.

Q That is specifically because it is involuntary?

A I think primarily because it is involuntary and also because of the underlying assumption, it is that the adolescent believes that the knowledge would be shocking or disruptive in the family or to the parents and the parent is usually in a position where they do not want to know the information in the sense that they either disagree with it or they would rather not hear it or they would like it to be otherwise; not wanting to know, it takes different forms of opinion or different layers of control.

* * * * *

[1361] Q Do you have any reason to believe that the effects of involuntary notice which you observed in the two cases you described are unusual in any way?

A Maybe unusual in that they represent part of my practice in one small period of time, but, no, I don't think they are unusual in terms of either the problem involved, the type of disclosure pattern involved, or the consequences.

I am sure there are other clinicians who have exactly the same type of experience.

Q Dr. Butzer, based on your entire range of experience treating teenagers and adults in the State of Minnesota, what is your opinion about the actual and potential effect of the Min-

nesota statute which is the subject of this case on minors making reproductive decisions and their families?

A Well, I have two opinions about it.

On the one hand, I think that the provision is not functional or useful. It does not provide a service or a safety valve or a diversion process that is needed. The individuals making the decisions often are unable to get those kind of services within their community or within the medical setting or, in many cases I think they do it within their own families.

The second thing is that I think that when it is invoked or what it presents itself, it provides a punitive and negative type of response to the individual who has to use it. **[1362]** On the one hand, they are afraid to disclose to their families and by using the bypass procedure they have to face in their mind an authority figure and I think they see it as a process where they have to justify themselves, have to justify the situation they have been in, and justify the process they have gone through in making a decision. I think to them it is—they see it as a validation kind of effort rather than a consultative or really equal decisionmaking type of format.

Q Do you think it improves the quality of decisionmaking at all?

A No, I don't.

Q Let me ask you one last question, and that is that in such situations where adult involvement might be helpful is it sometimes better, better for the adolescent to get adult input from someone other than the parent?

A I think they are excellent judges of that. I think they seek the attitudes that they can relate to, that they know they will get good information from. They are very responsible about how they do that. If they think that they have not adequately processed the decision, they will often go to someone they have confidence in.

They use teachers, they use religious advisors, they use other people's parents; they use professionals and many of them I suppose will use their parents.

[1375] • • •

BY MR. GALUS

Q Could you indicate a calendar year?

A I think it probably occurred around anywhere from '81 to '83, the period in the early 80s was reflective for a span of time of increased, increased sexual activity and increased drug experimentation and somewhere in that period of time the value system began to change. It is different in different segments of each of the seven-county area.

If you look at the far suburban or rural, if you get out further into Wisconsin or further south in Scott County or north in Chisago County you see a more conservative impact earlier than you do at the urban core. But the trends are the same, it is just the degree or the rate at which they change.

Q Let's think of them in the aggregate if this is possible for you to do; how has the value system in the period '80 to '83 changed?

A The value system seems to be drifting away from a high value on sexual experience or sexual activity to one more of individual decisionmaking or individual choice or individual control. As a consequence there is a renewed, I would say it is probably termed best as a conservative sort of development in **[1376]** society so that a group now that has a value of about nonuse of chemicals, of nonparticipation in social sex rather than meaningful relationship oriented sex or recreational sex is a phrase that has been used that also applies to the same statistics, are showing a trend in terms of numbers of students completing high school diplomas and it is being shown in terms of voluntary enlistment in the military and it is being shown in terms of voluntary participation in religious and other related activities. It is a general societal trend we are seeing.

Q There is a trend away from recreational sex, that is a trend among the teenage population, a trend away from recreational sex to responsible sex?

A A trend away from recreational sex toward more relationship-based sex in all ages of society.

Q Including teenagers?

A Yes.

Q Well, I thought we were talking about the change in the trend you noticed in the adolescent population in the '80 to '83 period?

A Yes.

Q My questions are intended to be limited to the adolescent sexuality.

A I understand.

Q Okay. Increase in positive attitude toward choices?

[1377] A Yes.

Q That could account for fewer conceptions, couldn't it?

A It could.

Q That could account for a lower abortion rate, couldn't it?

A It could.

Q Have you observed, in reviewing the statistics that are available, any trends in use of contraception among the teenage population in Minnesota?

A There is less generalized information about that so I would be speaking more from a clinical population or perspective and I would say that there is increasing awareness of birth control choices, better planning about it, but still I think less than there should be in terms of that group. But certainly there is more individuals choosing birth control methods, more males, for instance, are choosing to accept responsibility in the sexual relationship than previously.

Q And is you answer with respect to the teenage population?

A Yes.

Q And that would certainly account for fewer conceptions, wouldn't it?

A Yes.

Q That would certainly account for a lower abortion rate, wouldn't it?

A Yes, possibly.

Q A plausible hypothesis, is it not?

[1378] A Absolutely.

Q This change in attitude occurred sometime in the '81 to '83 period to the extent you have been able to observe?

A Yes.

Q You say that teenagers are more aware factually of contraception but still aren't doing as good a job about it that you think they should?

A That is true.

Q Do they do as good a job as an adult?

A Yes, they do.

Q You talked in statistics about the statistics that you became aware of near the end of 1985.

Can you identify those specifically?

A They were accumulated through social service agencies in the St. Croix river valley and I believe they were done through questionnaire research and I am unsure of who actually did it. I am unsure of what their actual sampling techniques were but it was school systems in the Stillwater area south to Hastings, Cottage Grove.

Q Did that study confirm the opinion that you have otherwise come to hold about more conservative attitudes about sex?

A If you look at it in the context of all the information it shows that that group at the time it was sampled was certainly a more conservative group than previous samplings. [1379] So I think you get into methodologic kind of analysis and then that gets into a different criterial arena.

Q You to some extent believe it is meaningful to talk about conservative-liberal attitudes?

A They are generally accepted terms and people usually know what we mean when we use them.

Q When you use those terms with respect to sexual matters do you believe there are conservative and liberal attitudes about abortion?

A Yes.

Q The trends that you have observed among the teenage population in Minnesota concerning conservative attitudes about sex, does that also include a trend toward more conservative attitudes about abortions?

A I think so.

Q That would certainly in you opinion account for a reduction in the abortion rate?

A I think it adds to the deterrent value of the whole array of information. There is also at this time a markedly increased

awareness about sexually-transmitted diseases and I think all of that has had or influenced the decisionmaking of everyone in sexual behavior.

But the conservative attitudinal shift adds to that as one increment or one factor.

Q In you clinical experience have you treated adoiescents **[1380]** who have suffered anxiety or stress or other disorders because of abortion decision?

A Yes.

Q How many?

A It is probably easier to talk about them in two groups. One group, talking about their anxiety in terms of making a decision and their difficulty in weighing the alternatives, those are usually short term and they are usually decision-related types of counseling exposure. They are largely oriented towards the conclusion of the decisionmaking process and the anxiety usually abates afterwards.

So whatever their choices they affirm them and they go forward from there.

Q Let me just focus on that one group for a minute. By short term you mean the problems were trivial?

A I mean short term as applied to the duration of professional contact or treatment.

Q But still serious problems?

A Of course.

Q And still serious enough for you as a professional therapist to be valuable in solving?

A Yes.

Q How about the other group?

A The second group, the second group applies to individuals who have gone through abortion decisionmaking and regardless **[1381]** of their decision have had either emotional fallout or distress after that either in terms of—we might use two diagnostic categories, one an adjustment disorder which implies a more time-limited or mere event-type of psychiatric disorder, so people who made a decision and then suffered some problems about the emotion related to the decision and sought treatment.

• • • • •

[1384] • • •

Q In those situations the patient didn't want to initially want to have anything to do with you?

A Absolutely—excuse me, in the whole part of the relationship which was important was that the intitial part of the transaction involved was to get them to see that I first was a valuable person, nonthreatening, and had something to offer them. Only when that has been accomplished could I then move to the second part of that equation which was to say now it has been useful or productive.

Q Don't you think parents have those sort of skills too with respect to adolescents whom they have reared and lived with for 14 or 15 years?

A Some parents, yes.

Q So it is not useless, the invocation of parental values **[1385]** and experience is not always useless if it is not wanted by the adolescent, right?

A No, but it depends on the variables as I mentioned.

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TRIAL TESTIMONY OF J. M., MINOR

[DIRECT BY MS. PINE]

[1417] • • •

Q Okay, J., how old are you now?

A Seventeen.

Q How old were you when you had your abortion?

A I was 15.

THE COURT: You have to talk a little louder, there is just us here in here and he wants to hear you, okay?

BY MS. PINE:

Q Who were you living with at that time?

A My mother.

Q Your parents were divorced?

A Yes, they were.

Q Can you tell us something about what your father was like and what your relationship was like with your father?

A After my parents were divorced my father and I didn't have much of a relationship. I saw him on my birthday and Christmas, various holidays like that and it was never directly on the holiday, it would be like the day after or the week following.

[1418] Q What is your mother's religion?

A She is Catholic.

Q And what are her views on abortion?

A She is pro-life.

Q Did she ever send you to classes at her church on these kind of issues?

A Yes. I was sent to classes in all through ninth grade.

Q And what was the subject of those classes?

A Abortion, pregnancy, it was all pro-life saying that you must preserve the life of children.

Q And when they said that they were referring to abortion?

A Yes.

Q What was your relationship like with your mom before your abortion?

A It was typical mother-daughter relationship. We didn't have too many problems, no more problems than the average mom and daughter have.

Q When you first learned you were pregnant who did you talk to at school?

A The school nurse.

Q Why did you decide to have an abortion?

A Because I thought I was too young.

THE COURT: How old were you, J.; I didn't hear you.
THE WITNESS: Fifteen.

* * * * *

[1420] * * *

Q And then what happened, did the school nurse set up a meeting?

A Yes, she called my mother to come in.

Q So who were you with when you told your mother?

A Well, the school nurse and my mom were in the nurse's office and I walked in and just when I had walked in my mom looked at me and she says, "You are pregnant, aren't you," right away; I am like, well, yeah, I am.

THE COURT: Had the nurse told her?
THE WITNESS: No, the nurse hadn't said anything.

BY MS. PINE:

Q She guessed because you were with the nurse?

A Uh-huh, yeah.

Q Can you tell us what happened at the meeting with the school nurse, exactly, what you told her, what the story was?

A She was hysterical, she was hysterical at first. She hit her fist against the seat and said, "I don't believe this," and started to cry and said, "I can't believe you would do this to me." I had like betrayed some trust in her or something, and it was hard for me to see her do that because it hurt me so much because I knew I was hurting her and it was very difficult to even tell her.

Q Was there any attempt to talk about what to do in that meeting?

[1421] A Well, the nurse had gone over what we could do, told us of a doctor that we could go to and the options that we had and my mother asked what I was going to do and I said, Jeff and I have discussed it and we are going to have an abortion.

Q What did your mom say, do you remember?

A She didn't really say anything at that point. She just kind of swallowed that in because she is against it and I didn't know what to expect from her.

Q After you left the school nurse's office did you and your mom drive home together?

A Yes.

Q Did your mom say anything to you in the car?

A No.

Q Nothing at all?

A Nothing at all.

Q So you drove home in complete silence?
A Uh-huh.

THE COURT: Now your father was gone, your parents were divorced and you were living with your mother, is that the situation you were in?

THE WITNESS: He lives in the same city we do but he is never around or anything.

BY MS. PINE:

Q What happened when you got home, when you got home what was the first thing that happened?
[1422] A We walked into the kitchen, we sat down and mom started to make some lunch. I turned on the TV. She didn't even turn to look at me, she just stopped, she had her hands on the counter like this, her back was toward me and looked up like this and said, "Why can't we keep it?"
Q Did she say anything else to you about the abortion that day?
A Yes, she said, "How can you kill something?"
Q Did she say anything else?
A No, we sat there in silence the rest of the day.

THE COURT: I am sorry?

THE WITNESS: We sat there in silence the rest of the day.

BY MS. PINE:

Q So you and your mother were sitting on the couch in front of the television—
A We were sitting in the kitchen.
Q Sitting in the kitchen?
A Sitting in the kitchen watching TV.
Q Watching TV and the two things you just told us are the only two things she said to you about that?
A Yes.
Q Inside did you—were you wishing that you could talk about it with her?

A Yes. I wanted to say something like, mom, what will help **[1423]** me, but I was afraid to. I just couldn't.
Q And your mom wasn't able to do anything helpful?
A She could have said something.
Q What did you feel, what did you say when she said the two things you just reported to us?
A I put a lot of thought into it and I did in a sense want to keep the child but how could I, I am too much of a child myself and I think of it that way, just if I am too much of a child how could I actually carry one?
Q So what did you say to your mom?
A I told her that exact same thing: I said, mom, I am too much of a child, I can't carry it, I don't feel responsible enough, and the second thing was almost like a shot through the heart; it hurt so badly.
Q When she said, "You are killing something."?
A Yes, because I fully realized what I was doing and I knew what I was doing and to have her reaffirm it, I know, and to have her just tell me that, it hurt so badly.
Q Did your mother ever bring up the subject of your pregnancy or your abortion in an effort to be supportive from the time—
A No.
Q —from the time she learned about it to the present?
A No.
Q After you told your mom did you still have to go to court?
[1424] A Yes.
Q Can you explain why?
A We couldn't—we both, my mother and I, decided, they told me I had to tell my mom and my dad and my mom thought this was absurd and so did I because my father is not a part of my life; I don't think he is, I see him twice a year. He lives a mile away from me and he calls on occasions, not very often.
He isn't a part of my life, he hasn't been for the past eight years.
Q Did your mom stay with you through the court process?
A No.

Q When you were on your way to the clinic to actually have the procedure done did your mom say anything to you about birth control?

A They had told us before we went to the clinic that they would be giving me a three-month pack of the pill and she told me to refuse it, to not take it.

Q Why did she say that to you?

A She said, "You have learned from your mistakes and you won't do it again, will you?" She was telling me I wasn't going to do it again.

It wasn't my choice as to whether or not.

Q Has the subject of your pregnancy or abortion ever been brought up by your mother in a nonsupportive way since the time **[1425]** she learned of it?

A Yes, sometimes she threw it back in my face as if like I would say I want to go out, where are you going and I would say, mom, we are only going to a friend's house, she would say what are you going to be doing, I said, mom, it is a bunch of friends; we are not going to be doing anything bad, and she would say no, you have already done that—

Q By that she meant—

A —she meant the abortion, she says you have already done the worst thing possible.

Q Could you give another example?

A I could give you one very recently, just this weekend my brother and sister-in-law were here and she said she wanted grandchildren right away and I looked at her, and this is after they had left and I said you want grandchildren, she said, "From them, certainly not from you."

Q So how would you—well, let me ask you one more thing, because of your mom's views on abortion did she ever—are there other ways in which she brought it up in which you felt she was specifically trying to make you feel bad and feel guilty and feel like you had done something wrong?

A I don't know, a lot of times mom didn't have to say anything. When we would see—we would watch a movie perhaps on TV that had something to do with teenage pregnancy or something just the look in her eyes, she would look at me and the look in **[1426]** her eyes is, "I cannot believe you have done

that," and I would have to look away. I felt guilty just by the way she would look at me.

It is almost like I have her looking over my shoulder saying, well, you have done this now.

Q Does she—I know you have said this before, I will ask you again; did she ever bring up the issue of teenage pregnancy or sexuality in any way to discuss openly your feelings and what you were going through?

A Never. When I did once ask her for help because at one point I was having a hard time dealing with it, she rejected the idea; she said you can come to me for help but the way she said it she said it in such a harsh tone I don't know how she—how I could go to her to ask for this if she was going to yell at me, talk down to me and tell me what I was to do rather than asking, rather than asking me what I wanted to do.

Q Can you sort of summarize in general what your mom's attitudes and her behavior with regard to pregnancy and abortion from that time on made you feel?

A Can you say that again?

Q You have described what your mom's attitude about abortion was and told you you had killed something. You have also talked about the way she has thrown it back in your face, and expressions, and that kind of thing.

What did all that make you feel about the abortion **[1427]** by yourself?

A It made me feel worse about myself, worse about the decision I had made. I thought I had done something for myself and she couldn't realize that. I felt guilty.

The decision was hard enough to make and to actually go through with it and accept what I had done. I didn't need her coming down on me afterwards.

Q How would you say the abortion and your mother learning about the abortion has affected your relationship with her?

A We always had that thing between us, it will never make it quite the same. She had told me that it will take you a very long time to rebuild the trust that you have destroyed and sometimes now even I know that I don't have the trust that I should for being my age and a senior in high school; I thought that I should deserve a little more than that because I have learned

from what I have done and she doesn't seem to realize or accept that.

Q Did you ever at that time, do you ever worry that she might do something drastic out of her anger towards what you have done?

A Yeah, I have often been afraid of her kicking—kicking me out of the house. She kicked my brother out of the house because of being too independent, too outgoing and I am afraid she just may do the same thing for me.

THE COURT: There is just the two of you now in the **[1428]** home?

THE WITNESS: No, there is my mom, me, my two brothers, one is older, one is younger.

BY MS. PINE:

Q Do you have—your relationship with your mother would be better today if you had not told her about the abortion two years ago?

A Yes, I believe so.

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TRIAL TESTIMONY EXCERPTS OF I. B., SISTER OF MINOR

[DIRECT BY MS. BENSHOOF]

[CROSS BY MR. ACKERBERG]

[1446] * * *

Q So after Meadowbrook told you you could go to court in your home county, what is your home county?

A St. Louis.

Q What steps did you take next?

A I then called the courthouse; after I told my mother and my sister that this had to be done, I called the courthouse.

Q Where?

A In Virginia, since I worked there every day, and told them what the situation was and what I wanted to do.

I was referred to someone from social services and I don't know if the name is important, if you want the name it was

Debbie Josephs, and I explained the situation to her, told her about the time factor, she did not know what—

MR. ACKERBERG: Objection, hearsay.

THE COURT: I think it has relevance with the fact it was said, not whether it is true or not. Objection overruled, you may answer just that it happened—

THE WITNESS: She said that she did not have any information on it and could I call her back in about an hour and a half, which I did. And she told me when I called her back **[1447]** that if we went to Duluth or Meadowbrook they would take care of the whole court proceeding along with the actual medical procedure, that that would probably be the best thing, that they weren't able to do that for us there; that if we went the other two places they would take care of it for us, either facility.

Q What did you do next?

A Well, I told them that I would just as soon be able to do it there and could I talk to anyone else and I believe at that time I talked to a Jean Paoletti. There were a few phone calls involved and after two years I guess I don't remember the exact sequence, but I did talk to her twice and then I finally got the judge on the phone and I told him the whole story over again and at several points I was told that either one of the other two facilities could take care of everything for me.

The judge finally said—excuse me, Jean Paoletti said they did not have the tools or the forms, they had the ability to do it at the Virginia court but they did not have the tools or the forms.

BY MS. BENSHOOF:

Q When you were told this what did you do next?

A At this point that was the end of that conversation or the two I had, I called back down to Meadowbrook and I don't remember if it was Pam or Paula that I talked to and asked **[1448]** them what kind of a form or what I needed and I said I could have a doctor's statement written up, whatever was required. They said they would send me some information as to

what the counties down here use, which they sent to me, forms, sample forms.

Q How did they send it to you?

A By air express. It came overnight.

Q Do you still have the envelope?

A Yes, I have the envelope in my purse with the information in it.

I then waited for the information to arrive and I believe that was Thursday and this had started on Monday—or Wednesday. I was not at work Wednesday afternoon so I started in again Thursday morning.

I called back to the judge's chambers and got the judge—

Q What judge?

A Judge Hall from the Virginia court.

I told him that I could have whatever they needed, I had some sample forms that could be used to let us do this part of it in Virginia. He asked me if my sister had a lawyer or was being represented, and I said no. He said, well, if she doesn't then I will have to appoint a public defender. I was not aware that she would have to be represented. Since he said that he would have to do it we went along with it. I was just trying to get this thing speeded up so we could get going **[1449]** and I told him if he would just give me the name of the public defender I would call them, make an appointment, whatever I had to do.

He told me at that point that the public defender was in court with him and if I would hold on a minute I could talk to him.

A few minutes later a gentleman by the name of Richard Salmen, I think, as I recall, was his name, introduced himself; he said the judge had told him what was going on, set up an appointment, and we were at the courthouse at I believe about 11:30.

Q That morning?

A 11:00–11:30; at which time—

Q When you say "we", who are you referring to?

A I was with my young sister and my mother was with.

He spoke to my sister for probably a half an hour, I don't know exactly what the conversation consisted of, I didn't press her as far as that.

Q You were not in when he talked to her?

A No, it was the two of them, they were talking, and at that point I was given a form or my sister was given a form that was a report to court, which I assume came from Duluth because the counseling was done at the Womens Health Center down there. My sister was given the form, told to have it retyped, fill it out and bring it back in the afternoon and **[1450]** she could see the judge.

Q She was given a report to the court form by whom?

A I believe Richard Salmen gave it to her.

Q And did your sister give this form to you?

A Yes. She told me what she had been instructed to do and because I happened to be lucky enough to have access to a medical secretary, I took it back. The name was inked out but the questions had been answered, all in all. I had it retyped, gave it to my sister, she filled it out and we were back in court that afternoon with a letter from the doctor, her doctor.

Q The doctor you work for?

A Yes, the doctor that examined her and also the doctor that I worked for. So I did have it retyped and it was filled out and we were back in court that afternoon.

Q And did you go into court with your sister when she saw the judge?

A No.

Q And did your sister come out with a court order?

A Yes, she did.

Q And did you then take that order down to Minneapolis?

A Yes.

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[1453] Q And other than your sister have you ever seen a court order for a minor in Virginia?

A No, I have not.

MS. BENSHOOF: That is all I have.

THE COURT: Cross Examination, Mr. Ackerman (sic)?

CROSS EXAMINATION
BY MR. ACKERBERG:

Q You weren't told at any point that the Virginia court would not process the petition, were you?

A They said they had the ability to do it but they didn't have the forms or the tools.

Q You indicated this was the first time that had come up, right?

A I don't know if in specific words, but, yes, I was under the impression that it had not come up.

Q Do you know of any minor who has been turned away from the Virginia courthouse in trying to get a petition processed?

A No, I do not.

Q On what day did you first contact the court?

A Monday.

Q And on what day did the court hold the hearing?

A Thursday afternoon.

Q And on what day was the petition approved?

A Thursday.

* * * * *

TRIAL TESTIMONY EXCERPTS OF J. H.,
MOTHER OF MINOR

[DIRECT BY MS. BENSHOOF]

[1521] Q And have you supported the children?

A Yes.

Q What year did you get a divorce?

A Officially in February of '73.

Q What were the grounds of that divorce?

A At that time the grounds were cruel and unusual treatment or something; I don't know what they—

THE COURT: Cruel and inhuman?

THE WITNESS: Cruel and inhuman treatment.

BY MS. BENSHOOF:

Q Did you actually go to court in this matter?

A Yes.

Q Was there testimony about your husband's treatment of you?

A Yes.

Q What was the nature of his treatment of you?

A Basically it was physical abuse, based on his anger with me before for not acting right.

My two witnesses were there to testify, one because she happened to be at the house when he slapped me with a spoonful of peanut butter because I didn't know how to make a peanut butter sandwich and the other was a nurse friend, I'd go to her to check some bumps on my head because I didn't want to go to the doctor.

Q And the bumps were caused by your husband?

[1522] A Yes.

Q Was he ever abusive to the children?

A Yes.

Q What sort of things did he do to the children?

A Mostly in terms of intimidation because they knew how he treated me so basically his philosophy was that everything, every dispute was to be settled by a board, what you need is the board up alongside the head. That was his solution to any situation that he couldn't control.

Q With the children?

A With them, yes.

Q Subsequent to your divorce what was the nature of your husband's contact with the children?

A He typically will see one of them like once a year.

Q So if there is four children he will only see the children once every four years?

A Probably.

Q So he sees one of the four every year?

A Yes.

Q And what is the nature of that contact?

A A social visit, they go to Arizona and he takes them to Disneyland when they were little or some type of thing like that for two weeks.

Q Did there come a time when one of your daughters got pregnant?

[1523] A There came a time when two of my daughters got pregnant.

Q Could we start with the first one.

Do you remember what year that was?

A That was in probably '79.

Q And did she come to you about this pregnancy?

A Yes, she did.

Q And what was the result of that?

A She came to me and asked me if I would—told me that she and her boyfriend had decided she was going to have an abortion and would I go with her to the clinic.

Q And did you?

A I did.

Q Did you talk to her at that time about whether or not she should tell her father?

A No.

Q Do you know whether or not she told her father?

A She did not tell her father. She asked me to promise that I wouldn't tell her father.

Q Do you believe that—what is your understanding if her father would have found out about her pregnancy?

A First of all, he would have probably harassed her terribly. He would have held it over her head forever. He would have talked about it to the other children, to make a big family issue of it and I don't really know whether he would—it would have ever—if he would have not, you know, seen her again or **[1524]** let her come out. I don't know what he would have done except that is—this typically would be something he would use to hold over her head to get her to do something later on, "Well, you remember when you did this kind of thing."

Q Do you have personal knowledge that his reaction to events subsequent to the time he moved away is what you described?

A Yes.

Q So even though you are divorced his relationship with the children continues in a manner to hold things over their heads.

A A social manner, yes, and in that same kind of thing he typically holds things over their heads.

Q Now did there come a time when your second daughter got pregnant?

A Yes.

Q What year was that?

A That was in 1981 or it was after the law so it must have been in the spring of '82 I think it was.

Q Did she also voluntarily come to you about her pregnancy?

A Yes.

Q And could you describe the nature of that communication or what steps you took to comply with the law and how you felt about it?

A When she came to me and her boyfriend was going to be gone because it was something that he didn't want his parents to know about so he didn't even want to be in town when she went **[1525]** to the clinic. So she had come and asked me if I would go with her and she had already called the clinic and talked to them and found out that she had to have consent by a parent and—which I assumed to mean that she had to have my consent since I was the custodial parent—so we went under the assumption that my consent was all she needed and that is so—since I was going to be going with her I could sign a consent when I got there. Then it wasn't until after we got there that she was already through the counseling and through all the other films and everything else that she was told that she had—where was the consent from her father, which of course we didn't have because, well, I was the one who didn't think that that would be necessary since I had legal custody of her and I didn't have to have his permission for anything else, when I had her tonsils out or anything like that.

So then what happened is we had to leave the clinic.

Q What clinic was this?

A Meadowbrook Clinic and go down to Hennepin County courthouse and go through filling out all the papers and get a court order based on the fact that her dad wasn't around and it wasn't anything she wanted him to know, before we could go back and complete the procedure.

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[1527] • • •

Q You went before Judge Lindsay Arthur. Did he ask you any questions?

A Basically the same type of things you asked me.

Q And so you had to relate the story of your divorce to the judge?

A Well, I didn't because I didn't want my daughter to hear it, what the gory details were. He accepted the fact that my divorce was based on physical abuse and I didn't have to tell him all about that.

Q But you had to relate that in front of your daughter this day that she was getting her abortion?

A Yeah.

Q How did you feel about having to bring up those details on that day?

A Well, I didn't think the whole thing was necessary so I was very angry about having to bring up all of this other stuff in addition to what she was there for.

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TRIAL TESTIMONY EXCERPTS OF MARY RING, SOCIAL WORKER WITH OLMSTED COUNTY SOCIAL SERVICE DEPARTMENT

[DIRECT BY MR. ACKERBERG]

[CROSS BY MS. BENSHOOF]

[1653] * * *

Q Do you know what the purpose of those questions are?

A I think, my understanding of the purpose of the questions is to develop awareness of the minor's understanding of the decisions involved in terms of pregnancy, her maturity, involved in terms of understanding the decision that she is making and also the circumstances that are surrounding her in terms of that decision.

Q You mentioned followup contact; is that correct?

A Yes.

Q What is involved in that?

A Well, sometimes clients will call me or come in to see me and advise me of—that they have gone for a post-abortion checkup, that they have—I usually ask them three questions: Number one, did you have any medical or psychological complications; number two, did you have your post-abortion checkup; and number three, did you receive contraceptive counseling at Planned Parenthood or some other medical facility.

Q Do minors who go through the parental—who go through the judicial bypass in Olmsted County, are you appointed as their **[1654]** guardian ad litem?

A Yes.

Q And how does the minor get in touch with you?

A Sometimes the minor is—well, in most cases the minor is referred by Planned Parenthood and sometimes from doctors, and sometimes from the court system.

But most minors come to me prior to going to the court system.

Q Okay. And do you assist the minor in getting to court?

A Yes, I do.

Q How do you do that?

A I provide counseling and complete a form and then I accompany the minor up to the court to make arrangements with a court and with the minor to obtain a court hearing date and to obtain a legal representation.

Q Could you describe what happens when you and the minor go to the court to make an appointment?

A We go up to the clerk's office; I indicate I want my standard form situation. Most of them know me up there on sight and are prepared to help me and we usually go to a private office. We have been using Judge Agerter's office or chambers, he is usually gone.

Q What was the purpose, if I might interrupt, of going to a private office?

A For confidentiality.

[1655] Q Who did you go into the private office with?

A We go in with our representative of the clerk of court, myself and the minor, and we proceed in contacting the attorney and making arrangements so that attorney can provide legal counsel to the minor or the clerk.

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[1660] * * *

BY MS. BENSHOOF:

Q Ms. Ring—

A Yes.

Q —you are a social worker with the Olmsted County Social Services, is that correct?

A That is correct.

Q And you do pregnancy counseling?

A That is correct.

Q And other counseling with other kinds of clients?

A About three months ago they asked me to take on child protection because luckily, or for some other strange reason, pregnancies have been down a bit in Olmsted County so my case load has gone down a bit.

So I have been asked to do other things.

Q Apart from the regular psychological counseling do you do any other kinds of counseling with clients?

A Mainly I have done pregnancy counseling but in the last three months I have now gotten involved in child protection.

Q How long have you done pregnancy counseling in Olmsted County?

A I think it will be 12 years in August.

[1661] Q So you counseled both adults and teenage women for 12 years in Olmsted County?

A Yes.

Q When these women come to you is privacy or confidentiality of their conversation with you a major concern?

A We do our best to provide confidentiality to clients.

Q When a teenager comes to you for pregnancy counseling do you tell her parents that she is pregnant?

A No, I do not.

Q It would be contrary to your professional ethics to do so, wouldn't it?

A Well, if a teenager is coming to me for counseling, in terms of the pregnancy, I think it would be a violation of my professional ethics to advise her parents.

Q Would it also deter teenagers from seeking you out for help if they thought you would tell their parents?

A I think that would be a great barrier, yes.

Q That would be based on your 12 years of experience with teens, right?

A Most likely.

Q When teenagers come to you for abortion counseling do they come to you in some instances because they don't feel they can go to their parents?

A I think on some occasions that might have been the situation.

Q So for some of these teenagers are you familiar with their [1662] family situation, just being a social worker in Olmsted County?

A In some cases, yes, we are aware of their family situation, because that family has had a long history or record of involvement with our agency.

We do handle those situations in a particular way because—if I am allowed to give an example—if I have a mother who is working for our agency, working with a social worker at our agency, and there is a file, we keep a file or record of all of our clients, what I do is we separate the minor's information from the parents' so that if the parent wanted to read their file they would not find any information on that minor in that file in terms of seeking an abortion.

Q How long have you separated the minors from the patients all 12 years?

A I can't answer how long we have been doing that. I know we have been doing it for some time. I don't know if we were as conscientious when we had a different law in effect.

Q But you are conscientious about seeing that the minor's parents do not involuntarily find out about the minor's pregnancy, aren't you?

A We work at it, yes.

Q Because you think that if a parent finds out about her daughter's pregnancy, by looking at your file, that could have some very bad ramifications, is that correct?

[1663] A I think so.

Q And you have seen situations with bad family ramifications when they found out about a teenager's pregnancy, haven't you?

A Yes, we have dealt in some circumstances with a parent finding out about their teenager being pregnant and not being able to respond or handle that in a positive way for the teenager.

Q What are the negative ways that you have seen?

A Well, my goodness, I think it probably would take some time to explain, you know, some of that.

I think probably putting it in simple terms there is a real breakdown in the family relationship, the relationship between the parents and the minor is strained. Sometimes even more complicated than that.

Q Well, have you ever seen situations of physical violence or being kicked out of the home?

A I haven't seen the direct ones; I have been involved in threats of ones.

Q Do you believe those threats are real?

A Yes, I do. I have been involved in some of those threats so, yes, I do.

Q When you say you have been involved in these threats, you mean they have threatened you?

A Well, we have had situations with minors where they have told their parents that they were electing to get an abortion **[1664]** and parents have responded in sometimes negative or violent ways and that is often why I have accompanied minors. This has occurred mainly when we had the old law where minors—that that occurred, those situations of violence or threats or violence occurred when a minor didn't tell their parents but these minors had to tell their parents because they needed financial support in obtaining an abortion and I went with them under those circumstances to tell the parents because they just didn't have any choice or option in that matter and we really had to spend some time working through some of those problems.

Q You mean you went with the minors to tell their parents so they could get money because they were afraid of violence?

A Well, they wanted the money to obtain the abortion and that was their only avenue of obtaining that abortion.

Q Right. But you accompanied the minor to tell the parents because the minor was afraid of violence?

A The minor was afraid of violence, yes.

Q You acted sort of like a bodyguard?

A No, I did not. I acted as a person who was going to provide support and help to that minor because that minor didn't have any other, you know, option at that time in working that situation out. I wasn't sure if the minor was accurate or was making an accurate statement that her parents would indeed react a certain way so I went with that minor to work through **[1665]** the problems.

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TRIAL TESTIMONY EXCERPTS OF ELDON HALL, JUDICIAL OFFICER FOR ST. LOUIS COUNTY

[DIRECT BY MR. ACKERBERG]

[1730] * * *

Q On the second petition that was approved, what was the time lapse between the time the minor contacted the court and the time that the petition was approved, if you recall?

A I would say six hours, maybe.

Q Six hours?

A Yes. Six working hours.

Q And in each of the cases was the standard decision—was the petition approved on the basis of mature and capable of giving informed consent to an abortion without parental notification?

A Very much so.

Q Have there been any lapses in confidentiality under the two bypass proceedings that have been held?

A Certainly none that I have been made aware of.

Q Is there a procedure in place now for minors to gain prompt access to the court for purposes of judicial bypass?

A Yes, there is.

Q What are they?

A The procedure itself is a written procedure which has been directed, I believe, through the district court administrator, Mr. Beck, and the process internally within the court, at

least from my end, is to be available, make an immediate response to the request—immediate.

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TRIAL TESTIMONY EXCERPTS OF SUSAN STACY, ADMINISTRATIVE ASSISTANT IN GUARDIAN AD LITEM OFFICE OF HENNEPIN COUNTY

[DIRECT BY MR. GALUS]

[CROSS BY MS. BENSHOOF]

[1776] * * *

Q Okay. Is there some sort of quota or guideline rule of thumb; I don't want to put words in your mouth, but do you have some limit?

A We try to keep the limit at six a day.

Q And is it your policy to make exceptions to that limit?

A If it is an emergency or is necessary, yes.

Q Okay. Under what circumstances is it the policy of your office to waive the six-a-day rule?

A If we are told by the clinic that it is necessary that the **[1777]** girls get in on that day because of how advanced their pregnancy is, that they would be in the second trimester, it would be more expensive for them, if they traveled a long distance, and it would be a very great inconvenience for them to come back another day, that sort of thing.

Q Do any other circumstances come to mind where you take more than six?

A No, I think that is about it.

Q Do you frequently waive the rule of six or is it infrequently waived, or what?

A Fairly often it is waived.

Q Do you know how recently you have exceeded six?

A Yesterday.

Q How many did you have yesterday?

A Seven. Tomorrow there are eight.

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[1779] * * *

Q Based upon your experience in booking and scheduling these hearings, do you have any estimate as to the average amount of time between the—that elapses between the request for the hearing and the date of the hearing?

A Usually it is just a matter of days. They certainly have the option of when they want to come in.

I know a girl called yesterday and wanted an appointment for the end of March which was three weeks or over. That is truly exceptional, but that was her choice.

Q So sometimes the hearing dates are selected to suit the young woman's choice?

A Usually.

Q And sometimes it is the first available appointment?

A Right.

Q Well, when you say—I believe in response to my question you said it typically is just a matter of days between the time of the request and the time of the hearing.

Could you elaborate on what you mean by days, a matter of days?

A If somebody called on Thursday it would probably be Monday unless there was some extenuating circumstances.

Otherwise they would call on Monday and get in on Tuesday, Tuesday to Thursday, that sort of thing.

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[1784] * * *

A Our guardians are always instructed as to the confidentiality in any matter involving juvenile court so that, of course, carries over into the parental notification calendar, that this is confidential, they are not to tell anyone about the girls they may see there, what goes on, or any other information they may get from their interview.

Q As a superintendent of this group of guardians, have you ever received a complaint of any breach of that confidentiality?

A Never.

Q Have there ever been any occasions when any out-of-the-ordinary confidentiality problems arose?

A There have occasions where the guardian has known one of the girls. There have been other occasions where the girls will see someone else from their school, their class, whatever, in the halls and they are concerned about that. We had one instance where a girl showed up with both her mother and grandmother and the guardian that was scheduled that day was the grandmother's best friend.

Q On those occasions—on that occasion where—or those occasions where the guardian has known the girl, what if anything was done about that?

A In the one where the guardian was the grandmother's best friend they saw each other in the hall and they said, I guess, we both know why we are here, do you want to talk to someone **[1785]** else or me, and it was left up to the family and they chose to talk to someone they knew rather than a stranger. The girls that are concerned about meeting a friend in the hall, we try to put them in a different room. We bring them in at a different time so they don't have to run into the people they know.

If the guardian knows one of the girls and they feel it would be a problem, not so much for them but for the girls, then I fill in and I do that one.

* * * * *

[1794] * * *

BY MS. BENSHOOF:

Q On direct examination you ran through with Mr. Galus the **[1795]** fact that you supervised the training of the guardians to hold parental notification hearings, is that correct?

A Susan and I do that jointly, yes.

Q Do you interpret the standard of maturity to be anything different than capable of giving informed consent?

A No.

Q And in figuring out whether or not a minor is capable of giving informed consent, wouldn't it be correct to say that you rely on the knowledge and counseling that they have received at the clinics to a great extent?

A Yes.

Q How would you interpret the phrase best interest, when you train the guardians, or when you hear a petition yourself, a petitioner yourself?

A I consider the best interests that maybe the girl is not mature but it is not in her best interest to continue with the pregnancy since she does not want to.

I feel it is not in teenagers' best interests to become mothers.

Q In your experience with the guardian have you seen a lot of teenage mothers?

A Yes.

Q Isn't it true that when you—well, strike that.

After you interview a girl, and I guess you have seen 500, do you make a recommendation to the judge, is that **[1796]** correct?

A Yes.

Q Have your recommendations nearly always been on maturity grounds?

A Usually.

Q But usually can you put a percent on it?

A 90 to 95 percent, I am sure.

Q You have seen 500 girls. Have you ever had a recommendation to the judge turned down?

A You mean my recommendation?

Q Your personal recommendation on the 500 girls?

A No.

Q And to the extent of your knowledge in supervising other guardians have they ever had a recommendation turned down?

A Not that I am aware of.

Q We have had some people in there testifying in Hennepin County, Susan Smith, Judge Oleisky and there has been testimony that there have been three girls that have gone through the Hennepin County system that didn't at least initially get their petitions granted.

One was a girl who was frightened and turned mute; one was a girl who wanted to be turned down because she thought she would get married; and I understand in those cases they came back, and there was a third girl.

Do you know about the third girl?

[1797] A Yes, I do.

Q Was that one of your clients?

A Yes, she was.

Q Was the other two your clients also?

A One of them was.

Q Which one?

A The girl that didn't want the abortion because she thought her boyfriend would marry her. I talked to her the first time she came through court; not the second time.

Q And those, the other two cases, did ultimately get abortions?

A Yes.

Q So you were the guardian for the third person who didn't get a parental notification petition granted in Hennepin County?

A Yes.

Q Could you explain the circumstances of that case?

A The girl was quite young; I think she was 14 or 15, she was from Wisconsin; she came with her mother and when I talked to her she kept talking about killing her baby. She told me when her baby was due, how upset she was about it. She said that her mother had told her that it was best for her to do that. Her mother was definitely pushing her to have the abortion. She made it very clear that that was not what she wanted to do.

The recommendation that I made to the judge was that [1798] I could not in good conscience recommend that order be granted given the way she felt under the circumstances, and about the whole subject of abortion.

Her petition was denied. In that particular instance we had not asked the mother to come into the hearing, we thought it would be too difficult.

After the hearing we walked out and told her what had happened; the mother started to cry, the girl started to cry, it ended up the public defender had the girl at one end of the hall, I had the mother at the other end, they were both hysterical, the girl was begging the public defender to take her back into court, she would say anything the judge wanted her to if he would only sign the order, she could not stand to see her mother upset; the

mother was crying and saying I can't let her have a baby; she is only 14 years old, she will be stuck on AFDC the rest of her life.

I don't want that for her. It had been a tremendous hardship for them to come to Minneapolis, the mother was working in some type of a menial job where she was trying to keep her family together, she was a single parent, she was very concerned that if she had to take another day off of work she would lose her job. Their car was a wreck; she didn't think it could make another trip to Minneapolis. She didn't know what to do.

When I was trying to talk to her she wanted to know [1799] what had happened; why the judge had turned down the petition. I told her that we had recommended that, we didn't feel it was in the girl's best interest because of her strong feelings about abortion and I said don't you think your daughter is going to resent you for pushing her into this and she said of course she is; I know that, but it is a chance I am willing to take, this is more important.

It was very difficult for me, she was saying some of the same things I know I would have been saying in her position.

It was very, very difficult for the girl to see her mother so upset and feel that she was definitely the cause of it.

They did leave. I did hear later that she did have an abortion, they sent a letter to the last-known address of the father. I don't believe the parents had ever married, but they obviously had to make a second trip back to the clinic. I have no idea how they accomplished that.

Q So then in this instance you were really feeling that the girl was, if not mature, at least capable of making the decision to be a mother in—

A Yes.

Q So it was an anomaly as far as the statute goes because she was making a decision to be a mother?

A Yes.

[1800] Q And do you ever see, as a guardian, teenagers who have two biological parents, both of whom know about the pregnancy?

A Yes, that has happened.

Q Why do the girls go to you if both parents know?

A Sometimes there was a misunderstanding; they didn't understand that they had to get a signature.

Other times the parents have been informed or have found out about the pregnancy and just have refused to sign saying that they wanted the girls to go to court; they want to make things as difficult as possible for them.

Q So the parents view is sending the girl through the court system as a punishment?

A Yes.

Q Do the girls view it that way also?

A Probably initially. I don't know if they do after the fact, but before that I am sure they do.

* * * * *

[1801] Q When you see the girls initially at their interview with you, what is their demeanor, what do you observe?

A They are nervous, some are better at hiding that than others, but I think all of them are nervous about going into court. They don't know what to expect.

They are cor. ned about what we are going to ask and even more concerned about what the court is going to ask; what the judge will think of them, what will he say, what will he do, how they will feel. It is very typical for them to say, "Am I going to be embarrassed, will he make me feel bad, what is he going to think about me."

Q So they feel they are being judged by the judge?

A Definitely.

Q And do they feel that they are more or less being judged?

A Yes.

Q Do they believe there is a good chance they will get turned down?

A They are concerned about that.

They ask how many times are these things granted, what do you think my chances are, does the judge usually sign them, that sort of thing.

Q If you say to them that the judge usually signs them, does that reassure them?

A I don't know. I hope so.

Q About what percent of teenagers that you see have parents **[1802]** with them?

A About a quarter of them, 25 percent.

Q Do you ask questions during the interview, of the parent also?

A Sometimes. I usually try to talk to the girl alone first and then toward the end of the interview, if she wants, we ask her mother to come in so we can explain the procedure, what is going to happen from that point on and what they can expect. I like to talk to the girls alone initially so we can find out if it truly is their decision or if someone is coercing them into it.

Q When you see the girl and a parent, is it your observation that oftentimes or sometimes the relationship problems or the parental problems are rehashed in front of you?

A Not very often, no.

Q And have you ever had any situation where one parent will come in and the other parent is let's say seriously ill?

A Yes, that has happened several times that the girls say I can't tell my mother or my father; whatever, they have some kind of catastrophic illness and it would just be very, very upsetting or detrimental to their health to inform them of what was going on.

Q And in some of those instances has the other parent been present?

A Yes.

[1803] A Yes.

Q And you believe the girl and the parent?

A Yes.

Q Have you ever had any teenagers come before you who have told their parents about a pregnancy and suffered physical or verbal abuse because of it?

A Yes, a couple. I had a girl tell me not too long ago that she had told her mother about another pregnancy and had in fact had an abortion, the mother had known about it, but at that time her mother had been very, very verbally abusive to her and kept throwing that up to her, making comments about her character, her behavior, that sort of thing and she was certainly not going to inform her of any future pregnancies.

Q Isn't it your experience that this statute has never weeded out an immature minor for whom an abortion would not be in her best interests except for that anamoly you discussed?

A That is right.

Q Have you had teenagers as parental notification clients who have suffered from abuse and neglect?

A A few, yes.

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TRIAL TESTIMONY EXCERPTS OF JODY DESMIDT,
LAW CLERK FOR HENNEPIN COUNTY
JUDGE OLEISKY

[DIRECT BY MR. ACKERBERG]

[1889] * * *

Q Are there any measures you take to allay whatever anxiety minors might have?

A I guess I just try to be real friendly with the girls when **[1890]** they come in. We have them sit, they sit in my office waiting, for example, if the first one is in with the judge, I will have the next girl sitting virtually across from my desk and I will just, if she asked me about the hearing, I will tell her it is real short and the judge is real friendly and I will ask them about the weather, just try to get them to be relaxed, you know.

Q And afterwards do they comment on the procedure?

A Yeah. I have heard some of them say it wasn't—

MR. PENTELOVITCH: Objection, about to give hearsay.

THE COURT: I think we have gone into that at great length on both sides about how the girls react, what their reasons are and so on.

You may answer.

THE WITNESS: I have had them say to me, well, that wasn't so bad—I guess they are nervous when they go in and when they come out they feel like, you know, the judge was nice to them and the hearing wasn't as bad as they had thought it could be.

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TRIAL TESTIMONY EXCERPTS OF JANE SCHLEUSNER,
COURT REPORTER FOR HENNEPIN COUNTY
JUDGE OLEISKY

[DIRECT BY MR. ACKERBERG]

[1899] A I wouldn't consider it a duty but I do it because I feel that they are in a bad way and it is a little bit—I don't want their experience with us to be any more traumatic than it has to be or would be.

Q How do you do that?

A Well, for a little background, when you deal with a lot of attorneys like I do you tend to have to kind of be strong at certain points during the day and I don't—I am less that way, I am softer, I talk softer, I smile more and I might even joke with them if the need arises.

Q On occasion has Judge Oleisky stopped a trial in order to hear a parental notification hearing?

A Absolutely.

Q Well, once the hearing begins have you noticed what the demeanor of the minors are, generally?

A Well, for the most part I would say that they are paying very close attention to what is happening around them, they are tied in their seat, they seem a little nervous, they are trying to answer questions appropriately and they seem a little nervous. They are looking forward to it being over, I think. Some smile though too.

Q Where are your stenographic notes kept of the hearing?

A I keep them with my daily notes and I, every day at the end of the day, no matter what I have heard during the day, I keep them all together. I label the day and I file them in a box. The box is kept in my office for about four to six **[1900]** depending on how many I have, that is just for my convenience. The office is locked every night.

Then after that they go down to the vault, we have a vault in our building that is kept locked at all times.

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TRIAL TESTIMONY EXCERPTS OF MARK MCDONOUGH,
FORMER LAW CLERK FOR HENNEPIN COUNTY
JUDGE OLEISKY

[DIRECT BY MR. ACKERBERG]

[1902] * * *

Q Have you had any experience with parental notification in the abortion context?

A Personally?

Q Yes.

A Yes. When I was first out of high school, my first year in college, the woman that I was dating regularly, steadily, whatever, got pregnant so we had to both deal with that at that time.

Q And did your girlfriend contemplate notifying her parents?

A I think we had the reaction that most young people do, when they find themselves in that position, and that is, "We can't tell our folks because they are going to kill us," or whatever; and, you know, I think now looking back it was **[1903]** simply we did not want to anger our parents and more importantly didn't want to disappoint them.

So that was our first reaction, can we handle this situation without letting our parents know about it.

Q Were the parents informed?

A Yes, and actively involved.

Q And what was the response of the parents?

A Well, it surprised—I guess it surprised both of us. I don't think either of us thought that our parents were that smart about things or that understanding about it, but it was an incredibly difficult time, something that takes you forever, I think, and our parents helped us through it.

It was a very trying time for both of us, both sets of parents were supportive to their children and their children's friends.

Q And neither you nor your girlfriend expected that response, initially?

A I think we did, but that wasn't our first thought.

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TRIAL TESTIMONY EXCERPTS OF DAVID KNUTSON,
ATTORNEY WITH HENNEPIN COUNTY
PUBLIC DEFENDER'S OFFICE

[DIRECT BY MR. ACKERBERG]

[CROSS BY MR. PENTELOVITCH]

[1910] * * *

Q Was there an occasion where the parent found out that her child was coming into the Hennepin County court for a parental notification hearing and threatened to send the police to pick up the minor?

A Yeah, I was told that the parent had asked the Burnsville Police to go to the juvenile justice center in Hennepin County and retrieve their child.

Q What did you do about it?

A I asked the guardian and Judge Oleisky if we could have an accelerated hearing and basically get that person out of the courthouse and over to whatever clinic she was going to attend before the police were to arrive.

Q Were you able to make such arrangements?

A Oh, yes.

Q Did you make notes when you were interviewing the minors?

A Yes.

Q What did you do with those notes?

A I destroyed them.

Q Why?

A Pardon me?

Q Why did you destroy them?

[1911] A I didn't have any filing system to keep them and there was no reason to keep them and I suppose from the confidentiality standpoint.

* * * * *

[1920] * * *

BY MR. PENTELOVITCH:

Q Now have you made any observations about the type of person who you have represented or who came through the public defender's office seeking representation on these parental notification hearings in terms of their social or economic background?

A Yes.

Q What are your observations?

A They are very much nonminority, they are very much white and they are very much middle class.

Q Is that a deviation from the experience you have with your other clients in the public defender's office?

A Markedly so.

Q Have you drawn any conclusions about the parental notification-judicial bypass system from the fact that the **[1921]** minors that you have represented have tended to be middle or upper middle class whites?

A Yeah, I think I probably have.

Q What is your conclusion?

A Well, I think the first conclusion I drew is that the procedure is one of jumping a number of hurdles to get into court and it seemed to me that the kids who were able to jump those hurdles almost by definition were going to be mature, were going to be intelligent, or whatever word you want to use to describe that.

It seems like once they finally got to my office there was probably a weeding out process. They just all were middle class and it seemed to be by and large middle class, I don't know, I can count probably on one hand the number of minority kids that I represented in the process for those three years and of the minority kids that I represented, well, let's say maybe ten minority kids at the most, most of these kids seemed to come from a middle class-type of background.

Q Approximately how many minors did you personally represent?

A Well, from a numbers standpoint I really wouldn't know. It would be hundreds, it would probably be between a third and a half of all the kids that came through Hennepin County from 1981 through 1984 and I just have no idea.

Q But many hundreds it would be?

[1922] A Yes, I would think so.

Q And yet 10 or less were minorities?

A Yeah, that is my impression.

Q And the majority of those minority individuals were from a middle class or better social-economic background, is that correct?

A Yeah.

* * * * *

[1924] * * *

Q Did you get any indications from any of these minors that the reason they were seeking judicial bypass rather than notifying their parents was that they were concerned about being abused or had been abused in the past?

A Yes.

Q How frequently did that occur?

A Well, this is just a rough estimate; probably 20 percent and maybe 25 percent of the cases.

Q And do you have a percentage of your minors who were reluctant or unwilling to tell their parents because of their parents' religious or moral beliefs?

A I would say an equal percentage, maybe a little higher.

* * * * *

TRIAL TESTIMONY EXCERPTS OF PATRICK CONNOR, FORMER RAMSEY COUNTY PUBLIC DEFENDER

[CROSS BY MS. PINE]

[1984] * * *

Q Following Judge Petersen's heart attack did it become substantially more difficult to get an appointment for a minor. Was scheduling more difficult?

A Scheduling was more difficult, yes, because instead of having one centralized judge or area to go to to schedule we had to try to fit in the hearing with one of the several judges that were available.

Q Could you give us an idea of in what ways it became more **[1985]** difficult; what kind of things would happen that had not happened previously or the things that would happen at that time?

A Well, when Judge Petersen was off the bench we had some meetings between the various administrative personnel and the juvenile court and the public defender's office set up two days a week that would be earmarked for these hearings and Judge Petersen did his best to be available during those times we had earmarked. We tried to continue on that basis as I recall, but it turned out that there was no municipal court judge available and I recall it being on Mondays and Thursdays that we tried to have the hearings. If there wasn't a judge available we wouldn't be able to have the hearing on that day. Something that I recall happening is having to typically tell

the girls that we couldn't promise them a hearing on a given day when they called and we talked about a hearing they would have to call back to our office unless we could return the call to them at home or whatever, and then we would verify whether or not that hearing date was available after having called municipal court, seeing whether a judge was available.

Q Wasn't it sometimes true that at the time the minor called back you had not yet been able to get an appointment?

A That did happen on occasions.

Q So the minor would then have to call again?

A Correct.

[1986] Q In your time in the public defender's office representing minors, was there ever a time when a minor called on a first occasion in an attempt to get an appointment and never called back?

A That did happen on occasion.

Q What was your impression as some of the reasons why the minor never called back?

A On the occasions that I had spoken with the minor personally and they didn't call back, I recall there being a couple of times that I had the sense that the girl was frightened, up tight when we talked on the phone, and then when she didn't get back to our offices, you know, a day or two later whatever, I remember a few times thinking to myself it wasn't real surprising she hadn't called back, she did sound frightened.

Q Do you think—do you have any impressions as to what might have happened with some of those minors?

A In every—well, this only happened a few times and in the instances I can think of they did call back eventually, let's say the following week, rather than, you know, initially when we asked them to call back so they eventually did get in and have a hearing but it was later than what we had initially talked about.

Q What would you say the—usually how long did it take you to get an appointment for a minor from the time she called, what would you say on the average, give us the average and give **[1987]** us the longest amount of time?

A The average would be if a girl called on a Monday or a Tuesday the average would be to get her on that following Thursday. If she called Wednesday, let's say half the time we would still be able

to get her in on Thursday, the other half of the time we would have to go over into the next week.

If she called on Thursday or Friday it would certainly obviously go into the next week.

There were occasionally times when we had already scheduled as many minors as we had earmarked with the judge and so on that could be heard on a given date and as a result the girl may have to wait until the next week. So a girl may have called on Monday, Tuesday, Wednesday and not gotten in until as late as Thursday of the following week. That is as long as I recall it ever happening.

Q So would you say that if you looked at the problems the occasional problems in getting appointments promptly with the court, in other words, the delay due to the court's schedule, and you combined that with difficulties the minors may have had in getting away from school or getting into court and combined that further with any delay that may have been due to the intimidation on occasion, there could be substantial delay before she actually got into a court hearing?

A Yes. As I said, like I said, in the case of a couple of girls, for whatever reason they didn't call back immediately, **[1988]** they called back a week later, there certainly would be a delay of a couple of weeks, and perhaps as long as three weeks before they got in.

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TRIAL TESTIMONY EXCERPTS OF JUDGE NEIL RILEY,
JUDGE OF HENNEPIN COUNTY DISTRICT COURT
[CROSS BY MR. ACKERBERG]

[2009] * * *

Q How would you describe the tone you sought to set when the **[2010]** minors came in for these hearings?

A It was nonthreatening. I sympathized with the predicament that they were in. I didn't tell them that but it must have been very obvious.

Q During the proceedings did you review the report of the guardian ad litem?

A Yes.

Q And did you ask questions of the minors?

A Limited pretty much to what I have already testified to.

Q Were the proceedings confidential as a general matter?
A Not as a general matter; they always were.
Q They were held in camera?
A Yes.
Q When was your decision rendered?
A Right then and there.

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TRIAL TESTIMONY EXCERPTS OF EDWARD EHLINGER, DIRECTOR OF PERSONAL HEALTH SERVICES FOR MINNEAPOLIS HEALTH DEPARTMENT

[DIRECT BY MS. PINE]

[CROSS BY MR. GALUS]

[2030] * * *

BY MS. PINE:

Q Let me go back to one thing that you talked about in giving us the basis for your opinion.

You mentioned that there might be other possible causes. Do you have an opinion on the relative importance of the parental notification law in explaining these trends?

A Well, I think in looking, as I mentioned looking at all of the factors that could influence these age groups, the other factors that would probably affect both of these groups fairly equally, whereas the parental notification law would be a factor that would affect only the 15 to 17-year olds and therefore, all other things being equal, that parental **[2031]** notification law would be an important factor.

Q In your opinion why would you say that the law might have this effect on the birth rate and the decreasing abortion rate for teenagers?

How would it operate?

A Well, the law is geared to have pregnant women, pregnant girls tell their parents that they are pregnant or tell them that they are planning on having an abortion and this may be a frightening experience for these women or they may not know the

ways to get around the parental notification through the legal system, which would then have them postpone or not tell their parents at all. And part of the delay, teenagers are not—often deny their pregnancies and any delays add onto the already delayed access they have to care and services for their pregnancy.

Q So you believe the requirement of notice, or alternatively going to court, might be what—can you reiterate that again?

A It might be a deterrent. The wanting or needing to tell their parents about their wish for an abortion, or telling their parents that they are pregnant, or the onus of going through court may be a deterrent for women seeking any kind of care.

Q And when you say deterrent, do you mean deterrent to having an abortion?

A That is the factor that I think would be deterred.

* * * * *

BY MR. GALUS:

[2038] A In terms of, you know, I am not sure the exact question that I answered you, my impression was you asked if that—there was a getting at whether there was a firm link between or if there were any other causes or any other explanations for some of these numbers and the rate, the birth rates and abortion rates and I said there are other causes, there are other things that have to be considered and that there are some assumptions that have to be made.

Q Do you recall me asking you on Wednesday morning last the question in substance as follows: Dr. Ehlinger, is your opinion of a connection between the parental notification statute and the data, Minneapolis data regarding abortion rates and birth rates, just speculation on your part? Do you recall me asking you that question in substance?

A In substance.

MR. PENTELOVITCH: I think the question is hearsay.

THE COURT: Objection overruled.

THE WITNESS: I remember you asking a question of that kind of substance.

BY MR. GALUS:

Q And do you recall responding to that question, "Yes."?
A I responded affirmatively to that question.
Q Do you recall using the term "Yes."?
A Yes.
Q And we talked at that time, did we not, also about your **[2039]** opinion as to other factors that may account for the data in that table, correct?
A That is correct.
Q And did you affirm to me at that time that in your opinion many factors may account for that data?
A That is correct.
Q And what are those factors?
A There are a lot of factors I think that influence birth rates and abortion rates and I am not sure that I know of all of those factors myself, but some of the factors are the economic situation occurring in this state, the increasing poverty in young women in Minneapolis, which goes along with the decreasing insurance coverage for that population.

Some of the other political or—I am not sure they are political, but budgetary occurrences that happened at the federal level in 1981, and that also would affect the services at the city level and population changes in Minneapolis that have been occurring.

Q So in your view many factors influence birth rates and abortion rates in Minneapolis?
A That is correct.
Q Including the economic situation and levels or incidence of poverty, insurance coverage, budgetary occurrences at the federal level in 1981 and population changes?
A That is correct.

* * * * *

[2043] * * *

THE WITNESS: I think that attitudes toward abortions affect abortion rates and I believe that from my dealings with minority communities they have attitudes that are different than what Caucasian attitudes are. But I don't know what those attitudes are and how they would affect abortion rates. I could guess at some of those things but I really don't know and some of my assumptions that I had previously, in looking at national data, didn't match with my assumptions from Minneapolis, so I would feel uncomfortable, you know, stating one way or the other that these abortion rates were affected by this particular attitude among minorities.

* * * * *

[2049] * * *

Q Do you think the—well—I believe you testified that you thought the minority rate of the population in Minneapolis affected the abortion rate, correct?
A Yes, I did.
Q And that it changed, a change in the minority rate might affect a trend in the abortion rate, correct?
A That is correct.
Q And is it your understanding the minority composition of Minneapolis has changed in the period 1980 to 1984?
A From my—we don't have census data, but we do have information from the public schools that shows an increasing number of minorities coming into the Minneapolis public schools from 1980 onward.
Q And you told us last Wednesday morning that is one of the pieces of information that you believe might account for a change in the abortion rate?
A That is a possible factor, yes, sir.

* * * * *

TRIAL TESTIMONY EXCERPTS OF DR. PAUL GUNDERSON, DIRECTOR OF MINNESOTA CENTER FOR HEALTH STATISTICS

[DIRECT BY MR. GALUS]

[CROSS BY MS. BENSHOOF]

[2085] * * *

THE COURT: Objection overruled.

The question is his opinion as to the effect of the bypass procedure on the gestational age of minors in Minnesota.

You may give me your opinion.

THE WITNESS: Based on the information shared in Exhibit 5(sic), there is no effect.

BY MR. GALUS:

Q Do you have any other basis for that opinion other than the gestational age data as set forth in the Defendants' Exhibit 35?

A I have two bases upon which I premise that opinion.

Q Would you please, taking one at a time, explain those other two bases to the Court?

[2086] A We have analyzed the married versus the unemancipated rates for the years in question and detect no difference, in fact the average gestation in weeks varies very little between the two populations.

Secondly, we have analyzed the resident women in Minnesota, age 17 and under, versus all women in Minnesota who use a medical clinic in this state for purposes of securing an induced termination and again we note that the results are essentially identical to that depicted here in Exhibit 35.

Q Do you have any opinion as to—

MR. PENTELOVITCH: Excuse me, Your Honor, I am going to move to strike the last answer, it is hearsay.

THE COURT: Objection overruled, the answer may stand.

BY MR. GALUS:

Q Dr. Gunderson, do you have an opinion as to whether or not 1980 was anomalous in terms of gestational age data for minors, that is patients aged 17 and under—do you have an opinion?

A Yes, I have an opinion.

Q What is your opinion as to whether or not 1980 gestational age data is or is not anomalous?

A My opinion is that it is not.

Q What is the basis of your opinion?

A An analysis of the 1979 data which would suggest gestation **[2087]** ages of the type which are exhibited in Exhibit 35.

THE COURT: But now the '79 is not shown in here.

THE WITNESS: That is right.

* * * * *

[2088] THE COURT: Objection overruled.

Is there any claim being made by plaintiffs that the statute results in greater complications for minors?

MS. BENSHOOF: Well—

MR. PENTELOVITCH: I will let her answer that.

MS. BENSHOOF: In Plaintiffs' Exhibits 1 through 9 and also in Dr. Hodgson's testimony there is a claim that the risk increases through delay, specifically the types of risks such as laminaria due to cervical—lack of laminaria use which relates to cervical injury, but we haven't demonstrated or said on any particular patients those risks have occurred except those who haven't been able to get it, who have gone to childbirth, which of course is much more dangerous.

THE COURT: Maybe you didn't hear my question or I didn't understand your answer.

Is there any claim on the plaintiffs' part that the parental notification statute has resulted in an increase in complications to minors resulting from abortions?

MS. BENSHOOF: Increased risk?

THE COURT: I am not asking about increased risk, I am asking about increased complications.

MS. BENSHOOF: No.

MR. PENTELOVITCH: I agree exactly with what she said; I think we have demonstrated increased risk but we have not proven any actual complication.

[2089] THE COURT: I will let him answer, but it seems to me the question is somewhat moot but go ahead.

MR. GALUS: Your Honor, we understand the contention to be that the statute is unduly burdensome for among other reasons, the reason that it endangers the medical health of those regulated by the statute and we think it fair

to put on evidence as to whether or not there has in fact been that effect, irrespective of what—

THE COURT: I agree, go ahead, you may answer, if you have the question in mind.

THE WITNESS: I have the question, I believe.

MR. PENTELOVITCH: I assume you were overruling the foundational objection?

THE COURT: Yes, sir.

BY MR. GALUS:

Q What is your opinion?

A My opinion is that there is no evidence that the complication rate has in any way changed as a result of the act itself.

Q The rate, that is the complication rate reported on Defendants' Exhibit 35, in percentage terms, does in fact increase between 1980 and 1983, does it not?

A That is right.

* * * * *

[2103] * * *

MR. GALUS: In Minnesota, under the age of 18, has the percentage of that population receiving first trimester abortions changed since 1980?

THE COURT: He would have to know the population and raw figures in order to figure out the percentage, is that what you are telling me; is that what you are asking him for?

MR. GALUS: Yes.

THE COURT: Do you have that data with you?

THE WITNESS: Yes, I do.

THE COURT: Okay, since 1980?

MR. GALUS: Yes, sir.

MR. PENTELOVITCH: I have the best evidence objection.

THE COURT: You can get it from him, he has it in front of him apparently.

MR. PENTELOVITCH: We would like—

THE COURT: You surely are entitled to it.

All right.

THE WITNESS: In 1980 75 percent of all abortions received by women age 17 and under was received by the end of the 12th week, the end of the first trimester.

THE COURT: Wait a minute now, I don't understand what I am getting. Give me your figure again with respect to **[2104]** 1980, did you say?

THE WITNESS: In 1980 75 percent of the abortions performed to women age 17 and under were performed by the end of the 12th week of gestation which is the end of the first trimester.

BY MR. GALUS:

Q That is in Minnesota?

A In Minnesota.

Q Okay.

THE COURT: What you are telling me is 75 of the abortions on the people 17 and under in 1980 were first trimester abortions?

THE WITNESS: That is right.

MR. GALUS: That is what is the—what is a comparable data for 1981, if you have it?

THE WITNESS: I am sorry, I have not calculated '81 and '82. I do have '83.

BY MR. GALUS:

Q All right, what is '83?

A '83 is 77 percent.

* * * * *

[2454] * * *

BY MS. BENSHOOF:

Q So if nationally 9.5 percent of all women get abortions in the second trimester compared with minors in Minnesota, 23 percent getting abortions in the second trimester, there is a public health problem in Minnesota, is there not?

A Yes, it is a problem, yes.

Q And if you look at that first line, 1978 to 1983, the problem for minors is not decreasing, is it?

A No, there is a slight increase there.

Q Yes. And the trend, and if you are not familiar please tell me, the trend in the United States, is, as a whole, not Minnesota, is for women to be getting abortions earlier, isn't that true, if you have been reading the CDC?

[2455] A Yes, overall that is the case, yes.

Q But Minnesota minors are not participating in that national health trend, are they?

A Not given the data you have quoted.

Q Well, it is your data.

A Uh-huh.

Q They are not participating in this national public health beneficial trend, are they?

A That is right.

Q And that is a public health concern, isn't it?

A Yes, it is.

Q And everyone in Minnesota should work to try to get minors back into the first trimester, shouldn't they, as a public health official?

A Correct.

Correct, that has been our stance as an agency.

Q There is also quite a substantial difference when you look at that chart between minors and teenagers age 18 and 19, there is a 5 percent difference in 1983, isn't that correct?

A In 1983?

Q Yes.

A That is 16, 16 percent?

Q Right.

A Yes, you are understating the difference.

Q It is a 7 percent difference?

[2456] A Correct.

Q Now as a statistician you don't just—I don't know if you can tell me off the top of your head, but what percent increase would that be for someone 17 and younger compared to those 18 and 19, do you want to use my calculator?

A I am sorry, I may not have understood the question.

Q My question is you don't just do substraction of 16 from 23 but rather in comparing the two—

A That is right.

Q —in comparing the two groups you would say one is 50 percent higher or whatever?

A Yeah, yeah.

Q If I gave you my calculator would you be able to give me the answer?

A Oh, yeah, yeah. The proportion of 18 and 19-year-olds in Minnesota in 1983 is only 70 percent that of the proportion for those 17 and under and that constitutes a fairly sizable difference.

Q Can you put that in terms of a percent?

A Well, in essence, round off, a 30 percent difference.

Q So in essence one could say, and correct me if I am wrong, that 30 percent more minors age 17 and younger get abortions in the second trimester than 18 and 19-year-olds?

A As a proportionate expression that would be correct, uh-huh.

TRIAL TESTIMONY OF DR. RICHARD SCHMIDT, PHYSICIAN AT GOOD SAMARITAN HOSPITAL IN CINCINNATI

[DIRECT BY MR. ACKERBERG]

[CROSS BY MS. BENSHOOF]

[2125] * * *

Q Does the specialty of obstetrics and gynecology include abortion procedures?

A It does.

Q Are there medical risks to abortion?

A Yes, there are.

Q What are they?

A Well, there is, as with any medical procedure, there is a risk of mortality. There is a risk of complication, major and minor. There are medical post-abortal complications. There are long-term complications.

Q Well, one of the complications, one of the medical risks of abortion is death?

A That is true.

Q How many deaths have there been from abortion?

A Well, looking at the 1985 CDC Abortion Surveillance, there are a total of 175 deaths reported from 1972 through 1981.

Q Were some of those deaths within the first trimester?

A Yes, they were first trimester abortions over that same time period produced 83, a total of 83 deaths.

Q Complications are also a medical risk of abortion?

[2126] A That is true.

Q What complication risks are there?

A Well, in terms of medical complications, hemorrhage and infection are the commonest, perforation of the uterus; long-term complications include a substantial question of future infertility or a higher incidence of spontaneous abortion.

Q Are there some types of adverse effects that the medical community is uncertain about?

A Well, there is continuing debate about the long term effects of abortion on fertility and the incidence of spontaneous abortion, in fact that debate continues with many studies being done and various conclusions reached by various individuals in the case, that that is still a lively topic and the bottom line is not in.

Q Are teenagers especially vulnerable to certain kinds of complication?

A Teenagers are more vulnerable to virtually all the complications, the early complications hemorrhage and infection, they generally are slower to report them, slower to seek help and in terms of long-term complications they probably are particularly susceptible to cervical damage. The younger the teenager, why the more rigid the cervix and dilation of the cervix inevitably produces some cervical damage, some of which is visible, some of which may not be visible but may be reflected in subsequent pregnancy outcome. Some of that **[2127]** has been overcome by more gradual dilation of the cervix with laminaria and some of it is—some of the longer-term hazards may be improved by D&E, dilation and evacuation as opposed to D&C, but each of those still carries a risk which, as I point out, is still under extensive evaluation, but I think it is clear and I think there is widespread agreement that teenagers are more susceptible to cervical damage than older women.

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[2133] * * *

Q Can parents of a minor provide medical history information that may be overlooked by the minor?

MR. PENTELOVITCH: Objection, Your Honor, leading.

THE COURT: Objection overruled, you may answer.

THE WITNESS: Yes, can and do very commonly. In virtually any medical procedure undertaken on a minor a history is sought from the parents. That is standard medical procedure.

Q Well, why couldn't a minor provide the same information?

A A minor may provide the same information; a minor may be very well capable of providing information that is within her **[2134]** knowledge.

Minors often have a rather sketchy view of their health status, when they were smaller children. They may be unaware of congenital problems, they may be unaware of family history which may be of significance.

Moreover, I think the teenager, under the stress of that particular problem, tends to minimize health problems. Her natural tendency is to want to dispose of that problem which is difficult for her and she tends not to pay much attention to the issues surrounding her own health history, health status and so on; which may be of significance.

Q Following an abortion is aftercare medically advisable?

A Yes, it is. Again following the pattern of other medical procedures, I think we would be negligent if we did not inform the parents of what to look for following an operative procedure, what to seek attention about, what to report, what to seek advice for.

And in other areas I think we would be negligent if we did not fill in the parents.

Q In her testimony Dr. Jane Hodgson stated that teenagers tend to have a higher incidence of infection after an abortion

because they delay post-abortion care and ignore complications.

Do you agree with that?

A I surely do, that is a common observation.

Q Does parental involvement have an impact on the quality of **[2135]** followup care that a minor might receive or seek after a medical procedure is performed on her?

MS. BENSHOOF: Objection, Your Honor, there is no foundation, the witness hasn't testified he has ever performed an abortion and talked to a patient about aftercare.

THE COURT: Give me the question again.

MR. ACKERBERG: Does parental involvement have an impact on the quality of followup care that a minor might receive or seek after a medical procedure was performed on her?

THE COURT: I will let him testify. I will overrule the objection, you may answer.

THE WITNESS: In my experience, which I believe is as broad as anyone's, in the circumstances surrounding abortion it is very important.

It is common in our emergency room; we have a tertiary level emergency room in our hospital. The common instruction given to patients in the abortion clinics in our area is to seek medical help if they have a problem from a major emergency room which is a perfectly logical and good thing to do.

As such we see abortion complications. In my experience at the Cincinnati General Hospital we manage many abortion complications and there is a very common pattern of, and particularly with young women, delay in recognizing either the effects of hemorrhage or particularly the effects of—**[2136]** of infection.

Picture, for example, and this is the kind of thing that we see fairly commonly, a young woman who has an abortion, her parents do not know about it, she has a little bit of fever, she may have some malaise, be not feeling quite as well. She may have some cramping, lower abdominal

pain. Her parents may very well interpret this as being a touch of the flu that a lot of other people have and is going around. It is in the interests of the child to hope that this really doesn't amount to anything because if she treats this as an illness, if for example, she has to go to a hospital, whether it is an out-patient facility, an emergency room, or be admitted to the hospital, this then involves hospital procedure which identifies problems. Their tendency is not to want to identify those problems so it is a natural tendency to hope that this, and believe that this is not a significant complication.

That is the way delays occur and can be avoided.

We see other examples where parents are involved, they may call too often, but indeed that is comparable to calling too late.

* * * * *

[2136] * * *

Q Have you had experiences with minors who are reluctant to inform their parents of the pregnancy?

[2137] A Minors are almost invariably reluctant to inform their parents. My own experience, and this extends, as I say, through private practice of some 35 years, and through our association with the teen-parent program, every teenager believes that her family relations are going to be utterly destroyed, and as well one not too distant example, I saw a 15-year-old girl whose mother I had taken care of, she called and asked my secretary if I could see her without—not knowing the problem, if I would see her without telling her mother and my secretary said yes, of course, and she came in and, indeed, she had an early pregnancy.

She did not want her mother to know about this. I said, what do you think is going to happen. She said, oh, my God, she will be horrified, she will disown me, I don't know that she is going to kick me out of the house but it is going to be terrible.

I said, well, now, look, I know your mother; I have delivered several babies for her, I have known her for years, I don't think that is going to happen and why don't we give it a try, why don't we call her up.

Indeed we did, her mother was not happy about it, but very quickly they resolved that problem and the teenager herself was, when presented with the prospect if she tried to do something without involving her parents the threat to their future relations, having this hanging over her was of **[2138]** significant concern.

As it turned out, she was aborted. She went to the local abortion clinic, her mother knew about it, her father knew about it, and I think they were off to a much more solid relationship.

That has been typical of my experience.

In over 200 patients treated in our teen-parent program, there are no horror stories. You hear about them, I believe some exist. We have had many parents of very poor economic circumstances, many broken homes, who were not happy about this but the general pattern in that clinic has been for parents to rally around the kids and be of significant help to them.

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[2184] • • •

BY MS. BENSHOOF:

Q So that if we were—as a public health concern it would be good to urge all teenagers to get abortions in the first trimester, would it not?

A I think that is a good policy.

Q And if I want to show you in a hypothetical situation that there was a state in this country where teenagers under the age of 18 who got abortions, 25 percent of them got them in the second trimester that would be a public health problem, wouldn't it, or something to seek to reduce?

A It certainly should be reduced, yes.

• • • • •

[2239] • • •

Q Now you testified that you believe it is a good idea to notify the parents for various medical reasons.

If you take a hypothetical, if you had a young woman coming in who wanted contraceptive care or who had a pregnancy and she was accompanied by her mother and by her stepfather and

she had never met her natural father, if she had learned from her mother that there was a divorce and that her natural father had nearly beaten her mother to death, take that situation.

Would you, in that instance, urge the teenager, her mother, her devoted and loving stepfather, to get in contact with this batterer?

A No, I would not.

Q Why not?

A It would serve no helpful purpose and could conceivably do harm.

Q Do you see any medical purpose to getting in touch with, let's say a man who fathered a child but never married the mother and has never seen the child his entire life until she came to you for medical services with her mother?

[2240] A Would I feel it necessary to get in touch with that father?

Q Who has never seen—

A It is a hypothetical case, the circumstances of which I know nothing about offhand. As you put that as a blanket situation, no, I would not see any reason to.

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TRIAL TESTIMONY EXCERPTS OF DR. VINCENT RUE, EXECUTIVE DIRECTOR OF SIR THOMAS MOORE CLINICS IN SOUTHERN CALIFORNIA

[DIRECT BY MR. GALUS]

[CROSS BY MS. BENSHOOF]

[2264] • • •

THE WITNESS: My opinion is that parental notification, when the minor is confronted with a problem pregnancy and with seeking the resolution of that pregnancy, and an abortion, that the family is advantaged as well as the adolescent in notifying the parents and in having family communication about that topic.

THE COURT: I am sorry, advantages to the family?

THE WITNESS: There is both parental advantage as well as adolescent advantage.

BY MR. GALUS:

Q In what way or ways do you believe the adolescent, the pregnant adolescent is advantaged by the parental involvement?

MR. PENTELOVITCH: Objection, lack of foundation.

THE COURT: Objection overruled.

THE WITNESS: I believe teenagers have an unspoken **[2265]** wish to face their parents and draw upon their support and I think when they have the opportunity, and the encouragement from professionals as well as from the state to do so I think it is advantageous because they can benefit from the wealth of guidance and counsel that the parents have, the parents' information, the value system that the parents have, the support, the encouragement. So I believe that she has much to benefit there and the family unit itself is strengthened.

It has been my experience that the family unit is the major source of strength in a crisis and as a result crises for many families become catalysts for positive change.

* * * * *

[2284] * * *

Q Based upon your education, training and experience as a psychotherapist and a family therapist, do you hold any opinion as to whether or not parents are likely to support their pregnant daughter's decision to have an abortion?

A Yes, I have an opinion on that.

Q What is your opinion?

A My clinical opinion is that parents in the main are supportive of their daughter's decision to resolve her pregnancy and in the main that is abortion. There are other studies that affirm that and I will just cite some of them very briefly here.

Fishman, Kimball, Clerman(ph), Bracken & Bracken, Perez, Reyes and Falk, Rosenthal and Rothchild; Steinhoff and Zimmerman. It has generally been found that most parents who

influenced and/or pressured their daughters did so encouraging abortion.

I will add one other study, and that is Rosen(ph), that found a similar conclusion.

Q Based upon your education, training and experience as a family therapist and psychotherapist, do you hold any opinion as to whether adolescents actively perceive their parents' reaction to an adolescent pregnancy or to an abortion decision?

A Yes, I have an opinion.

[2285] Q What is that opinion?

A Adolescents are prone to considerable exaggeration. They are also prone to considerable distortion, both of their own feelings and their parents' feelings.

Some are hypersensitive to anticipated parental reaction. Chilman and others suggest that this may be the first sharing of adolescent sexuality that has occurred between the pregnant teenager and the family. I wanted to add one other thing and it slipped my mind; if you might repeat the question I will continue.

Q Well, does your opinion with respect to adolescent perceptions in the regards you have just testified about, is that based at all on your clinical experience?

A Yes, it is.

Q What is the basis of your clinical experience for that opinion?

A That adolescents benefit from notification?

THE COURT: No, that they properly perceive or anticipate their parents' reaction.

THE WITNESS: Oh, yes, thank you.

There is considerable distortion of how the adolescent perceives parental reactions and there is also considerable projection that is she projects her own feelings of rejection about herself to her parents' anticipated reaction to being notified.

[2286] BY MR. GALUS:

Q Have you observed those phenomenon in your clinical experience?

A Yes, I have.
Q On more than one occasion?
A Very definitely.
Q Based upon your training, education and experience as a psychotherapist and family therapist since 1975, do you hold any opinion as to the psychological vulnerability of adolescents when confronted with a problem pregnancy as you have used that term, or a decision what to do about that pregnancy?
A I think taken as I said earlier—
Q First of all,—
A Yes, I do have an opinion, I am sorry.
Q Could you tell us what that opinion is?
A My opinion as I said earlier is that I believe adolescents as a group are at risk in the psychosexual area. Adolescents' decisionmaking typically spans into what is called concrete operational thinking as well as formal operational thinking.
Q You had better define those terms as you use them.
A Concrete operational thinking as developed by Piaget could be called maybe more child-oriented childish thinking where an individual looks at concrete and specifics, plans for immediate versus future goals and may have what is called haphazard reasoning as opposed to formal operational thinking **[2287]** which has the following five characteristics:

First, to anticipate possible outcomes.
Second, weigh values of each outcome.
Third, test risks systematically.
Fourth, consider complex interactions.
Fifth, associates behavior with outcomes.

Now I mentioned that because adolescents will cross back and forth in terms of their competency as to decisionmaking.

In a problem pregnancy we see the interaction effect between an intense emotional set versus—in addition to the cognitive measures of dealing with a problem pregnancy.

The result is that teenagers may tend to be egocentric and make irrational and emotional decisions about them and the various choices that they encounter.

Adolescents lack—lack the benefit of adult experience, life experience. Young women very often are less analytical in their

approaches to a problem and rely frequently on peers or romantic notions or unrealistic scripts. Some people will say that adolescent decisionmaking could be characterized by egocentricism and/or romanticism.

So in addition to that I would conclude and say that teenagers are at risk, they are vulnerable because they don't have experience; they have very little information with respect to the birth control, sexuality, abortion area; one study by **[2288]** Reichelt and Whirley(ph) found teenagers scored only 42 percent of correct answers on a topic of contraception, abortion and venereal disease and only 36 percent with respect to birth control in general.

Q I would like you to focus your attention on what I understand to be your testimony about your opinion as to the psychological vulnerability of adolescents confronted with a problem pregnancy or decision as to what to do with that pregnancy.

Is there anything in your clinical experience that leads you to hold that view?

A Teenagers—
Q And if so would you tell us what it is?
A Yes, there is. From my clinical practice I have seen teenagers act in a very impulsive manner when confronted with a problem pregnancy. They are overwhelmed by feelings of inadequacy and self deprecation, embarrassment and hostility.

They are vulnerable at this point because they have not contacted anyone, they are alone in their decisionmaking, they are frightened and they fear as to their future.

Q Have you observed any adverse psychological sequelii in your clinical experience to an abortion?
A Yes, I have.
Q What have you observed in that regard?
A I have observed a number of reactions, some of which span **[2289]** short-term rather mild reactions of depression, guilt hostility, sadness, remorse, through insomnia, eating disorders, interactional problems both with parents, partner and others; restricted subsequent bonding to future—in future pregnancies.

I have witnessed anniversary reactions, I have witnessed suicidal ideation, suicidal attempts because of a prior experience with an abortion.

Q And have you borne this witness with respect to patients of yours in your clinical experience?

A Yes, I have.

Q Okay. What do you mean—what do you mean by having observed anniversary reactions?

A Anniversary reactions are emotional high points that occur generally at the time of the abortion the following year.

It may also coincide with the time when the fetal child were to be born and anniversary reactions may manifest themselves with intense crying spells, with intense depression, with psychiatric numbing, that is an inability to feel, through manifestation of intense hostility, to withdrawal.

Q Have you personally provided psychotherapy to patients experiencing the reactions you have just testified about?

A Yes, I have.

Q What did you mean in your answer to my last question about suicidal ideation?

A Suicidal ideation is a thought process an individual goes **[2290]** through when he or she is extremely depressed. She considers options, ways of destroying herself. It is more serious, I will add, when the methodology is identified.

Q You observed that in one or more patients that you have personally provided psychotherapy for?

A Yes, I have.

Q Apart from your clinical experience concerning the adverse psychological sequelii that I have just enumerated, is there any other basis for your opinion as to the risk of pregnant adolescents for such adverse psychological sequelii?

A There are a number of studies that talk about psychological sequelii. Cates identified that pregnant teenagers are more at risk emotionally than are adults.

Adler found abortion is a stressful experience. Bold examined health experiences of Harvard women post-abortion including depression, anniversary reactions, guilt, despair. Smithonna found that women who treated abortion as a moral issue encountered considerable role and decisionmaking comflict.

Duetch found that never-pregnant adolescents manifest higher levels of self esteem than first time and repeated abortion

subjects. Repeated abortion adolescents showed significantly more signs of instability and personality conflict than the never-pregnant group.

There are many others that have identified adverse psychological sequelae.

[2314] * * *

BY MS. BENSHOOF:

Q Dr. Rue, what is your personal feelings about abortion?

A My personal feelings about abortion are that abortion is basically the taking of human life, and it ought to be only necessary to prevent the death of the mother.

Q And is it your opinion that life begins at the moment of conception?

A Yes, it is.

Q And so it would also be your opinion that the IUD and some birth control pills takes human life?

A Not some birth control pills, not being a medical doctor, but my understanding is that the IUD is abortive-fashioned and therefore it does destroy life after it has commenced.

Q Even though you personally oppose abortion are you still in favor—are you still in favor of keeping abortion legal in the United States?

A I am not in favor of legal abortion in the United States.

Q Are you familiar with the article—I imagine that you are—that you wrote entitled The Familial Context of Induced Abortion, Chapter 5?

A Yes, uh-huh.

Q In referring to page 125 of that article, would this quote accurately reflect your views: "Abortion shreds the **[2315]** soul of humanity and the fabric of relationships. It exists for women and yet it is against women, men and children. Like an anesthesia abortion comfortably numbs all from experiencing the burden of pregnancy. Abortion has become a social eraser, individually, quickly and secretly, eliminating all traces of a problem that is pregnancy and yet traces always remain. Within the depths of humankind the indelible marks of violation appear."?

A Yes.

Q Based on that view of yours, I take it that you would never believe that family problems might be a reason for an abortion?

A That is correct.

Q And that you never believe that mental, psychological, emotional problems would be a justification or basis for an abortion?

A That is correct.

Q And that you do not believe that incest would be the basis of an abortion?

A That is correct.

Q What about rape?

A The same.

Q Would you say that your views around abortion are well-known?

A Well, I don't know with respect to how many people read my **[2316]** articles. I don't have an answer to that. Am I asked to give talks, yes.

Q You spoke at the National Right to Life convention in June 1985, is that correct?

A If you will tell me where that was I can affirm whether or not I was there. I don't recall at this point.

Q Can you remember speaking at any National Right to Life conventions?

A Yes, I can.

Q And that convention received a fair amount of publicity, correct?

A I don't know which one that was. If you give me the location I could remember being in that city, but I have had a lot of speaking engagements.

Q Well, it would be a correct assumption that the National Convention received a fair amount of publicity?

A Well, that is speculative. Frequently the pro-life groups complain of not receiving sufficient publicity.

Q Would you say that your two clinics have a reputation, or clinic and branch office, have a reputation for being anti-abortion?

A No, I don't believe so.

Q Would you say that some of your clients are familiar with your views on abortion?

A Yes, I would agree with that statement.

[2317] Q Would it be a correct characterization of your views that you believe that there is a relationship between increased abortion or legal abortion in this society and the rise in child abuse?

A I think there is a correlation to the extent that it is causal. We don't know at this point. There are some studies that are suggesting that that is the case.

My own professional opinion is that I believe they are related.

Q And you did say, did you not, that if violence begats violence and abortion is the violent truncation of life, then to what extent does abortion actually enable child abuse, is that correct?

A That is correct.

Q And you have very strong feelings, do you not, about the fact that the laws in this society allow women to make the choice without the consent of the sexual partner or husband?

A I have an opinion on that.

Q And isn't it your opinion that sexual partners or husbands should be able to have a say in the decision whether a woman should have an abortion?

A To the extent that a sexual partner is involved in the conception of a pregnancy I believe it only logical, just and fair that that person ought to be involved in the decisionmaking regarding the product of that sexual encounter.

[2318] Q You said to the extent, don't all pregnancies start with a sexual partner?

A Well, not all. But let's—for our sake, yes, in terms of most problem pregnancies, unwanted pregnancies, they are the product of intercourse.

Q And isn't it true that because the man has been excluded from this decision there has been an increased inequality between the sexes and that the universal value of patriarchy has decreased and this inequality, "has the potential to breed displaced male aggression via child abuse, spousal abuse or self abuse."?

A No, that is not the direct quote and I disagree with the infusion there of patriarchy. I don't believe I ever used that word. If you would strike that out I would agree with that statement.

Q Except for the word patriarchy you agree with that statement?

A That phrase, patriarchy, yes.

Q Didn't you use that phrase patriarchy before in your testimony before Congress on the Human Life Amendment?

A I don't recall saying that word, I may have, but I don't recall it. My view is basically eliminating the male from the abortion decisionmaking does increase the inequality between the sexes.

Q And that you support, would you not, laws which would **[2319]** require forced consent or at least notification of sexual partners of women?

A I would support spousal notification laws regarding abortion.

Q What about sexual partners who are not married?

A Again I would support notification of sexual partners, yes.

Q But not consent?

A I don't have an opinion about consent, but certainly I would very strongly encourage, recommend, spousal or partner notification.

Q Would you also support such partner notification in the case of rape or incest?

A Yes, I would.

* * * * *

[2328] * * *

A If I am understanding your question you are saying when a minor does not want to contact her parents why don't I call up her parents and simply say, "Surprise, your daughter is pregnant."?

Q Yes.

A Because that is a violation of the confidentiality, the relationship, the privileged information I have with that minor.

Q And a minor's mental and emotional health can be as important as her medical health, can't it?

A Well, I am in the mental health field so I guess I am biased that way, yes.

Q And do you think that if minors thought you would be calling their parents, they would delay or maybe never seek you out for these kind of discussions about their pregnancy?

A Well, I don't have an opinion on that. I don't know.

Q But you do think it would be a violation of their confidentiality to—

A Yes, that I believe, that I know.

Q Is confidentiality important to you as a therapist?

A Yes, it is.

Q Why?

A Because it respects the right of privacy of the individual to communicate sensitive material to me in a relationship, in a context that is safe.

[2337] * * *

Q You have run into a situation with a battered wife and children?

A Uh-huh.

Q It is possible in such a situation of a daughter's pregnancy could cause death of either the wife or the daughter, isn't that true?

A I have never witnessed that.

Q But you do believe that could happen, do you not?

A It is a very, very remote possibility.

Q But you do believe that could happen?

A It is possible.

* * * * *

[2349] * * *

Q Now if a woman was married but separated from her husband and the woman had been battered and there was an order of protection against her husband and she was living and trying to raise her children herself, and you were trying to help the woman and her children, would you consider the batterer part of the family in the context of wanting him notified if the teenager is pregnant?

A Let's divide the answer into two parts.

Q Okay.

A First the batterer is very definitely a part of that family and second, with respect to any decision as grave as notification these exceptional cases, we must examine the context, and individual circumstances of both the teenager, her mother and prior problemsolving and whether or not there has been abuse to this adolescent. If there has been I don't see notification in the best interests of that adolescent.

* * * * *

[2373] * * *

Q But isn't it true that both of those eminent scholars who you respect and who are in your field oppose mandatory parental notification laws by the state?

A Most professionals in my field share their perceptions, namely that obligatory notification is not in the best interests of minors. I would respectfully disagree with that. It hasn't been my clinical experience.

* * * * *

BY MR. GALUS:

[2414] * * *

Q Have you, in the course of your counseling of adolescents, or psychotherapy involving adolescents, or family therapy involving families, a member of which is an adolescent, have you had occasion to deal with families where there was a custodial parent and a noncustodial parent?

A Yes, I have.

Q On those occasions have your ever had occasion to involve the noncustodial parent?

A Yes, I have.

Q And to what end and for what reason?

A Because that noncustodial parent is part of the family system and because of the nature of the problem pregnancy it is important and I encourage that that noncustodial parent be involved in the decisionmaking.

Q And has your encouragement been accepted in some cases?

A I would say in the majority of cases it has been accepted.

Q Based upon your experience in those cases, where your encouragement in that regard has been followed; namely encouragement to involve the noncustodial parent, have you had any ability to observe the results in terms of forming an **[2415]** opinion as to whether or not communication between the adolescent and the noncustodial parent has served any good?

A Yes, I have.

Q What is your opinion in that regard?

A Time and time again I have seen the relationship improve between this young woman, the teenager, and her noncustodial parent where a relationship was strained because the trust, the faith, the love was there, the sharing was beneficial in most instances.

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TRIAL TESTIMONY EXCERPTS OF MARCUS KJELSBERG, HEAD OF BIOMETRY DIVISION OF SCHOOL OF PUBLIC HEALTH AT UNIVERSITY OF MINNESOTA

[DIRECT BY MR. ACKERBERG]

[2421] * * *

Q Dr. Kjelsberg, do you have an opinion as to what weight can be attached to the data in Exhibit 27 in hypothesising whether or not the statute has affected the abortion rates for minors, for Minnesota resident minors?

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[2423] * * *

THE COURT: And I will let the witness give his opinion as to the statistical significance of these figures.

MS. BENSHOOF: The statistical significance of figures has nothing to do with the law.

THE COURT: Well, vis-a-vis the law, if he has an opinion as to that effect, I am going to let him answer. You may answer.

THE WITNESS: All right. I might say statistical significance has a very technical meaning in our profession. I will take the general meaning here and say that the figures given there, that minus 25 percent and the minus 11 percent are certainly consistent with a hypothesis that the law has an effect on the abortion rate; but I would consider that as a hypothesis and very speculative.

BY MR. ACKERBERG:

Q Why would you consider it speculative?

A Well, these are figures that I consider to be pretty much **[2424]** in isolation. They are—one would like to—and one would like to have data in order to make a case for the law having an effect to see that these data are supported when one looks at trends over time, when one compares different geographic areas, you would like to look, I think, at the age specificity, that is to look and see what the trends over time would be by single years of age to see whether or not—what the patterns would be over time.

To me, based on my experience, is that it is very, very hazardous to pick an event in time as an explanation for some alteration in vital statistic trends because they are the result of very, very complex social phenomenon.

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TRIAL TESTIMONY EXCERPTS OF DR. ARTHUR HOROWITZ, PHYSICIAN AT MEADOWBROOK WOMEN'S CLINIC

[CROSS BY MR. GALUS]

[2499] • • •

Q From time to time do you know whether or not women coming for abortion services sometimes ask for an appointment a week or a week and a half later?

A Yes.

Q Okay. To your knowledge does Meadowbrook have a policy of dissuading those women for setting an appointment a week or a week and a half later?

A Only inasmuch as the gestational ages involved with the—if the woman knows when her last period was and what her gestational age is, and if she would not be unduly delayed or placed into more jeopardy, significantly more jeopardy; for instance if she went from the first trimester into the second trimester by delaying for a prolonged period of time, we would suggest that she come in sooner.

Q Assume a woman asking for abortion services from Meadowbrook in the first trimester of her pregnancy, okay, and assuming further the woman says, well, I would like to

come in a week and a half later, and assume further that that is still within the first trimester and there is no apparent compelling circumstances or particular medical problems, Meadowbrook doesn't try to talk that woman out of that date, does it?

A We probably would not, but this is a very hypothetical situation because most of our patients want to get in as fast **[2500]** as possible and they might have a preference, say, for a Monday or a Friday or something like that. It would be somewhat more unusual for them to request, "I would like to come in in two or three weeks."

Q My question was a week or within a week and a half. Does that never occur?

A I am sure it does occur.

Q How about a request for an appointment five days later, does that occur?

A I am sure that occurs.

Q Under those circumstances it is not a matter of Meadowbrook's policy to urge the woman to come in earlier, correct?

A It would not be, again within the limitation I set forth.

Q Again assuming that the date she requested still puts her within the first trimester?

A Yes.

• • • • •

[2510] • • •

Q I would like to now, if I may, focus your attention on the first trimester and the subject of risks of abortion in the first trimester.

Isn't it true that it is your expert medical opinion that there is probably not a very much greater degree of risk from week to week within the first trimester?

A The risk in the first trimester is relatively small and although it does increase from week to week within the first trimester, it isn't really that great.

Q Isn't it true that the degree of risk from week to week within the first trimester does not vary, does not—probably does not change very much?

A I think it does change but again it is—we are dealing with relatively small increases, incremental risks.

Q And when did you form that opinion?

A Again I can't really tell you.

Q Prior to 1984?

A Possibly—probably.

Q Doctor, turn your attention, if you would, to page 29 of your deposition, starting at line 13.

Do you recall being asked the following questions by me and giving the following answers:

"QUESTION: Doctor, I believe you testified earlier in this deposition that generally speaking the greater **[2511]** the gestational age the higher degree of risk there is associated with the abortion?

"ANSWER: Yes, that is on a trimester-to-trimester basis.

"QUESTION: In other words, increased risks can be seen in the second trimester as opposed to the first trimester?

"ANSWER: As opposed to the first trimester and, in fact, it may that there is an increased risk with progressive gestational ages within the second trimester, but I am not sure if this has been exhaustively analyzed."

Then there is a question and answer I would like to skip, but I would like you to turn your attention to line 28.

Do you recall being asked the following questions and giving the following answers:

"QUESTION: The evidence, at least to your mind, is unclear whether the degree of risk varies within the second trimester?

"ANSWER: Yes. I think it may well be as the gestational age progresses within the second trimester risk may increase.

"QUESTION: In the first trimester from week to week within the first trimester is there a greater degree of risk?

"ANSWER: Probably not very much."

Do you recall giving those answers to those questions?

[2512] MR. PENTELOVITCH: I will make the objection this is improper impeachment because it is consistent with his testimony, if he is offering it as deposition testimony prior—

THE COURT: It is not impeachment, a deposition of a witness, of a party, can be used for any purpose.

MR. PENTELOVITCH: I agree with that.

THE COURT: It is in.

BY MR. GALUS:

Q And you reviewed this deposition carefully, didn't you?

A Yes.

* * * * *

TRIAL TESTIMONY EXCERPTS OF HENRY DAVID, DIRECTOR OF TRANSNATIONAL FAMILY RESEARCH INSTITUTE

[DIRECT BY MS. BENSHOOF]

[CROSS BY MR. GALUS]

[2531] * * *

Q Are there any studies in the United States comparing only adolescents who give birth, or who have abortions, in a controlled study, for example in one particular hospital?

A Well, there was a study done in the State of Hawaii which is the only study which comes close to that and that was a study done by Dr. Patricia Steinhoff (ph) from the University of Hawaii, and it was published very recently. I have an advance **[2532]** copy of the paper and they found, they checked their records for the years 1978, 1980, and found 313 abortion cases and 393 controls—by controls being women who delivered.

Q These are only adolescents?

A Yes. Well, they are young women, which means they may go up to age 24. I will be glad to mention some of the conclusions if you wish.

Q Yes, please.

A I will read: "The data provides striking evidence that women who utilized abortions were able to realize their family goals. They avoided subsequent unwanted pregnancies, subsequent births were overwhelmingly intended and wanted, and occurred in a positive emotional atmosphere. Among the very young women"—this would be women 15 to 17—"the use of induced abortions leads to postponement of the first birth well beyond the second birth of the women in the control group." In other words, those women who delivered had a second child fairly rapidly after the first; whereas the woman who had the abortion was able to delay it longer. And it raised the social, educational, and economic level of the household and the subsequent family.

* * * * *

[2533] * * *

Q Has the World Health Organization, based on international studies, issued any statement on the sequelae of abortions?

A Yes. In 1978 there was-an expert committee on induced abortions covering all ages, and from which I take this quote: "There is now a substantial body of data reported from many countries, after careful and objective follow-up, suggesting frequent psychological benefit and low incidence of adverse psychological sequelae."

Q And that was reported out by the committee appointed by the World Health Organization?

A And endorsed by the World Health Organization in publishing the report.

Q And that included people on the committee from every—other countries?

A No, if we had that we would have a committee of 158 people. I would guess that the committee was about 12 experts from around the world.

Q There has been testimony in this case by a—not a psychologist, a family relations expert, that adolescents are more at risk for adverse psychological sequelae than adults.

[2534] Could you comment on that observation?

A Yes. I am not aware of any scientific study which compared sequelae of abortion to sequelae of birth coming to such a conclusion. There has been no scientific follow-up study. There are many case histories, but there are no scientific follow-ups and our Danish study would indicate just the opposite. The women under age 20 had the lowest rate of admission to psychiatric hospitals compared to all other age women. The highest rate of admission to psychiatric hospitals after abortion were in women 30 to 34 years old; and among delivering women 35 to 49 years old.

Q So you would believe not only in your expert opinion but based on studies, that that observation is incorrect?

A Yes. I would go back to a study published by the National Academy of Sciences in the United States reported in the New England Journal of Medicine, June 1978, a study to which I was a consultant, and it was concluded that: "Feelings of guilt, regret, or loss, elicited by legal abortion in some

women, are generally temporary and appear to be outweighed by positive life changes and feelings of relief".

Nothing has happened in the scientific world since 1978 that would make me change that opinion.

* * * * *

[2544] * * *

A I have learned over the years that it is extremely important to respect the confidentiality of the adolescent. I have also learned that we must look at the adolescent as the adolescent perceives her or his world. They don't live always in our world. The world that we experienced as adolescents is different from the real world today and if a youngster for reasons of his or her own does not want to communicate, whether there are any factual reasons for not communicating, whether or not the youngster misperceives the opinion of his or her parent, whatever, I think we need to respect the right to confidentiality of the adolescent. And, I am not at all convinced that forced notification will do anything to alleviate that situation.

Rather my own clinical experience suggests that it will create far more stress because not only is the adolescent made uncomfortable by something happening that he or she did not wish [2545] to happen, but the parents are confronted by a situation with which they are extremely uncomfortable, and to expect parents to behave as they do in novels or in our best hopes and aspirations for ideal parent-child relationships simply does not square with the real feelings of real people and the real expressions of real emotions in the real world.

* * * * *

[2546] * * *

Q Do you have an opinion based on your original research and your extensive experience with others in your field, whether or not forced notification would increase or decrease a pregnant adolescent's emotional well being at the time of the abortion decision and the potential for any adverse psychological sequelae from abortion?

A It is extremely difficult to answer that because there is no scientific evidence. If somebody were to engage in a study comparing that, I wonder whether it would be worth the risk taken. It is not the kind of study which from an ethical point of view I would want to see authorized, because it means an invasion of

[2547] the confidentiality of the adolescent, it is a lack of respect for the adolescent as a person, and if that adolescent feels that all of these years his or her relationship with their parents was such that at this point they don't want the parents to know, I think it should be accepted, the adolescent's statement.

If the state wants to do such a study, of course that is possible, but I think the risk of creating havoc with adolescents is such that I, if I were to be on the ethical practices committee of an institution, I would not wish to see such a study done.

BY MS. BENSHOOF:

Q Do you believe that forced notification could increase a pregnant adolescent's emotional upheaval at the time of the abortion decision?

A I am going to hedge my answer because there is no scientific evidence one way or the other there, but as a psychologist who has seen a good many adolescents and knows adolescents I think fairly well, I would say the risk far exceeds the likely benefits.

* * * * *

[2578] * * *

BY MR. GALUS:

A Dr. Baird is a physician from Scotland.

Q Okay. And, speaking of your Danish Study Baird tells you there, does he not, that this is an impressive study but the United States has a different culture and social background to Denmark?

A That is what he said.

Q You responded Denmark has long been the leading indicator of social change, observers believe Denmark is ten years ahead of the United States. If so, problems of guilt surrounding abortion and measurable psychiatric morbidity may be expected to decline in the United States?

A That is what I said.

Q Does that continue to be your view?

A That is a hope and expectation, yes.

Q Is it implicit also in that view that as of the present time adolescents in the United States are more at risk for adverse psychological sequelae than adolescents in Denmark?

A Yes.

Q And will continue to be so at least for a period of ten years in your view?

A I can't predict, but it is possible.

* * * * *

[2584] * * *

Q Do you believe—well, based upon your education, training and experience, clinical experience and academic and scholarly research, do you believe that generally speaking adolescents find an abortion a more stressful situation than adult women?

A Depending on their ages. If you are talking about women under 16, they are likely to find it more stressful than those who are older and certainly more stressful than those who are married at 18 and 19 years.

Q Would you make that same generalization with respect to women 17 and under?

A It depends on their family situation, their marital situation and such.

Q The stress encountered by a particular adolescent will, in that particular case, depend upon a lot of variables?

A Correct.

Q You have generalized however, have you not, at least insofar as the group 16 and under, that group of women seeking an abortion will be in a more stressful situation than older women?

A It is very likely, yes.

Q Is that your opinion?

A Yes.

Q Do you have that same opinion with respect to the comparison—[2585] comparing the group of women 17 and under to older women?

A It depends on the individual concerned and on the family situation in which they find themselves.

* * * * *

PLAINTIFFS' EXHIBIT NO. 10

[LETTERHEAD OF HENNEPIN COUNTY]

DATE: April 4, 1984

TO: Judge Oleisky

FROM: Susanne Smith

SUBJECT: Parental Notification Calendar: Statistical Update

I. *CASE VOLUME*

August - December 1981	191
January - December 1982	474
January - December 1983	454
January - March 1984	118
TOTAL:	1237

II. *HEARING DAYS/FREQUENCY*

		# of days on which cases were heard
1981	(191 cases)	74
1982	(474 cases)	169
1983	(454 cases)	143
	TOTAL:	386

Average number of cases per hearing day: 2.9

III. *PETITIONER'S AGE*

	1981	1982	1983	Total	/ %
Age 13	0	3	1	4	/ (.003%)
Age 14	5	9	3	17	/ 01%
Age 15	17	52	45	114	/ 10%
Age 16	67	157	156	380	/ 34%
Age 17	102	253	249	604	/ 55%

IV. *PETITIONER'S RESIDENCE*

	Hennepin County Resident	Non-Hennepin Resident
1981 (191 cases)	90	101
1982 (474 cases)	231	243
1983 (454 cases)	198	256
TOTALS	519 / 46%	600 / 54%

PLAINTIFFS' EXHIBIT 21
(ALL)

LETTER FROM GEORGE O. PETERSON, JUDGE OF
RAMSEY COUNTY JUVENILE COURT,
TO REPRESENTATIVE KATHLEEN VELLENGA

RAMSEY COUNTY
JUVENILE COURT

GEORGE O. PETERSEN
JUDGE

December 6, 1982

Representative Kathleen Vellenga
Minnesota House of Representatives
886 State Office Building
St. Paul, Minnesota 55155

Dear Representative Vellenga:

I have now completed the data gathering and computations you requested on September 20 and to which I referred on September 27.

From August 1, 1981 through November 30, 1982, our Court has conducted 258 abortion-consent hearings.

In 80 of those cases, the parents of the girl were divorced. In 35 of those 80 cases, the girl discussed her abortion with her custodial parent but did not wish to notify her non-custodial parent of her desire to have an abortion.

In 20 of the 258 cases, the girl lived with both parents but wished to notify only one of them of her desire to have an abortion.

In another 48 of the 258 cases, the girl discussed the proposed abortion with an adult relative but wished not to notify either parent.

In many of the remaining cases, the girl had sought out the advice and counsel of other adults before going to professional

counselors. Those adults include teachers, employers, parents of friends, parents of the potential father, ministers, priests and neighbors.

In 8 cases girls were seeking their second abortion.

Two girls already had a child at home.

Fourteen girls were living independently or were in foster homes.

During the first full year the statute was in effect from August 1, 1981 to July 31, 1982, we held 167 hearings, an average of 14 per month.

Since August 1, 1982, we have held 91 hearings, an average of 23 per month.

There were an additional 15 girls who called to schedule hearings but then did not appear.

By age, the girls we have seen are classified as follows:

Age	*Number*	*Percentage*
13	2	1%
14	11	4
15	26	10
16	86	33
17	133	52
	258	100%

The reasons they give for not wanting to tell one or both parents about the abortion are as follows:

Reason	*No.*	*Pct.*
Fear of damaging parent-child relationship:	76	29%
Parents opposed to abortion-have said would kick the girl out:	54	21
Parents opposed to abortion-would force the girl to keep the child:	14	5

Reason	*No.*	*Pct.*
Marital, financial or health problems already in home-this would aggravate:	47	18
Absent parent or parents not part of their lives and have no right to know:	35	14
Prior physical abuse feared to reoccur:	11	4
Fear of prior expressed threats:	10	4
One or both parents alcoholic:	9	4
Raped:	2	1
Totals:	258	100%

As you might imagine, the reasons girls express for wanting an abortion are many and varied. The desire to continue one's education and have a career is expressed in over 95% of the cases. Regardless of hopes and plans for the future, some feel they are simply too young to have a child.

The overwhelming majority of the girls we see are above-average students, have part-time jobs, are active in school and church activities, volunteer in the community, and have responsibilities at home.

All the girls are aware of their options and have considered the alternatives to abortion: single parenting, marriage and adoption.

I hope this information will be helpful in your deliberations. Please do not hesitate to call if I can be of futher assistance. I will always respond as soon as I am able.

Respectfully,

/s/ GEORGE O. PETERSEN
George O. Petersen
Judge of Ramsey County
Juvenile Court

GOP:ceb

PLAINTIFFS' EXHIBIT NO. 25

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA
THIRD DIVISION

Court File No. 3-81 Civ. 538

JANE HODGSON, M.D., et al.,

Plaintiffs,

v.

THE STATE OF MINNESOTA, et al.,

Defendants.

DEFENDANTS' RESPONSE TO PLAINTIFFS' [SECOND] REQUEST FOR ADMISSION

Defendants object to Plaintiffs' [Second] Request for Admission as ambiguous by failing to specify the time-frame applicable to requested admissions and failing to define "sit." The following responses are as of December 1983 and presume that "sit" refers to normal judicial work schedules without regard to (a) absences due to illness, vacation, judicial conferences, continuing legal education seminars and weather emergencies, (b) schedule departures required by caseload demands and emergencies and (c) the availability of judges outside normal work schedules.

Without waiving objection and with the noted qualifications, for the purpose of the above-captioned action only, defendants respond to Plaintiffs' [Second] Request for Admissions as follows:

STATEMENT 1. No judge sits in Roseau County on Wednesdays, Thursday mornings, and some Friday afternoons.

RESPONSE: Admitted as qualified.

STATEMENT 2. No judge sits in Clearwater County on Tuesdays, Wednesdays, or Fridays.

RESPONSE: Admitted as qualified.

STATEMENT 3. Judges Spellacy and Spooner sit in Itasca County each weekday from 8:30 a.m. to 5 p.m.

RESPONSE: Admitted as qualified insofar as the statement applies to Judge Spooner; denied insofar as the statement applies to Judge Spellacy.

STATEMENT 4. No judge sits in Cook County except for the first and third Wednesday of each month and during special term in March and October.

RESPONSE: Admitted as qualified.

STATEMENT 5. A judge sits in Virginia and Hibbing in St. Louis County each weekday from 9 a.m. to 4:30 p.m.

RESPONSE: Admitted as qualified.

STATEMENT 6. A judge sits in Goodhue County each weekday during regular business hours.

RESPONSE: Admitted as qualified.

STATEMENT 7. A county judge sits in Wabash [Wabasha] County Monday-Friday, and District Court Judge Lawrence Collins sits about once a month.

RESPONSE: Admitted as qualified.

STATEMENT 8. County Judge John Fahey sits in Carver County Monday-Friday during regular business hours.

RESPONSE: Admitted as qualified.

STATEMENT 9. County Judges Wolf and Johnson sit in Rice County Monday-Friday from 8 a.m. to 4:30 p.m.

RESPONSE: Admitted as qualified insofar as Judges Wolf and Johnson sit to 4:30 p.m.; denied insofar as Judges Wolf and Johnson sit from 8 a.m.

STATEMENT 10. Judges sit in Dakota County Monday-Friday from 8:30 a.m. to 4:30 p.m.

RESPONSE: Admitted as qualified.

STATEMENT 11. Judges sit in Freeborn County Monday-Friday and are almost always available during regular business hours.

RESPONSE: Admitted as qualified.

STATEMENT 12. No judge sits in Hubbard County on Wednesday or Friday.

RESPONSE: Admitted as qualified.

STATEMENT 13. No judge sits in Watonwan County at least one day a week.

RESPONSE: Denied.

STATEMENT 14. Judge Christianson sits in Pipestone County an average of four days per week; and when he is not present, another judge is usually available.

RESPONSE: Admitted as qualified.

STATEMENT 15. Judge Lasley sits in Jackson County Monday-Friday during regular business hours.

RESPONSE: Admitted as qualified.

STATEMENT 16. A county judge sits in Cottonwood County Monday-Friday during regular business hours.

RESPONSE: Admitted as qualified.

STATEMENT 17. A judge sits in Redwood County Monday-Friday from 9 a.m. to 5 p.m.

RESPONSE: Admitted as qualified.

STATEMENT 18. No judge sits in Murray County on Friday mornings, and Judge Holt occasionally travels to other counties.

RESPONSE: Admitted as qualified.

STATEMENT 19. A county judge generally sits in Nobles County Monday-Friday, but there are days when no judge is available.

RESPONSE: Denied.

STATEMENT 20. Judge Crippen is scheduled to sit in Rock County on Wednesdays, and Judge Christensen sits every Thursday morning. There are often several days during the week when no judge is sitting.

RESPONSE: Admitted as qualified.

STATEMENT 21. Judge Marquis Wood sits in Chippewa County five days a week, from 9 a.m. to 5 p.m.

RESPONSE: Denied.

STATEMENT 22. Judge Jim Zeug sits in Renville County about four days a week.

RESPONSE: Admitted as qualified.

STATEMENT 23. Judge Collins or another county judge sits most of the time in Stevens County.

RESPONSE: This request for admission is objected to as ambiguous and not susceptible to admission or denial.

STATEMENT 24. Both a district court judge and a county court judge sit in Anoka County every weekday during regular business hours. The scheduled judges are on call for emergencies 24 hours a day, seven days a week, so a judge is always available.

RESPONSE: The first sentence is admitted as qualified, except that five district court and five county court judges sit in Anoka County every weekday during regular business hours. The second sentence is admitted.

STATEMENT 25. A county court judge sits in Pine County each weekday from 8 a.m. to 5 p.m. However, when the judge is on vacation or attending judicial conferences, no judge is available in Pine County.

RESPONSE: The first sentence is admitted as qualified. The second sentence is denied.

STATEMENT 26. No judge sits in Sherburne County on Tuesdays and Thursdays, unless a traveling district judge happens to be in town.

RESPONSE: Admitted as qualified.

Dated: December 23, 1983.

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota

By: /s/ PETER M. ACKERBERG
Peter M. Ackerberg
Special Assistant
Attorney General

515 Transportation Building
St. Paul, Minnesota 55155
Telephone: (612) 296-8954

PLAINTIFFS' EXHIBIT NO. 27

Table 1

Abortions and Abortion Rates, Minnesota Residents Under Age 20, 1980-1982

	1980	*1981*	*1982*	*Percent change, 1980-1982*
Number of Abortions				
Women under age 18	2,327	1,820	1,564	-32.8%
Women aged 18-19	3,380	3,064	2,799	-17.2%
Abortions per 1,000 Women				
Women under age 18*	20.3	16.7	15.2	-25.1%
Women aged 18-19	40.6	38.4	36.0	-11.3%

* Denominator is women aged 15-17

Sources

Number of abortions: Minnesota Center for Health Statistics, Minnesota Department of Health, *Reported Induced Abortions 1980, . . . 1981,* and *. . . 1982.*

Number of Women: Minnesota Department of Health estimates of women aged 15-19 for each year, divided into 15-17 and 18-19 according to the proportions in population estimates created by interpolation between the 1980 census figures and 1985 projections provided by Market Statistics, adjusted to national totals estimated by the Census Bureau.

PLAINTIFFS' EXHIBIT NO. 28

Table 2

Birth Rates, Women Aged 15-17 and 18-19, Residents of Minnesota and Four Comparison States Averaged, 1981 and 1982

	1981	*1982*	*Percent change, 1981-1982*
Minnesota			
Age 15-17	17.3	16.7	-3.5
Age 18-19	59.4	55.8	-6.1
*Four States (Average)**			
Age 15-17	22.9	21.7	-5.2
Age 18-19	70.6	67.3	-4.7

* Iowa, Nebraska, South Dakota, Wisconsin

Sources

Birth data: National Center for Health Statistics, U.S. Department of Health and Human Services

Population data: Four comparison states, interpolation between 1980 census figures and 1985 projections provided by Market Statistics, adjusted to national totals estimated by the Census Bureau; Minnesota, The Minnesota Health Department totals for ages 15-19, divided into 15-17 and 18-19 in proportion to the population estimates as described above.

PLAINTIFFS' EXHIBIT NO. 41

EXCERPTS FROM DEFENDANTS' ANSWERS TO PLAINTIFFS' FIRST SET OF INTERROGATORIES

INTERROGATORY NO. 20: State the numher of county and district court judges who sit in the courthouse in each county; specify separately:

a. Days of the week when a judge is sitting at the courthouse;

b. Hours of the day when a judge is sitting at the courthouse:

c. Days or times when no judge is sitting at the courthouse:

d. Where a litigant or attorney would have to travel for a hearing on those days or times when no judge is sitting at the courthouse.

ANSWER:

First Judicial District. Carver (2), Dakota (5), Goodhue (1), LeSueur (1), McLeod (1), Scott (2), Sibley (1).

a. Monday-Friday.

b. 8:30 A.M. to 4:30 P.M. in Carver County and 8:00 A.M. to 4:30 P.M. in all other counties.

c.-d. There are rare isolated dates when there may be no judges "sitting" in a given county. The five district court judges travel irregularly through the seven counties. County court judges rarely travel outside their counties. On those occasions litigants or attorneys would travel to the nearest other county.

Second Judicial District. Ramsey County has one judge and three referees presiding over its Juvenile Court.

a. Monday-Friday.

b. 8:30 A.M. to 4:30 P.M.

c.-d. Absences occur only due to a judge's or referee's illness or vacation. Temporary assignments are made to fill such vacancies.

Third Judicial District. Each of the 11 counties is served by one or more county court judges. There are six district court judges.

a. Monday-Friday.

b. One hour every day by county court judge and 1½ days a month by district court judge in Dodge County. In addition, a county court judge serves Dodge County all day on Wednesday and Thursday every other week. From 8:00 A.M. to 4:30 P.M. in Fillmore and Waseca Counties. From 8:00 A.M. to 4:00 P.M. in Wabasha County. In all other counties the schedule is 8:00 A.M. to 5:00 P.M.

c. See answer b. above.

d. On those rare occasions in Dodge County, the litigant would travel to the nearest adjacent county.

Fourth Judicial District. There are 17 county court judges and 20 district court judges in Hennepin County.

a. Monday-Friday.

b. 8:00 A.M. to 4:30 P.M.

c. None (except non-business hours).

d. Not applicable.

Fifth Judicial District. There are sixteen county court judges who sit regularly in the fifteen counties, which are divided into five sub-districts. There are seven district court judges who rotate regularly among the fifteen counties.

a. Monday-Friday.

b. From 8:00 A.M. to 5:00 P.M. in Blue Earth, Brown, Cottonwood, Lyon, Nobles, and Rock Counties. From 8:30 A.M. to 5:00 P.M. in Faribault, Martin,

Murray and Watonwan Counties. Martin County also has a county court judge sitting from 7:00 to 9:00 P.M. every Wednesday. From 8:30 A.M. to 4:30 P.M in Jackson, Lincoln, Pipestone, and Redwood Counties. From 9:00 A.M. to 5:00 P.M. in Nicollet County.

c. Not applicable.

d. Not applicable.

Sixth Judicial District. There are six district court judges, eight county court judges and six judicial officers serving the four counties in this district. Their schedules vary.

a. Monday-Friday in Carlton and St. Louis (Duluth, Hibbing and Virginia) Counties. Schedules in Cook and Lake Counties vary.

b. Typically 8:30 A.M. to 4:30 P.M. in all locations.

c. Seldom.

d. Nearest neighboring count or county branch (e.g., Ely, Hibbing or Virginia in St. Louis County).

Seventh Judicial District. There are four district court judges who preside over the ten counties. In addition there is one county court judge in every county except Clay and Otter Tail (which have two each) and Stearns (which has four).

a. Monday-Friday for every county except Mille Lacs County, which has a judge every Monday, Wednesday and Friday.

b. 8:00 A.M. to 4:30 P.M. in all counties.

c. See answer a. above.

d. Nearest other county (would only occur in Mill Lacs County).

Eighth Judicial District. There are three district court judges and eleven county court judges serving the thirteen counties on a shared or rotating schedule.

a. Monday-Friday in all counties but Big Stone (Tuesday, Wednesday, Friday), Grant (Tuesday, Thursday), Renville (Monday, Tuesday, Wednesday, Friday), and Traverse (Monday, Thursday) Counties.

b. 8:00 A.M. to 4:30 P.M.

c. See answer a. above.

d. On those days when a judge is not available in some county, he usually is available in the evening. In cases where a judge is unavailable for a 24-hour period, the litigant would travel to the nearest other county.

Ninth Judicial District. There are six district court judges and fourteen county court judges serving the seventeen counties on a shared and rotating basis.

a. Monday-Friday in all counties except Aitkin (almost every day), Clearwater (Monday, Thursday), Kittson (Wednesday, Thursday), Koochiching (almost every day), Lake-o-Woods (Thursday), Mahnomen (Tuesday, Thursday), Marshall (every other day), Norman (Monday, Thursday, Friday), Pennington (Tuesday, Wednesday, Thursday, Friday), Red Lake (Monday), and Roseau (Monday, Tuesday, Friday).

b. From 9:00 A.M. to 4:00 P.M. in Aitkin, Marshall, Pennington, Polk, Red Lake, and Roseau Counties. From 8:00 A.M. to 4:30 P.M. in Beltrami County. From 8:30 A.M. to 4:00 P.M. in Cass and Crow Wing Counties. From 9:00 A.M. to 3:00 P.M. in Clearwater, Hubbard, Kittson, Koochiching, Lake-o-Woods, Mahnomen, and Norman Counties.

c. See answer a. above.

d. The nearest adjacent county.

Tenth Judicial District. Every one of the eight counties is served by one county court judge except Anoka County, which has five, and Washington County, which has three. In addition

there are six district court judges who serve these counties on a shared and rotating basis.

a. Monday-Friday for all counties except Kanabec County, which has a county court judge every Tuesday and Thursday and a district court judge on other days each week irregularly. In addition, Sherburne County has a county court judge every Monday, Wednesday and Friday and a district court judge on other irregular days. Finally, Wright County has a county court judge every Tuesday and Thursday and a district court judge on other irregular days.

b. From 8:00 A.M. to 5:00 P.M. in Anoka County. From 8:00 A.M. to 4:30 P.M. in Chisago, Isanti, Pine, Washington and Wright Counties. From 8:00 A.M. to 4:30 P.M. in Kanabec County. From 8:30 A.M. to 5:00 P.M. in Sherburne County.

c. See answer a. above.

d. Nearest adjacent county.

INTERROGATORY NO. 21: State whether any of the judges identified in the preceding interrogatory preside over their courts on a part-time basis, and whether they change courts. If answered in the affirmative, indicate the schedules of those judges.

ANSWER:

First Judicial District. All are full-time. The five district court judges travel on an irregular basis throughout the district. Occasionally, county court judges are assigned to other counties temporarily to fill needs as they arise.

Second Judicial District. The juvenile court judge and referees are all full-time and do not change courts.

Third Judicial District. Every county has at least one full-time county court judge. The full-time district court judges usually are assigned to the following schedule: Dodge County, 1½ days per month; Fillmore County, 1½ days per month; Freeborn

County, 5 days per week; Houston County, 3 days per week; Mower County, 5 days per week; Olmsted County, 5 days per week; Rice County, 4½ days per week; Steel County, 3 days per month; Wabasha County, 3 days per month; Waseca County, 3 days per month; Winona County, 4 days per week.

Fourth Judicial District. All are full-time and do not change courts.

Fifth Judicial District. See answer to Interrogatory No. 20. In addition, a judge is assigned from 9:00 A.M. to 5:00 P.M. the first and third Wednesdays of each month in the Springfield and Sleepy Branches of Brown County Court. County court judges from Nobles and Pipestone Counties also occasionally share responsibilities in Rock County as the calendar dictates. On an irregular basis the sharing configuration of counties among county court judges is as follows: district A (Lincoln, Lyon and Redwood), district B (Brown, Cottonwood, Nicollet and Watonwan), district C (Blue Earth), district D (Faribault, Jackson and Martin), and district E (Murray, Nobles, Pipestone and Pock).

Sixth Judicial District. There is not a fixed schedule. All county and district court judges may sit in any court or branch thereof. All are full-time.

Seventh Judicial District. The schedule of rotation varies and has not been finalized for 1982. Sample copies of the 1981 schedule are available upon request. The eight counties are divided into the following three county court groups for rotation purposes: Becker, Clay and Otter Tail; Benton and Stearns; and Douglas, Todd and Wadena.

Eighth Judicial District. See answer to Interrogatory No. 20. All judges are full-time.

Ninth Judicial District. See answer to Interrogatory No. 20. There are no set schedules; rotations depend upon needs of calendars in each county. All judges are full-time.

Tenth Judicial District. Same as answer for Ninth Judicial District. In addition, the Minnesota Supreme Court was admin-

istratively assigned one county court judge from Mills Lacs in the Seventh Judicial District to serve Kanabec County as needed (presently about two days each week).

* * * * *

INTERROGATORY NO. 24: State which courts in Minnesota have set up procedures designed to process the abortion petitions of Minnesota. Describe in detail such procedures and attach written copies of the same. Specify whether those courts of one county may hear petitions of residents of a different county.

ANSWER: All courts have adopted some procedures. Those of the Tenth Judicial District are not yet formalized beyond use of guidelines provided by the Minnesota Attorney General's office. See, Affidavits and exhibits of Karen L. Ives, dated Aug. 26, 1981; Michael D. Calvert, dated Aug. 26, 1981; and Gregory Date, dated Aug. 25, 1981. Those other courts which have put their procedures into written or printed form are attached as Exhibits E-I hereto; see Answer to Interrogatory 29, *infra*.

INTERROGATORY NO. 25: State which courts in Minnesota have set up procedures designed to process the abortion appeals of Minnesota. Describe in detail such procedures and attach written copies of the same. Specify whether those courts of one county may hear appeals of residents of a different county.

ANSWER: See answer to Interrogatory No. 24.

INTERROGATORY NO. 26: State the times for regularly scheduled abortion hearings within Hennepin, Ramsey, and St. Louis counties.

ANSWER:

1. *Hennepin County*. Based on the court's experience through December of 1981, it was determined that the demand usually necessitated scheduled hearings only four days each week. Thus, the hearings are

scheduled at 11:45 A.M. every Monday, Tuesday, Thursday and Friday. In emergencies, hearings may be held on Wednesday evenings or on weekends.

2. *Ramsey County*. Regularly scheduled hearings are at 4-6:00 P.M. every Monday and Wednesday. Other hearings are scheduled by appointment to accommodate work and school schedules.
3. *St. Louis County*. There is not a regular schedule. All hearings are set as needed and upon the request of the minor or her counsel.

INTERROGATORY NO. 27: Identify and describe the appropriate person by whom inquiries concerning abortion petitions and/or appeals are initially answered; include the name, address and telephone number of any such person(s).

ANSWER:

1. *Hennepin County*. Anyone at the Child protection Hotline (612-348-3552) in Minneapolis, or with the Public Defender's Office. Counsel and guardian ad litem are appointed without a prior court order. They then call the Clerk of Juvenile Court (348-6634) to schedule a hearing.
2. *Ramsey County*. Most initial contacts have been from a St. Paul abortion clinic where the minor has gone. They are referred to the Public Defender's office which has a 24-hour phone service (612-298-5797).
3. *St. Louis County*. Any one of three offices: Public Defender's office, 1726 London Road, Duluth, 218-728-4425; Midwest Health Center for Women, 611 Medical Arts Building, Duluth, 218-727-3352; St. Louis County Probate Court Clerk's Office, 301 Courthouse, Duluth, 218-723-3488.
4. *Anoka County*. Jean Stack, Anoka County Courthouse, Anoka, 612-421-4760 (Ext. 1355).

5. *Washington County.* Juvenile Section, Washington County Courthouse, Stillwater, 612-439-3220.
6. *All other counties.* Initial contacts are with clerks of respective county courts and/or public defender.

PLAINTIFFS' EXHIBIT NO. 56

MINNESOTA PROGRAM FOR BATTERED WOMEN, 1985 UPDATE

INTRODUCTION

This report is an update of the 1979 Report and the subsequent updates to the Legislature submitted by the Department of Corrections on the Program for Battered Women. The initial report described steps taken by the Department of Corrections to implement the Program for Battered Women; the next two reports detailed the expansion of the Program in the 1980-81 biennium and the maintenance of the Program in the 1982-83 biennium. This report will discuss current funding and new directions taken by the Program for Battered Women. More specifically, this report will:

—present the Minnesota Advisory Council on Battered Women and Department of Corrections recommendations for continuation of the Program.

—provide information on the 17 shelter programs,

—provide information on the 22 nonshelter service programs.

Based on the professional experience of the many individuals involved in providing services to battered women, it is believed that men assault their partners for two primary reasons. First, many men believe that they must maintain control of their partners which often includes the use of violence. This behavior most likely results from growing up in homes where violence is prevalent and where the children are not provided with alternative patterns to cope with basic human emotions such as anger and frustration. Second, there are few societal repercussions to the violent partner.

The public as well as professionals often assume that women must, to some degree, encourage their own battering by their behavior. However, it is now becoming generally recognized that if a man has not learned alternate ways of dealing with his

anger, he will most likely use violence against his partner regardless of her behavior. This is not to say that women do not participate in conflicts that occur in any relationship, it is to say that only in those relationships involving a person who uses violence to express anger will conflicts result in battering.

Data collected from law enforcement officers, human service providers, medical personnel and shelter programs in Minnesota indicate that:

—an estimated 187,115 incidents of assault on women by their partners have occurred in Minnesota since mandatory reporting began in 1978, an average of about 31,200 incidents a year,

—domestic violence has been reported in every county of the state,

—the majority of women who were assaulted were married to and living with their assailant at the time of the assault,

—women who were assalted range in age from 12 to 96 years.

A complete analysis of data collected from these sources is available in the Minnesota Department of Corrections, Program for Battered Women Data Summary Reports.

MINNESOTA PROGRAM FOR BATTERED WOMEN, 1985 UPDATE MN. DEPT. OF CORRECTIONS

The passage of the legislation for battered women in 1977 and the subsequent creation of the state Program in the Department of Corrections provided the incentive to initiate or expand local organizations for battered women. With the aid of the Advisory Council, the Program for Battered Women continues to support local programs through financial and technical assistance.

The Program for Battered Women and funded organizations also educate professionals on the problems and needs of battered women through workshops and speaking engagements.

As professionals have begun to examine their own interaction with abused women, they are joining with grassroots organizations to effect changes within the systems from which battered women seek help so that services may be more effectively delivered.

Finally, battered women's programs, through their educational effort, have reached thousands of men and women in violent relationships giving them the motivation to seek help for what was once considered a "family matter". These efforts have resulted in increasing numbers of women and men turning to the system for assistance.

The state of Minnesota has taken a lead in recognizing the devastating effects of battering on women and on the family structure. (See Appendix A for a list of resources available to battered women in Minnesota and Appendix B for maps showing the locations of funded programs.) Once a "hidden crime", battering has come to be recognized as perhaps the most frequently committed violent crime in the state. It is believed that children who grow up in violent homes are likely to become victims or abusers themselves as adults. Prisons, state hospitals, juvenile institutions and treatment centers are crowded with men and women who grew up with violence in their homes. Although to date this Program may have reached only a small percentage of those in violent homes, it continues to challenge society to accept the responsibility of openly confronting the problem of family violence.

PROGRAM IMPLEMENTATION

The following are the major steps taken by the Department of Corrections to implement the Program for Battered Women during the 1984-85 biennium:

—continuation of the Minnesota Advisory Council on Battered Women.

The role of the Council on Battered Women is to act as the advisory body to the Commissioner on issues pertaining to the implementation of legislative mandates relating to battering. The Council is a working committee that has actively participated in all phases of implementing legislation pertaining to battered women.

PLAINTIFFS' EXHIBIT NO. 57

Adolescent Abortion:

Psychological and Legal Issues

Gary B. Melton

University of Nebraska-Lincoln

Report of the Interdivisional Committee on Adolescent Abortion, American Psychological Association.

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Congress has amended Title X of the Public Health Service Act to require family planning clinics receiving federal funds to "encourage family participation."[50] The Reagan administration's interpretation of this language to require parental notice[51]—the "squeal rule"—stimulated a storm of protest, including 60,000 comments from individuals, 1,200 letters from organizations, thousands of form letters, and hundreds of petitions containing thousands of signatures. Two federal circuit courts ultimately enjoined enforcement of the rule, as inconsistent with Congress's intent to increase minors' access to family planning services.[52]

Summary. Although the Court is far from single-minded in its approach to adolescent abortion cases,[53] it is clear that the majority find ample basis for age-based regulation of abortion. The majority perceive pregnant minors to be likely to make poorly reasoned decisions, absent involvement by parents or other third parties (participants in the decision other than the minor and her physician). Moreover, the Court assumes great risk of severe and permanent emotional scars of the decision to abort, when the decision is made in adolescence. We turn now to an examination of the validity of the Court's assumptions.

Psychological Evidence

Vulnerability. In terms of medical risks, the Chief Justice's sanguine view of pregnancy carried to term and his fear about the dangers of abortion in adolescence are clearly misplaced. Teenagers are no more likely than adult women to suffer complications as a result of abortion. Moreover, the mortality rate from pregnancy *continuation* is five times higher for teenagers than the mortality rate associated with adolescent abortion—(Cates, 1981). This finding is consistent with research showing that women carrying unwanted pregnancies—often the case in adolescent pregnancies (Russo, this volume)—are at special risk for medical complications in pregnancy (Cates, 1982).

Research on psychological risks is less clear and less extensive. Research on the psychological effects of abortion has frequently been marked by substantial attrition in follow-up, inconsistency of definition, and other methodological flaws (Adler, 1976; David & Friedman, 1973; David, Rasmussen, & Holst, 1982). Although relatively recent studies have tended to be better designed and less obviously subject to investigator bias (Adler, 1979), there still are few studies which have isolated the effects of age on response to abortion (Adler & Dolcini, this volume).

Nonetheless, there is sufficient evidence to refute the Court's assumption that the effects of abortion on adolescents are "grave" and "markedly more severe" than the effects on adults (see generally Adler & Dolcini, this volume). Although it is undeniable that the decision whether to abort is stressful, it is also clear that the model response to abortion itself is relief (Adler & Dolcini, this volume; Olson, 1980; Osofsky, Osofsky, & Rajan, 1973). Although there is some evidence for relatively more negative effects on adolescents (e.g., Bracken, Hachamovitch, & Grossman, 1974), the magnitude of age differences is small, and reactions are generally mild. Although the somewhat more negative responses of adolescents may be related to developmental issues, the predominant factors seem to be ones related to adolescents' social situation rather than developmental differences per se (e.g., tendency to delay seeking an abortion; coercion by mother or others to have an abortion; see

Adler & Dolcini, this volume). Regardless, severe responses are very rare. In an analysis of health registry data in Denmark for 1975, David, Rasmussen, and Holst (1982) found only five admissions to psychiatric hospitals of females aged 19 or under who had had an abortion within the past three months, a rate of 11.4 psychiatric admissions per 10,000 abortions.

That abortion is frequently a relatively benign alternative for pregnant adolescents is unsurprising when one considers the social consequences of becoming a teenage parent, all of which carry their own psychological effects (see generally Marecek, this volume; Scott, 1984). Adolescent parenthood typically results in lower educational attainment than for peers of similar socioeconomic background and academic/vocational aspirations prior to the pregnancy (Card, 1977). Adolescent mothers also find their ultimate occupational attainment, income, and economic self-sufficiency (i.e., ability to stay off public assistance) to be lower than that achieved by peers who delayed childbearing (Card, 1977; Marecek, 1979). Not surprisingly, marriages resulting from adolescent pregnancies tend to be unstable, and females who begin childbearing at an early age ultimately have more children than peers who delay childbearing (see Marecek, this volume, for review).

Ultimately, unwanted children themselves may be the victims of restrictive abortion policies. Although findings are mixed and sparse, children born to adolescent mothers may be at increased risk for a variety of psychological problems, including poor intellectual and academic performance, low self-control, and passivity (Marecek, this volume). Most directly on point, a longitudinal study of children born to women denied an abortion in Czechoslovakia (David & Matejcek, 1981) has shown that, in their teen years, unwanted children experience a relatively high incidence of referrals for mental health services, relatively low educational attainment, and relatively high maternal emotional rejection (especially of boys). David and Matejcek concluded that, "[w]hile there is evidence in many individual cases of an eventual compensation for the original rejection on the part of the mother or both parents, the finding that group differences between the matched children are still apparent after 16-18 years of family life, and that these differ-

ences have actually widened, suggests that 'unwantedness' during early pregnancy constitutes a not negligible risk factor for the subsequent life of the child" (p. 34).

Incompetence. Just as there is no evidence for marked negative psychological effects of abortion in adolescence, there is no reason to believe that adolescents will be less competent in decision making about abortion than adult women. There is now a substantial literature showing that adolescents do not differ from adults in their ability to understand and reason about treatment alternatives (see, for reviews, Grisso & Vierling, 1978; Melton, 1981; Melton, Koocher, & Saks, 1983; Melton, 1984a, pp. 463-466; Weithorn, 1982; see also Weithorn & Campbell, 1982).

However, as the Supreme Court has noted,[54] there are major factors to be considered in making a decision about abortion other than the medical risks and benefits involved in terminating or carrying a pregnancy. The social and moral dimensions of the decision are sufficiently unusual and the importance of the problem sufficiently great that research is needed with a specific focus on age-related changes in competence to consent to abortion. At present, there is only one such study. In a comparison of minors and adults at three pregnancy clinics in California, Lewis (1980) found few age-related differences in knowledge of law or factors affecting the decision whether to abort, relinquish the baby, or keep the baby. Minors did not differ from adults in "the number of people consulted or expected to be consulted; the tendency to consult the boyfriend, the parents, or members of the peer group; the expectation that conflicting advice will be received from different sources; or the expectation that advice will favor continuation of pregnancy vs. abortion" (Lewis, 1980, p. 448). The major differences identified were ones which might be expected to follow logically from differences in minors' and adults' social status and economic situation. Minors were more likely than adults to perceive their decision as externally determined (e.g., the product of parental wishes), and they were less likely to expect to consult a professional about the decision (cf. Lewis, 1981).

If "maturity" in the abortion context means something other than the ability to understand and reason about factors relevant

to the decision, then determination of the typical level of maturity of pregnant adolescents will be more difficult and value-laden. As some commentators (e.g., Mnookin, 1985) have noted, conservatives may regard any minor who becomes pregnant as "immature," and liberals may perceive any unmarried pregnant teenager who seeks an abortion as demonstrating a "mature" response to the situation. Assuming, though, that maturity may refer to general psychological competence rather than specific competence, it is noteworthy that comparisons of personality functioning between adolescents who abort and those who carry to term generally show more adaptive, healthier functioning in the former group (Dixon, 1977; Falk, Gispert, & Baucom, 1981; Kane & Lachenbruch, 1973).

Family integrity. The Supreme Court has assumed that the involvement of parents in minors' decisions about abortions will usually be helpful. There is in fact evidence that the probability of a positive emotional response to abortion increases when adolescents feel supported by their parents in their right to make a decision and in the decision itself (Bracken, Hachamovitch, & Grossman, 1974; see Adler & Dolcini, this volume). Pregnant adolescents who decide to carry to term often find that they overestimate the negativity of their parents' reactions to their pregnancy (Furstenberg, 1976).

Even without legal requirements to do so, pregnant adolescents *do* often consult their parents, although commonly not until after discussions with male partners and girl friends. Among minors who carry to term, parents are commonly among the last confidants to be informed of the pregnancy (Allen, 1980). Similarly, in a sample of minors attending an abortion clinic in Minneapolis/Saint Paul, 37% informed their mothers, and 26% informed their fathers, but 71% had talked with their best girl friends about the pregnancy (Clary, 1982). In a Michigan sample of pregnant teenagers, few (14%) sought advice from parents when they first suspected that they were pregnant; most consulted with their male partner or girl friend (Rosen, 1980). Once pregnancy was confirmed, 57% involved their parents in the decision. The figures for adolescents who

decided to abort and those who decided to carry the pregnancy to term were similar.

Those minors who do consult their parents prior to an abortion tend to be those for whom parental support might be expected to be most important and who are most at risk for negative psychological effects of the procedure (Clary, 1982; Torres, Forrest, & Eisman, 1980). Mothers also seem to have greater influence when their daughters are experiencing substantial conflict about the decision (Rosen, 1980).

In Clary's (1982) sample, the most common reason for not informing mothers about the pregnancy and impending abortion was concern for the parent's feelings (i.e., disappointment, embarrassment), but about 30% failed to inform their parents because they feared negative results (i.e., physical punishment, retaliation). Minors were especially unlikely to inform their parents if they believed that one or both parents held strongly negative attitudes toward abortion.

It is impossible to know whether the adolescents' perceptions of the likelihood of hostile reactions from their parents were accurate. The evidence that adolescents who decide to carry to term often overestimated the negativity of their parents' probable reaction (Furstenberg, 1976) may not reflect the reality for adolescents who decide to abort without informing their parents. In some sense, however, it makes no difference. The *perception* of probable hostile—or even just disappointed—reactions in their parents might be enough to increase pregnant minors' delay in seeking medical attention, if parental notification were required. Delay in seeking abortion is already a major problem with minors (Bracken & Kasl, 1975; see Russo, this volume, for review); such delay substantially increases the medical and psychological risks associated with abortion (Bracken, Hachamovitch, & Grossman, 1974; Cates, 1981; Osofsky, Osofsky, Rajan, & Spitz, 1975).

Whatever the accuracy of teenagers' fears, the idyllic picture of American family life portrayed by the Supreme Court clearly does not match contemporary reality (Melton, 1984b). For example, in Clary's (1982) study, one-third of the minors seeking abortion came from single-parent families, and 13% more declined to inform their fathers because "we don't get along."

Even under substantially less stressful conditions than a daughter's announcement that she is or may be pregnant, sexuality is usually not a comfortable topic for parents and daughters. Among a stratified random sample of mothers of 10- to 18-year-olds in Cincinnati, only 31.5% reported giving their daughters reading material about sexuality, while 36.7% reported having explained intercourse, and only half had discussed birth control (Rothenberg, 1980; see also Fox & Inazu, 1980; Furstenberg, 1971). Instead, adolescents report receiving most of their knowledge about sex from friends and teachers. As one of us has noted elsewhere, "[i]t would be surprising to find that this view of sex as a forbidden topic [in the home] should suddenly turn toward open and detailed discussion of the options available to a pregnant adolescent" (Melton, 1983b, p. 471).

The distance between parent and adolescent in matters of sexuality is not entirely unhealthy. Maintenance of privacy—including privacy of information about personal matters—is an important aspect of individuation, a principal developmental task of adolescence (Melton, 1983b; Wolfe, 1979). Although it is unfortunate when adolescents cut themselves from sources of counsel about private decisions, it is equally unfortunate when authorities overlook adolescents' needs for privacy. In that regard, confidentiality is the major reason for choice of family planning clinics by adolescents, especially whites (Zabin & Clark, 1983).

Finally, the Court's view of the family may underemphasize the real power differentials within families. As a matter of law and of social, psychological, and economic realities, adolescents are rarely free to overcome the expressed will of their parents. Justice Stevens's contention that "a woman intellectually and emotionally capable of making important decisions without parental assistance also should be capable of ignoring any parental disapproval"[55] does not comport with common sense. The Court majority has recognized this point by requiring an alternative of judicial review *before* parental consent is sought.[56] Nonetheless, the Court's approval of parental notice requirements, at least for some minors, seems implicitly to suggest a belief that minors could be reasonably expected to seek

approval for an abortion through judicial review or other procedure established by the state, even when parents object to the plans for the abortion.

Summary. Although the research is scant on some issues, the available evidence raises substantial doubt about the validity of the premises underlying the Supreme Court's approval of age-based regulation of abortion. Contrary to the Court's assumption of marked vulnerability of minors who obtain abortions, age differences in response to abortion are small, and, in any event, most adolescents who obtain abortions report relief. Severe emotional reactions are very rare. On the other hand, deleterious psychosocial effects of many minors who complete their pregnancy are well documented. By the same token, the research available on consent to medical treatment and the single study currently available on consent to abortion give no reason to doubt adolescents' competence to make decisions about continuation of pregnancy. Additional research focused on the special aspects of the abortion decision is needed, however. Finally, although the Court's view of the helpfulness of parents of pregnant adolescents is undoubtedly true in many cases, the idyllic view of the family ignores the many variations in family life. Many teenagers seeking abortions believe that informing their parents, some of whom are staunch foes of abortion, would result in retaliation and effectively block access to abortion. The literature on parent-adolescent communication about sexuality also gives reason to doubt the helpfulness of many parents in advising their children about decisions regarding pregnancy.

The Effects of Parental Notice Requirements

Unless it actually results in parental consultation, a parental notice requirement is a meaningless hurdle delaying or obstructing minors' access to abortion. Moreover, except insofar as the purpose is to protect family integrity (i.e., parental control) per se, a parental notice status would be constitutional only if it actually results in better reasoned abortion decisions. Otherwise, no significant state purpose would be served.

There are no outcome studies available on notice statutes of the sort upheld in *Matheson*.[60] Nonetheless, there are several reasons to doubt the efficacy of the notice statutes. As we have already noted, it seems naive to assume that parental notice is likely to result in open and reasoned discussion of all of the options available to a pregnant adolescent. Moreover, while most parents might be supportive, it is also obvious that some parents will be retaliatory or obstructionist, especially if they are strongly opposed to abortion. Even if such a reaction would not actually occur, many pregnant minors clearly *perceive* that it would. The tragic irony is that parental notice statutes may actually heighten the medical and psychological risks for minors by stimulating additional delay (cf. Cates, 1981; Zabin & Clark, 1981) and inhibiting reasoned analysis of the various alternatives.[61]

Effects of Judicial Alternatives

In response to the plurality's suggestions in *Bellotti v. Baird*,[62] a number of states have enacted parental notice[63] or consent[64] statutes which provide the option of "bypassing" parents and seeking the approval of an abortion by a judge. As already noted, these statutes require a two-level inquiry. First, if the judge finds the minor to be mature, the minor's privacy must be respected. Second, if the minor is immature, the judge must determine whether an abortion would be in her best interest.

As a matter of practice, proceedings have turned out to be pro forma rubber stamps of minors' decisions. Most minors are found to be mature, and, perhaps unsurprisingly, abortions are almost always found to be in the best interest of immature minors. In Massachusetts between April 1981, when the *Bellotti*-style statute took effect, and February 1983, about 1,300 minors sought an abortion through the judicial bypass procedure (Mnookin, 1985). In about 90% of cases, minors were found to be mature. In the remaining cases, all but five petitioners' requests for abortions were approved, according to a best-interest standard. In three of those cases, the trial court's decision was overturned on appeal. In one case, the judge

invited the minor to seek approval from another judge, who granted the petition. In the remaining case, the minor decided to go to a neighboring state for the abortion. Similar findings have been reported in Minnesota, where only five petitions were denied from 1981 to 1983 (Donovan, 1983).

About three-fourths of minors obtaining abortions in Massachusetts obtain parental consent without going to court (Mnookin, 1985). It is estimated that, prior to the enactment of the statute, one-third to one-half of pregnant minors consulted their parents before having an abortion. However, it is unclear that the statute has in fact resulted in an increase in parental consultation. There has been a marked drop in the number of abortions performed on minors in Massachusetts, apparently as a result of minors choosing to go to neighboring states and bypass the judicial bypass procedure (Donovan, 1983; Mnookin, 1985). An analogous drop of 33% was observed in Minnesota during the first full year of its judicial bypass statute (Donovan, 1983). It is unknown whether the statutes are increasing the numbers of unwanted children born to teenagers.

There is evidence to suggest that the statutes are increasing delay in obtaining abortions and, therefore, increasing risk to minors (Donovan, 1983). Generally, it takes several days to schedule a hearing. In some instances, minors may have to travel several days to obtain access to the courts, because many judges who are opposed to abortion have recused themselves. Thus, there is a de facto waiting period with the necessity of minors' missing more school and, therefore, greater difficulty in maintaining privacy.[65] Moreover, the process—real or perceived—of obtaining a lawyer and going before a judge may be sufficiently formidable to deter many minors from promptly seeking a pregnancy test and, subsequently, an abortion.

No research has systematically examined the psychological effects of the judicial procedures on the minors who go through them. Most of the pregnant minors who choose the alternative of going to court are older adolescents (ages 16 and 17), who would be most likely to be already competent to consent to an abortion (see generally Melton, Koocher, & Saks, 1983). It is plausible that the process of preparing for court helps also to prepare for the abortion itself (cf. Meichenbaum, 1977, on

stress inoculation). However, it is not intuitively clear that rehearsal for court increases the thought and care applied to the decisionmaking process itself (Donovan, 1983). Also, although lawyers and clerks of courts have worked hard in some jurisdictions to minimize the trauma of going to court, there still is cause to wonder whether the judicial procedure does not *heighten*, instead of diminish, the psychological risks attached to abortion for minors. Some anxiety, embarrassment, and even sense of degradation about discussing personal matters with a lawyer and the judge would be unsurprising. It is possible that these issues are least significant, although still present, in jurisdictions which conduct abortion hearings in juvenile or family court (Donovan, 1983).

Research is needed to evaluate the effects of *Bellotti*-style statutes more extensively than has occurred thus far. However, the evidence available suggests that they have harmed, rather than helped, minors considering an abortion. Nothing has yet been uncovered to contradict the view of Justice Stevens and three other justices:

> It is inherent in the right to make the abortion decision that the right may be exercised without public scrutiny and in defiance of the contrary opinion of the sovereign or other third parties. . . . As a practical matter, I would suppose that the need to commence judicial proceedings in order to obtain a legal abortion would impose a burden at least as great as, and probably greater than, that imposed on the minor child by the need to obtain the consent of the parent. Moreover, once this burden is met, the only standard provided for the judge's decision is the best interest of the minor. That standard provides little real guidance to the judge, and his decision must necessarily reflect personal and societal values and mores whose enforcement upon the minor—particularly when contrary to her own informed and reasonable decision—is fundamentally at odds with privacy interests underlying the constitutional protection accorded to her decision.[66]

PLAINTIFFS' EXHIBIT NO. 60

Transcription of Hearing on Venue
Amendment to M.S. § 144.343(6)

SEN. WALDORF: Yes, I would be happy to explain the amendment. It changes the venue from county to judicial district. There are a couple of important reasons for that. On the initial draft of this legislation which I was not part of, it has been in the House, I don't think sufficient ?? has been given to the fact that imposing county venue is somewhat restrictive in that two problems occur; one is availability in a court for the hearing process as well as the potential difficulty with anonymity. And so Mr. Chairman, I think the judicial district boundaries are more appropriate and would like to add the amendment.

JACKIE SCHWEITZ: But even in its weakened form, the law has been credited with saving the lives of unborn children in this state, as young women consult with their parents and decide not to choose abortion. Abortion statistics for 1983 will not be available from the Minnesota Center for Health Statistics for another month or more, but its reports from the previous year indicated that, after several years of relative stability, the rate of abortions performed on teenagers in Minnesota dropped 29% between 1980 and 1982. The birthrate for this same group was down 7% during this same time frame. The statistics support the observation of an abortion counselor quoted in the December 1982 of Family Planning Perspectives that Meadowbrook Women's Clinic, the state's oldest and largest abortion clinic, had observed that the number of teenagers seeking abortion there, had fallen by one third since the law went into effect, and similar statements made since then by other abortion clinic operators periodically quoted in these articles.

KATHERINE WELSH: These problems are as follows: The financial responsibility for implementation of this amendment in 87 counties, the provision of counseling services in

a non-biased manner which would address all alternatives available to minor women. The court in our county has a report to the court that helps them determine the maturity of minor women. Some of the questions contained in this report, regard to post-abortion care, physician's liability, and alternatives available for a non-planned pregnancy. How and by whom would these counseling services be provided? The problem of confidentiality is and always will be, encountered when dealing with smaller counties and smaller cities. We must remember that we are not dealing with delinquent women, but daughters of our friends, relatives, neighbors and public figures. For example, in our county, we had a young woman who came into chambers only to discover that the clerk was her next door neighbor that she baby-sat for. We have another one that we had to come in and use the back entrance and use the freight elevator and have the public defender interview this young woman in the bathroom on the third floor of the courthouse because her mother worked in the probation office across the hall from the chambers. Or we also had a public defender who denied access to this young woman because he was uncomfortable because it was the daughter of his partner in his law firm. We're talking about small communities now. Time frame? The parent notification law is very explicit in stating minors must be heard within 24 hours. Through my experience since August 1, 1981, we have never heard a case heard (?) other than from 8:30 to 4:30, Monday through Friday. We have only had one hearing out of 200 that was on a Saturday. We are presently and will not in the future be comfortable with this law for minor women. It is my opinion that it is just another burdensome step for women who are already being harassed and are seeking abortion as an alternative. From personal experiences, I have dealt with the judges in eight counties. One of the judges told me in no uncertain terms that he *could give permission for a young woman to have an abortion in this court. I give you this statement only to point out that the judge did not understand his responsibility to the law and his blatant disrespect for it. I

would like to know what assurance we're going to get for these young women that they will be heard justly. I have documentations and observations that might make you feel more comfortable against this amendment. Most of the minor women that we have dealt with are 17 year of age. Observations of our studies also show women who seek abortions are more mature than the women who decide on other alternatives. I also have documentation that indicates in our clinic, in 1983, we dealt with 105 minors that satisfied the parent notification law through other means—other than the court bypass system, and we only had 58 that used the court bypass system. And I am servicing 24 counties in northern Minnesota, and these are the counties all included. In 1984, we found that the same for the minors, and I think that you have these forms. I would like to point out that it's not cost effective to set up this system in 87 counties. We must remind all of you that if you feel uncomfortable with the bill as it is, then you must be prepared to allocate the funds to enable the counties to give these services. So far it is common knowledge that indeed the private clinics are incurring the cost of providing these services, because as we all know, there were no state funds allocated in the passage of the parent notification in 1981. It is also common knowledge that the private clinics can and will not be able to provide these services in 84 counties. We are not alone in our position. I think you have some letters, one of them that support our position is the Minnesota Association for Court Administrators, and their letter is dated April 1st.

EXCERPTS FROM PLAINTIFFS' EXHIBIT 68

PAMPHLET FROM MEADOWBROOK
WOMEN'S CLINIC ON SECOND TRIMESTER ABORTION

Second Trimester Abortion

Meadowbrook Women's Clinic
6490 Excelsior Blvd. Suite E510
St. Louis Park, Minnesota 55426
(612) 925-4640

APPOINTMENT REQUESTS:
Monday - Friday until 9 PM
Saturday - 9 AM - 5 PM

PROCEDURE: Dilation and Evacuation, a method used for second trimester abortions 14 to 21 weeks L.M.P.

ULTRASOUND: An Ultrasound examination, is a painless diagnostic test, which will determine how long you have been pregant. The test is similar to X-Ray but uses sound waves rather than radiation.

LAMINARIA: Laminaria is a material which, when inserted into the cervix, absorbs moisture and expands, causing dilation of the cervical canal. This is a natural process which takes several hours or overnight to accomplish. When the doctor inserts the laminaria you will feel pressure or cramping. You will then rest in the recovery room for a short period of time. You will be given medication to prevent infection, and further instructions.

REMEMBER: *after you have had Laminaria inserted you may have cramping for several hours; non-prescription drugs containing acetaminophen, such as Datril, will help relieve it.

*you must not have sexual intercourse.

*you must not douche, use a tampon or insert anything into the vagina.

*you should use a sanitary pad (bleeding may occur)

*you may shower, but do not take a bath.

*do not eat or drink anything after 12:00 midnight.

*if the laminaria are expelled or fall out bring it/them with you when you have the abortion.

*if you have diabetes, rheumatic fever, thyroid problems, or if you experience seizures or are taking drugs, please consult the nurse for instructions.

*some spotting or light bleeding is normal. IF YOU HAVE SEVERE CRAMPING, A GUSH OF WATERY FLUID, FEVER, OR MODERATE TO HEAVY BLEEDING, CALL

OUR EMERGENCY NUMBER:
(612) 925-4645

*once the laminaria are inserted the abortion has begun. You must keep your appointment and follow all directions carefully or your health will be in jeopardy.

Clinic Abortion.

If you have had laminaria inserted very early in the day, it may be possible to do the abortion several hours later. Your nurse or counselor will let you know if this can be done.

If you are scheduled for an abortion the next day, please make certain that you are prompt.

It is likely that prior to the abortion you will have a small needle inserted into a vein in your arm through which medication can be administered to relax you. This will cause little discomfort.

The doctor will then remove the laminaria, cleanse the area, administer a local anesthetic, and using a vacuum aspirator alternately with a grasping instrument, remove the pregnancy tissue. You will feel some cramping, tugging and/or pressure. The physician or nurse may massage your abdomen, momen-

tarily increasing the pressure, in order to help your uterus contract and decrease bleeding.

You will rest in our recovery room and be given further instructions by your nurse.

AFTERCARE

Be sure to follow the instructions in the booklet you are given, and to return for a two-week checkup.

PLAINTIFFS' EXHIBIT 69

MEADOWBROOK WOMEN'S CLINIC
Suite 510 6490 Excelsior Blvd. Minneapolis, MN 55426
(612) 925-4640

Post Abortion Follow-up Care Book

EMERGENCY INFORMATION

All medical procedures carry some risk of complication.

If you have had an abortion at Meadowbrook Women's Clinic, P.A., Please read these instructions carefully and completely.

Our 24 Hour Emergency Number is:
1-612-925-4645

When you call this number you are talking to an answering service who will contact the doctor at his home.

Our doctors are available for emergency calls at any hour.

However, if you have a question about the standard medications, activity, bathing or intercourse please call during regular Clinic hours which are 8:00 am to 5:00 pm Monday through Friday.

YOU SHOULD CALL IF:

1. You have a fever of 100.4° or 38°C (See Temperature).
2. If after reading the section on Bleeding, your questions have not been answered.
3. If after reading the section on Cramping, your questions have not been answered.

1-612-925-4645 is a 24-hour, seven-day per week telephone number. For a medical emergency during regular office hours, you may call collect. If you call after office hours, please do not call collect because the phone is answered by an answering service. Call our number and leave your name and telephone number and a doctor will return the call.

WHEN CALLING PLEASE HAVE THE FOLLOWING INFORMATION:

1. Temperature within the last hour.
2. The number of sanitary pads used within the last two (2) hours.
3. The telephone number of your pharmacy.

TEMPERATURE

You should check your temperature three times per day for three days following the abortion.

It is important to check your temperature because an elevation of temperature (fever) may indicate a pelvic infection. If a temperature of 100.4°F or 38°C is recorded you must call MWC or your own doctor.

Be sure that you have not had anything hot or cold in your mouth for at least 1/2 hour before taking your temperature (coffee, pop, a cigarette).

Don't hesitate to call a doctor if the fever is associated with cramping or a general pelvic discomfort. If your temperature is in a range of 99.6° to 100.2F and you are unsure of what to do, recheck it in 1-2 hours. If at that time it is unchanged or rising call MWC or your own doctor.

BLEEDING

The amount of bleeding after an abortion varies from woman to woman. It may be very scant (light) or as heavy as a normal period. Sometimes the bleeding may persist intermittently for as long as four weeks. Usually, however, women have very little bleeding immediately after an abortion or during the next two-three days. During this time, the uterus contracts and reduces bleeding. Anywhere from 3 to 8 days later the uterus may relax, thus allowing small amounts of blood to accumulate. Eventually the blood collects and is expelled in the form of clots. Accompanying this release of clots may be some mild to strong cramping. If the bleeding becomes progressively heavy or persists for 24 hours, MWC or your own doctor should be notified.

Bleeding should not require more than one pad (regular size) per hour for more than 4 to 6 hours in a row.

Often a woman has been lying or sitting for a length of time (such as overnight), she will notice an increased amount of bleeding with activity. This is blood that has accumulated in the vagina and has not been expelled. Change your pad and note whether or not the bleeding continues as heavily. More than likely it will diminish.

Remember, you must use sanitary pads, not tampons, for two weeks following the abortion.

CRAMPING

It is normal to have slight to moderate cramping after an abortion. This is a natural response by the uterus to contract back to its non-pregnant state and also to control bleeding. This cramping should not become progressively worse. If after 24 hours the cramping intensifies, you should call us or your doctor.

Some patients experience cramping long (3-8 days) after an abortion. If this is not accompanied by fever (100.4°F or 38°C), this is unlikely to be dangerous. Acetaminophen (Tylenol, Datril) is a suitable medication to take during this time. However, if strong cramps persist more than 24 hours, it may mean that clots are trapped in the cervix. Please call the clinic. If the cramps are relieved by the passage of clots there is no need to call.

MEDICATION

You will be given: Tetracycline (an antibiotic to help prevent infection). There are 16 tetracycline pills.

Take the tetracycline, on an empty stomach, one hour before each meal and at bedtime (4 times a day) until they are gone. DO NOT TAKE WITH MILK—no harm will be done; milk just inhibits the tetracycline from working. Start the medication one hour before dinner the day of your abortion and again at bedtime. The following day take them four times each day and continue until they are gone.

Acetaminophen (to help ease your cramps). Brand names of this drug are Tylenol, Datril, and a few others. Two tablets of acetaminophen may be taken every 3-4 hours. Stomach upset is less likely to occur if you have eaten first.

If you have chosen to use birth control pills, start taking them THE SUNDAY FOLLOWING YOUR ABORTION. Take one a day AT THE SAME TIME EVERY DAY. If you do not start on birth control pills immediately following the abortion, you may not have a period for 6 to 8 weeks. If you have no period after your first cycle of pills, there is no need to be concerned. You should start your second package on Sunday and you should have a period at the end of the cycle.

If you have any questions about your pills or prescription check with us if you live in town. If you live out of town, contact your doctor or nearest family planning clinic for proper instructions.

PHYSICAL CHANGES

Several changes take place in a woman's body during pregnancy. The changes are related to the presence of hormones, and reverse themselves following the termination of pregnancy. Among the changes are breast tenderness, breast fullness, explusion of milk from the breasts, fluid retention, complexion changes, and nausea.

Wearing a bra with good support may be of some help in decreasing breast tenderness. Do not stimulate the breasts, since this may cause or increase milk excretion.

Frequently the nausea will subside very soon after an abortion. Some of the other changes may not reverse as rapidly. Be patient; relief of the unpleasant symptoms will occur.

EMOTION

It is not uncommon for women to feel depressed or blue a few days following an abortion. Just as hormonal changes in your body can cause you to feel low or moody prior to a menstrual period or following childbirth, the same phenomenon applies after an abortion. Don't be alarmed about such feelings; they are usually of short duration and will disappear once your hormone levels return to their pre-pregnancy state. You may also experience a feeling of well-being and relief. "Highs" and "lows" are normal and common, as is no significant change in your feelings.

If you wish to talk about your feelings with one of our counselors, please call at any time. Post abortion counseling is available on an individual or group basis. Please call MWC for information. If you prefer additional counseling, talk with your counselor about a referral.

CONTRACEPTION

You have watched films and talked with a nurse practitioner and counselor about birth control. With their help you have selected a method that is the most appropriate for you. There is no perfect method of contraception, but any method is better than taking chances. You may resume intercourse two weeks after your abortion. Unless you are using some form of birth control you are already taking a chance. Ovulation (the releasing of an egg from one of your ovaries) will begin again soon after your abortion. You could be risking pregnancy as soon as two weeks from today. During your reproductive years you have about 400 menstrual cycles—in other words you have 400 opportunities to become pregnant! In time, your luck will run out if you don't contracept. The single most important thing you can do for yourself following your abortion is to select a method of contraception—and use it.

ACTIVITIES

There is no medical reason why you can't resume most of your normal activities following the abortion. You can bathe, drive your car, and return to work or school. Let your body tell you if you are over-doing it. Too much activity may fatigue you or increase your bleeding or cramping. If this happens, discontinue the activity and rest. There are, however, two things you must not do until after your two-week checkup. Under no circumstances should you have sexual intercourse nor should you insert **anything** into your vagina, including tampons, douches, etc. Medication we prescribe will be explained. Remember that

your cervix has been dilated and opened. Until it closes again, anything placed in the vagina may cause infection.

TWO-WEEK POST-ABORTION CHECKUP

It is extremely important that each woman have a checkup two weeks after the abortion. This two-week check is provided by Meadowbrook Women's Clinic physicians at no charge at either the clinic or one of their two private offices. If you are unable to return to see one of our physicians, please consult your own doctor for this examination. If you do not have a physician of your own, you should ask your counselor for a referral.

Meadowbrook Women's Clinic
Meadowbrook Medical Building
6490 Excelsior Boulevard, Suite E510
Minneapolis, MN 55426
612-925-4640

Sinykin Associates
Meadowbrook Medical Building
6490 Excelsior Boulevard, Suite E507
Minneapolis, MN 55426
612-920-5166

Sinykin Associates
Metropolitan Medical Building
825 South 8th Street, Suite 312
Minneapolis, MN 55404
612-338-6996

Some of the problems which may occur if you do not have a checkup are:

1. Anemia
2. Continuing Pregnancy
3. Ectopic pregnancy (pregnancy in the tube)
4. Damage of the cervix
5. Failure of the uterus to return to its non-pregnant state

If you return to your PMD for your two week check-up your doctor should run a pregnancy test.

This should be negative (not pregnant). Some doctors however are using a very sensitive test and the results may be positive even though you are not pregnant.

If this occurs, ask your doctor what type of test was used. Then call the Clinic. Our number is 925-4640. Call during business hours.

Meadowbrook Women's Clinic will not be responsible for any **hospital** costs resulting from a complication of the abortion, nor any fees charged by another physician. Any treatment provided by one of our own staff physicians, related to your abortion, is free of charge.

IT IS NOT UNUSUAL TO PASS SOME CLOTS OR TISSUE-LIKE MATERIAL FROM THE VAGINA FOLLOWING AN ABORTION. Since you are using pads, these are more likely to be noticeable than with normal period flows. These clots do NOT indicate that you have had an incomplete abortion. Physicians who do not specialize in abortion are not always able to determine whether the cramping or bleeding you are having is normal. Therefore, before agreeing to hospitalization or surgery which may be unnecessary, please ask your physician to contact ours. We may be able to help resolve the problem without more expense to you. In this way we can share accurate follow-up information and provide the best possible service for you.

FUTURE PREGNANCIES

Women who have had abortions are understandably concerned about the effects on future pregnancies. Recent studies indicate that the most important factor bearing on future pregnancy outcome is timing. Pregnancies occurring within 3 months of an abortion, miscarriage, or a vaginal delivery have a somewhat greater likelihood of ending in miscarriage. After 3 months the risk of miscarriage is the same for women not having had abortions (about one in eight). After one abortion the bulk of the scientific evidence shows no increased risk if proper timing is

observed. Some studies show a slight increased risk of prematurity or low birth weight babies after 2 or more abortions. Other studies, however, disagree with this finding. The important thing to remember is that the physician caring for you during a subsequent pregnancy should be made aware of the fact that you have had an abortion. This will enable him/her to give you proper and appropriate care.

TO PHYSICIAN SEEING OUR PATIENTS FOR FOLLOW-UP CARE:

Ms. _____ had a _____ vacuum aspiration abortion _____ a D&E with Laminaria abortion to terminate a pregnancy of _____ weeks gestation on _____ 19____. Her RH factor is _____. She (did) (did not) receive RH Immune globulin.

Type of contraception in which the patient is interested:

_____ Oral 1 month supply given of

_____

_____ IUD
_____ Diaphragm
_____ Sterilization
Special considerations _____

_____

POST-ABORTION CHECK-UP FORM

Please return to Meadowbrook Women's Clinic, P.A.
Suite E510, 6490 Excelsior Blvd., Mpls., MN 55426

Date of Abortion: _____

NAME: Ms. _____

Physician Name _____

Address _____

City, State Zip _____

Results of Examination _____

_____

_____

Date Signature of Physician

PLAINTIFFS' EXHIBIT 70A

EXCERPT FROM PHONE TRAINING MANUAL FROM MEADOWBROOK WOMEN'S CLINIC

PHONE TRAINING MANUAL
MEADOWBROOK WOMEN'S CLINIC
Parental Notification for Minors

Minnesota has a state law requiring parental notification prior to an abortion, if the patient is under 18 years old. The requirement is not for consent, just notification. Parents cannot prevent their daughter from having an abortion.

The law specifies that both biological parents be notified, even if only one parent has custody of the child. There are two general ways of meeting the requirements of this law: 1) furnishing proof that parents have been notified, or 2) obtaining court permission to bypass the notification requirement.

When making an abortion appointment for a minor, you must tell her about this law and determine which method of compliance she will use. Do this before you actually make the appointment because the timing of the appointment will depend on how she decides to handle notification.

A. *Exemptions From Parental Notification Requirement*:

There are three situations in which a minor is not required to notify her parents:

1. *She is an emancipated minor*—this means that the woman is married, has had a child and is raising it, or lives apart from her parents and is self-supporting. She must furnish proof of her status (ie. copy of her marriage certificate, copy of her child's birth certificate, or paycheck stubs, rent receipts, etc.)
2. *She would die if the abortion was not done.* This must be certified in writing by a physician. (This has not happened in 2 years.)
3. *She is a victim of sexual abuse, and it has* been reported.

Sometimes a parent will say that the other parent is not allowed to see the daughter. This usually does not mean that the parent doesn't have to be notified. Ask whether the custodial parent has court documentation saying that parental rights have been terminated for the other parent. If not, then he or she must be notified.

B. *Determining How the Patient Will Notify Parents*:

Start by asking her whether she has discussed the abortion with her parents. If she says yes, ask whether they are both her biological parents. (For example, if the parents are divorced, the patient may live with one parent and the parent's new spouse. Unless that spouse legally adopted the patient, he or she is not the patient's parent. If the minor has been legally adopted by either step-parent, then the absent biological parent would not need to be notified.) If both legal/biological parents know about the abortion, tell her that there is a notification law and that we need proof of notification. That can be done in one of two ways:

1) Both parents can come with her and sign the consent form, or
2) If one or both parents are not coming with her, she must bring a notarized letter from that parent or both parents stating that they consent to their daughter's abortion. Emphasize that the letter must be notarized and that if she does not bring it we cannot do the abortion that day. We are very strict about this.

If the patient says that both parents are coming with her, you should tell her that if plans change and one parent doesn't come, she needs to bring a notarized letter from that parent.

Make an explanatory notation in the "special" column on the appointment page. The notation will indicate the method of notification the patient is using. Write "PWP" if both parents are coming to the clinic with the patient. If she is bringing a notarized letter, write "NL". If she is bringing one parent and one letter, write both "PWP" and "NL" in the column.

Sometimes a patient has discussed the abortion with only one parent, but cannot or prefers not to discuss it with the other parent. There are three situations which fall within this category:

One Parent Knows

— *the other parent lives far away or cannot be located.* In this case, it may not be possible or desirable to get a notarized letter from that parent. Instead, the parent can be notified by a certified letter or the patient can go to court to waive notification. These options are described later.

— *the other parent is deceased.* In this instance, the patient must bring proof that the parent is deceased. This is usually a copy of the death certificate from the State Health Dept.

— *the patient prefers not to tell the other parent.* Sometimes the patient and one parent decide not to tell the other parent about the abortion. In that case, the law requires the patient to go to court, even though one parent does know about the abortion.

Neither Parent Knows

When the patient prefers not to tell either parent about the abortion, then she goes to court.

C. *Instructing the Patient on Notification Procedures*:

Once you have determined how the patient wants to handle notification, you can give her the necessary instructions and make her appointment. The notarized letter was described above. The certified letter and court options are handled as follows:

—*Court*

When the patient is going to court, first find out where she lives and where she'll go to court. According to the law, she should have access to court in any Minnesota county. However, the easiest counties are Hennepin and Ramsey. If she *lives* in either Hennepin or Ramsey counties, she must go to court in the

county in which she resides. Minors who live in counties *other* than Ramsey and Hennepin may go to *either* court. We most often send ours to Hennepin County Court because they can have everything done in one day if they are a vac patient.

For *Hennepin County*, tell her she can go to court and have the abortion on the same day. Hennepin County sees minors at 10:30 AM every Monday, Tuesday & Thursday.

Give her the phone number for Hennepin County Courthouse (the number is posted at the front desk) and tell her to call there first to schedule a court appointment. All court appointments in Hennepin County are at 10:30 AM. Then she will call us back and we will give her an abortion appointment on the same day.

Make the abortion appointment for 7:30. You should enter the appointment information, however, under a 10:00 or 10:30 slot on the appointment page. (Her abortion will actually be done in the afternoon). Write "7:30" next to it.

Tell the patient she will come here first at the time we gave her. She will have her lab work, exam, counseling done before leaving for court. This is because the judge wants the patient to be informed about the abortion before she goes to court. Then she is given a map and directions to court, she goes there, gets her court document to bring back, and returns to the clinic for her abortion procedure. She will not get back to the clinic until about 1:00.

For *Ramsey Court*, her court appointment and abortion appointment will probably be on different days. Give her the phone number for Ramsey County courthouse and have her make that appointment. Then she will call us back, and set up an appointment here for counseling *only* before the court appointment. This appointment should be made for the early afternoon, under "indecision counseling" in the second trimester appointment book. She needs to come here first because the judge wants her to be counseled about the abortion before she goes to court.

When she calls to make the counseling appointment, she can also make the abortion appointment for any day after going to court. She will be examined, etc. on the day of the abortion.

After making the abortion appointment for a court patient, write "CT" in the "special" column on the appointment page. This indicates to the staff that she is going to or has been to court.

It is important to remember that a patient *cannot* go to court if the parent in question knows about the abortion. Court is only for minors who do not want to tell one or both parents about the abortion. If the parent knows about the abortion he or she must provide a notarized letter or receive a certified letter. (If they don't want to go along with the abortion and refuse to provide a notarized letter, the certified letter is the only option.)

—Certified Letter

The law specifies that a certified letter must be received by the parent hours before the abortion is done. When making the abortion appointment you must determine how far ahead to make the appointment. The letter is considered to have been delivered to the parent the day after it is mailed. Then the abortion appointment can be made for the third day after the letter is mailed. Make the appointment in the late morning of that day, so that the abortion will actually be done after noon. For example, if the patient calls on Monday, and the letter is mailed on Monday, then the parent gets it on Tuesday and the appointment can be made for Thursday.

Write "CL" in the "special" column on the appointment page.

If they *are not sure* where the absent parent lives, we can send a letter to last known address.

How to Send a Certified Letter

— there is a file on "Certified Letters" at the front desk. It is in the drawer next to the furthest left chair. In this file, you will find the forms you need to send the letter. You will also find xeroxed copies of how the forms should look when they are filled out.

— first, pull out a copy of the letter which is sent to the parent. Sign it with Dr. Fred Lyon's name. Fill in the blank spaces with the appropriate information.

— enclose it in an envelope. Take a copy of the small white and green slip labeled "Receipt for Certified Mail". Refer to the xerox copy for how to fill it out. It is always the same. After filling it out, tear off the bottom green part, moisten the back, and put it on the lower left corner of the envelope. The top part gets handed to the mailman when he comes to get the mail.

— write restricted delivery above the green "certified mail" tag on the front of the envelope. This means that the letter can only be delivered to the addressee.

— the other form you need is a green cardboard tag. It should be filled out on both sides. On the side which says "return to" write our address. On the other side, fill out questions 1–4. On question #4, the "article number" is the number on the green "certified mail" tag which you put on the front of the envelope.

After filling this out, tear off the adhesive tape and fasten the tag to the back of the envelope, so the letter cannot be opened without removing that tag.

— be sure to write our return address on the envelope. Just write:

E510
6490 Excelsior Blvd.
St. Louis Park, Mn. 55426

— after the letter has been posted, it is ready to be mailed. The last step before mailing is to enter information about your letter to the record we keep of certified letters, in the same file at the front desk. You should write in the patient's name, the date the letter was sent, the address it was sent to, and the date of the abortion.

— the mailman comes to the clinic every day at about noon. The letter must be handed to him. Until then, tape the letter on the edge of the counter where the clipboards are. Whoever is at the front desk when the mailman comes will give it to him.

— if the mailman has already come that day, and it is urgent that the letter go out that day, take it to the Post Office by 5:00 (the window must be open). You can also take it to Byerly's, as they have a Post Office there.

PLAINTIFFS' EXHIBIT NO. 73

MEMO TO: All Staff Scheduling Abortion Appointments

FROM: Char Baker

DATE: July 10, 1984

RE: Compliance with the Parental Notification Law for Minors

PARENTAL NOTIFICATION LAW	*CHECKLIST*
1. Every patient must be asked her age: Identification should be requested and photocopied and placed in the patient's file establishing the woman's identity and age. This should be done for all 18 and 19 year olds and any woman who appears to be under age 20.	Driver's license, birth certificate or notarized *Statement of Age* form
2. All minors (women under age 18) must be established as emancipated or unemancipated.	
3. *Emancipated minors* are women who are under 18 years of age but:	
• are married; or	Marriage License
• have continued a pregnancy to full term; or	Child's birth certificate
• have managed own affairs and are living apart from parents	Copies of 1 (one) year's rental receipts
Emancipated minors must sign a "statement of emancipation".	*Minors Exceptions* form

Parental Notification Law	*Checklist*
4. *Unemancipated minors* have to meet one of the following conditions:	
• provide authorization for the abortion in writing from both of the parents (if living), or the legal guardian or conservator, if the minor has one; or	*Parental Notification* form
• provide written notarized authorization by the living parent that the second parent is not living; or	*Abortion Decision Acknowledgment By Parent (When Other Parent is Absent)* form
• provide written verification by the parent accompanying the minor that the absent parent is aware of the abortion decision; or	*Verification of Absent Parent Signature* form
• both parents (or guardian or conservator) are notified in writing of the abortion by MHCW forty-eight (48) hours prior to the appointment; or	*Letter to Parents* form Certified mail return receipt
• provide written notarized verification by both parents stating they are aware of the minor's abortion decision; or	Notarized *Parental Notification* form
• have been a victim of sexual abuse, neglect	*Minors Exceptions* form

or physical abuse by the minor's parent(s), guardian or person responsible for the minor's care. MHCW must report this immediately (if a report has not been made) as required by Subdivision 3 of Section 626.556 of MN. Statutes	Written proof of reported abuse
5. Unemancipated minors who do not desire parental notification of both parents can utilize the *Court Bypass Procedure.*	
6. *Scheduling LEC Minors*:	
• Only schedule LEC appointments prior to abortion clinic (1 hour prior to counseling schedule) or following the abortion clinic (allowing 1 hour for the LEC work-up).	Check with Teen Counselor for court appointment and counseling Check with Nurse for lab and exam work-up
• Out-of-town minors can be scheduled for the LEC work-up at 8:00 a.m. on scheduled court days.	Check with Teen Counselor for court appointment and counseling Check with Nurse for lab and exam work-up

PLAINTIFFS' EXHIBIT NO. 92

DEPOSITION TESTIMONY EXCERPTS
OF DR. JANE HODGSON (JULY 11, 1985)

[DIRECT BY MS. BENSHOOF
AND MR. PENTELOVITCH]

[25] * * *

Q Could you give us any approximation about what percent of your patient load throughout the years have been teenagers?

A I would estimate at least 30 percent.

Q Prior to the—

A May I add?

Q Go ahead.

A When I began practice in Saint Paul, I—in order to pay the rent, I took the job as gynecologist at the University Health Service and provided gynecology care for all of the University of Minnesota women students. And that was very—so that the group of patients I saw there were all college level. And I—I continued in this role for a matter of six or eight years until I was too busy to continue it.

Q So during the six and eight years you were Director of Gynecology for the University of Minnesota, nearly all **[26]** of your patients were teenagers—

A Correct.

Q —or just above that?

A Correct.

Q Thank you. And what years was that?

A That was from 1947 till probably till the—about 1945—'55.

Q Other than the present Minnesota abortion parental notification law, have you had any experience in your career working under parental notification laws or policies, either in the field of contraception or abortion

A Well, there has always been a reluctance on the part of hospitals and physicians to deliver any kind of medical services to a minor without parental notification. And the laws have

never been really spelled out. They differ, depending upon the—the organization you're working with.

Each—each clinic, each organization, each hospital has their own regulations in that regard, partly on a defensive basis and partly so that they can be sure to collect the bill.

I've had—as far as I was concerned, I—I—sometimes I would insist upon it and other times I was indifferent as to whether or not I felt that each case **[27]** should be judged on its individual merit and as long as—so that I was always aware of it, shall we say, but it was never any major problem.

Q When you were aware of it, you stated that it wasn't a major problem for your medical practice. Why wasn't it? Do you believe you acted differently than other doctors?

A Yes, I do.

Q How did you act differently in regards to your teenage patients?

A Well, if I thought that it was bad medical care for us to involve the patient's parents, I would not involve them. And on—on the other hand, when it was important, I would insist upon it.

I also always insisted upon a private interview with a teenager before discussing the problems with a parent. If a mother brought her daughter in to see me for any reason, I always excluded the mother from my interview with the patient and insisted on seeing her alone because I found that the histories were much more accurate, particularly in regards to confidential matters.

Q So you found even when a minor came in with their parent that they would not reveal the truth about sexual matters when the parent was present?

A That's correct. And they would—often contradictory and it was much more time consuming and I felt that I **[28]** could—I could determine the situation much—make a diagnosis much better if I saw them separately, on the whole.

Q Throughout your history of treating teenagers in the last 45 years, have you found that confidentiality was an important concern?

A I think that privacy is extremely important to a teenager who is notably sensitive about their immaturity. They're anx-

ious, apprehensive, often ignorant about the realities of life and the—to them, their privacy is extremely important, particularly at that stage in life where their parents are concerned.

There's that stage where they go through the closed door syndrome, where they go to their room and close their doors and never speak to their parents, and I think everyone goes through that if you've had a teenager.

Q In providing contraceptive care, do you find that to be equally true?

A In regard to any matter. In regard to their physical or social wellbeing, I think that teenagers tend to be very private.

Q You stated that you've worked under various institutions with different policies on parental notification or consent. Do you find that minors are more willing to seek out medical care when they're assured of confidenti**[29]**ality?

A Oh, that has been demonstrated in any number of articles.

Q Do you find that true in your own experience?

A Oh, exactly. Absolutely.

* * * * *

[50] * * *

BY MS. BENSHOOF:

Q Dr. Hodgson, you've testified that you've received many referrals and are still receiving referrals from other doctors in the state on their patients needing abortions. Do you have an opinion as to why there are not more abortion providers in Minnesota?

A Well, there are a number of reasons. I think one of the obvious ones is the unfavorable publicity surrounding the procedure and the delivery of services, the clinic bombings and—and the violence and the—the actual **[51]** terrorism.

There are a number of doctors throughout the country that have had their offices bombed. One right here in the Twin Cities has had a lot of damage done. So that is the most obvious reason.

I think the fact that abortion is never taught in medical school or very few of the medical schools, that there's a great

lack of teaching in the field. And it's only recently that it—it has even been discussed in the textbooks. That's one reason I published this in 1981 as a textbook on the field.

Many doctors are not trained in it It is a specialized procedure. Simple though it is, it is a subspecialty that requires a certain amount of expertise.

And doctors have been—in the past, the older group, anyway, have been so intimidated by the—the teachings of—against invasion of the uterine cavity, the pregnant uterine cavity, for any reason whatsoever all through the past that this has been thoroughly engrained and it's difficult for conservative doctors to overcome this attitude.

In addition to that, there has been, up until the present time at least, a relative shortage of doctors in the country so that everyone that—many that—were too busy or it didn't involve their specialty and they **[52]** didn't want to undertake—withstand the glare of the publicity that would surround it.

So all of these things enter in and—and the law, of course, was the chilling effect up until '73. And now, even the restrictive laws that we do have are—are chilling, as far as teenagers are concerned. I think doctors would be very—most doctors are very reluctant to undertake the teenager—the minor, simply because of this notification—mandatory notification law.

Q Do you believe that there are doctors in Minnesota who do or would do abortions for adult women who are reluctant or do not do abortions for their teenage patients?

A I would say that I think they're much more prone to refuse—to refer the teenager—the minor than they would the adult. And I—I also believe, but I cannot document it, that there are a number of physicians throughout the state that are doing procedures, the occasional one in their office. And these are not reported and we have no way of knowing, but I—I believe now with the increased availability of equipment, more and more physicians are buying suction machines; the hospitals are getting more or less standard equipment now to treat the incomplete abortion.

Many physicians now are invading the uterus for a woman that has already started to bleed and they are **[53]** using suction for incomplete abortion procedures so they are becoming more

familiar with the technique. And as time goes on, I think that they will be doing more, but it's very, very slow and we have—don't have nearly enough providers at the present time.

Q So you think that doctors who have the equipment and are technically capable of doing an abortion still, for other reasons, refer patients to you?

A Yes, I do. I think they don't want the hassle. There are so many problems involved, plus the fact that they—there still is a stigma to being abortionists.

Q Do you think that doctors are concerned about their name being known as doing abortions?

A Absolutely. If they belong to a church where there are—where there's a strong feeling in opposition to abortion services, why they're going to be affected. Obviously—even though they may personally or medically have no objection to it.

Q You've mentioned that you've been Medical Director of all of the clinics or most of them in Minnesota in the past few years. As Medical Director, was it part of your job to get other physicians to work at the clinics?

A Yes, and I have trained any number of young doctors in the specialty. It has been difficult, really, to find—very—very difficult in the past to find qualified **[54]** physicians who were anxious to learn.

Q Did you, in seeking physicians to be employed at these various clinics, have conversations with doctors who then turned you down?

Q I'm sorry. Would you repeat that?

Q When you were Medical Director and sought to engage the services of doctors to do abortions at the various abortion clinics, did you have conversations with doctors to become employed at those clinics, after which conversation the doctor refused?

A Oh, yes, very many. Particularly, this was the case in opening the clinic in Duluth. It was impossible to get local Duluth physicians. It still is. We are—we have to import physicians from Hibbing and Bemidji and—I can't think. It's a town near Grand Rapids. Anyway, small communities some distance from Duluth, all of whom I have trained personally.

I have frequently approached the Duluth—the Saint Louis Medical Society and given presentations and they—they have requested me to appear before their residents and—and discuss the technique and all. But they're a very conservative group there and so we've been unable to get any of the Duluth physicians involved.

Q What reasons do they give you?

A Economic and social pressures, primarily. And then some **[55]** of them ideologically are opposed. Members of the—the specialists in the Duluth clinic tend to be, the older members.

Q What do you mean by ideologically?

A Well, that feel that abortion services are immoral and so they don't want to have any part of it.

Q And when you say social pressures, that's not the same thing as ideological?

A No, not necessarily. Some may be in sympathy with the provision of services, but because they feel they cannot go contrary to the—the opinion of their church or their friends or their family, they don't want to create any waves so they abstain from performing the service.

There are many facets to the problem and, obviously, the—I think as time goes on and it becomes more and more of a standard procedure, this is lessening and people are much more free to discuss it and the fact that a million and a half are being performed every year in this country I think is—is making it more commonplace.

Q What factors, other than the number of providers, affect the accessibility in Minnesota of abortion for minors?

A Well, the geography of the state, for one thing. It is a very long state. The distances are many and—and the providers are all concentrated down in this one little—these five counties all close together, with **[56]** the exception of Saint Louis County.

And so they—a patient from International Falls, for instance, has a long trip. And prior to the Duluth clinic opening, why they had to come all the way down to the Cities. It still is a distance to go to Duluth. Some of them have to travel all across the state, both the width or the length.

And transportation is poor in many of these communities. Train services have been disconnected and—and no flights. Many—as far as Duluth is concerned, many of the patients have to—they have to drive by—with a personal automobile.

And I've seen many of the teenagers that hitchhike when I've been working here in the Twin City area, as well as in Duluth. And they will hitchhike in extreme kinds of weather which is another hazard, the sub-zero weather in the winter and the hot weather in the summer, and so—

Q You've had teenage patients who've been hitchhiking many miles—

A Oh, indeed.

Q —to get to you? Teenage patients?

A Indeed. Desperately, that have come in extreme heat and—and that was what prompted me to want to help open the clinic in Duluth because we were having so many from **[57]** the Iron Range, Canada, northern Michigan, that would come all the way to the Twin Cities and have to undergo such hardship, actually, to get here; and then the risks of sending them right home after a surgical procedure were relatively great and so I was repeatedly concerned about this for years.

And when we opened the clinic in Duluth, why we promptly—the very first month, there were more than 100 abortions performed and they've averaged about 125 a month on a very steady basis. They're drawing more and more from Canada and, of course, from the whole northeast section of the state. And this has alleviated, to a degree, the travel hazards and the burden on the teenager.

But it's still—we are one of the worst states in the nation, as far as accessibility, according to the Guttmacher studies on the importance of travel time and the accessibility of abortion services as far as providing those that are necessary.

They still estimate that they're—that we are only doing roughly 50 percent of the abortions that are—are wanted and needed in this state.

Q Have you had teenage patients who couldn't get to you or had to cancel an appointment because of the travel distance in Minnesota or lack of transportation?

[58] A Blizzard conditions. That's not at all unusual during the winter months, although these patients are usually so motivated that they'll get through and no other patients will.

It's sort of a joke at Saint Paul-Ramsey that when they close down the—all the clinics at the hospital, the only one they don't close is the Fertility Control Clinic because you can be sure that—that some of those patients are going to get through and come. So it's rare that a whole clinic would ever be cancelled. Some patient's going to make it.

Q So is it your opinion that whatever burdens exist for all women in Minnesota in abortion accessibility, these are accentuated in the case of teenagers?

A I think it's much different than a small state like Massachusetts, for example, or—or in the New York area where transportation's available. Yes, our problems are considerably different.

And the fact, too, that many of these teenagers are from rural—very rural communities, very sheltered. They don't know how to cope with—some of them have never been to the Cities before. And then there's the matter of finances of arranging for this travel, which is a—

Q For the teenagers?

[59] A For the teenager, which is an—the economic burden is great. They not only have to arrange for their—the payment of the service, but just simply the time consumed and the costs of travel and then, of course, the problem being away from school.

Q If a teenager is from a family in Minnesota that receives Medicaid for their medical services, does such Medicaid pay for the teenager's abortion?

A No. There is—there are no subsidies granted a patient—a teenager who chooses to terminate her pregnancy.

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[70] * * *

Q Dr. Hodgson, we've—we've been discussing the mortality risks of abortion overall. Does that—do those risks change depending on weeks of gestation? And I'd like to refer you now to examine Plaintiffs' Exhibit 5.

A It has been very obvious that the risk increases with the stage of gestation. This has been repeatedly pointed out by—there are many, many articles to support this. This particular graph, Exhibit 5, is from the Center for Disease Control, Abortion Surveillance—I think the same graph is in my textbook on abortion and sterilization—illustrating that for the death-to-case rate increases with each week of gestation and this is roughly 50 percent per week after the eighth week.

Q So that for each week of pregnancy a woman delays an abortion, the risk of death increases 50—

A Increases by 50 percent, right.

* * * * *

[73] * * *

Teenagers tend to seek their care later and they tend to be more anemic. They're careless about their diets. They tend to have a higher incidence of infection because they delay their post abortion care. They ignore **[74]** the complication and they don't have the care that the older women do.

But overall, there's very little difference in the morbidity rates, when you adjust particularly for the stage of gestation.

Q So that—you've testified that one factor creating a complication for teenagers is that they have tighter cervixes so that's a different consideration.

A Correct.

Q What can be done—or what do you do as a physician to help eliminate the possibility of this kind of complication in an abortion for a teenager?

A One of the advances in abortion technology in the last decade has been the increasing use of laminaria which is a—prepared from Japanese seaweed. It's the stalk of the seaweed. It's a very hydroscopic—hydrophilic, I should say, material which absorbs water from the cervix and has a very peculiar effect that no one has really explained scientifically which makes the cervix very easily dilated.

And this—these—this material which comes in the—very much resembling a pencil, a very fine pencil, is inserted into the cervix and left for several hours, at least four to six hours as a minimum, and this causes softening and dilatation of the cervix

and facilitates **[75]** the dilatation and avoids the tearing and any muscle damage to the cervix. So that in the teenager, particularly, this is being used more and more commonly.

Q What gestational age—at what gestational age would you use laminaria when you do an abortion?

A Well, it wouldn't be a matter of age. It would be more frequent, of course, in the youngster because they have the tight, immature, very—

Q I meant the stage of pregnancy.

A Oh, in the early pregnancies—well, in any stage in—in the adolescent we're apt to use it because—depending on the stage of their pregnancy.

If they have a—a second trimester pregnancy, they would have to have laminaria; and often in the late portion of the first trimester, if the cervix is still very hard and undilated, they have to have it.

So it's an individual thing. It doesn't necessarily relate to—to stage of gestation or age, but particularly is it appropriate to use it in the teenager.

Q Is it correct to say, then, that your testimony is you tend to use—you consider laminaria medically advisable more often with teenage patients because of the condition of their cervixes than with adult patients?

A Oh, very definitely.

Q And is this a recent development in abortion technique?

[76] A Well, it has gradually increased in popularity. I would judge that 50 percent of the clinics all over the country do use it, at least in select cases. Some use it routinely in every case.

Q First and second trimester?

A Yes. In—at San Francisco, for example, it was the protocol to insert laminaria in every woman, every age, every stage of gestation, regardless, and—which is really superfluous treatment for the woman who's had several children and it accomplished very little. But they felt so strongly about its performance, they didn't want to deprive anyone of possible benefit.

So this necessitated two visits to the clinic which had a real handicap, too. They would be sent home with the laminaria in

place and then come back the next day. We'd insert it late in the afternoon or in the afternoon and then the next morning, they'd come in—back for their procedure.

Q When you teach abortion techniques, do you point out to other doctors about the use of laminaria in teenage cervixes?

A Oh, very definitely. I feel very strongly that they should have the benefit. A number of synthetic materials have been manufactured in an attempt to find something cheaper because the laminaria is rather expensive and **[77]** nothing has really proven as satisfactory as yet as the laminaria.

Q You've testified that insofar as mortality rates, abortion is one of the safest surgical procedures in the United States. Is it your opinion that considering morbidity or complication rates, it is still one of the safest procedures or that—is that included in that opinion?

A Yes. It is about one two-hundredth the risk of an appendectomy, for instance.

* * * * *

BY MS. BENSHOOF:

Q Dr. Hodgson, you testified that the mortality risks for abortions increases 50 percent with each week of pregnancy. Is there also an increase in risk for complication rates or morbidity?

A Oh, absolutely. That also increases with each increasing—with each increased week of gestation.

Q For teenage patients, what are your medical recommendations insofar as lowering the risk of death and the risk of complication for these patients?

[78] A The most important way to eliminate complications in the teenager is to eliminate delay. And I have felt very strongly on this particular issue, even to the extent of incorporating it in a chapter on unwanted pregnancy in adolescents which was submitted as an exhibit. It is in Dr. Blum's textbook on adolescent pregnancy.

Q What year was that?

A That was written in 1981. Actually written in 1980, prior to the—to our law that was passed on parental notification.

But I—in this article—in this chapter, I stressed the importance of responding to the teenager on a—just instantly. When they telephoned, they shouldn't be left hanging on the telephone. They shouldn't be given the—the go-around as far as appointments. They should—

The receptionist should be alerted to the way that teenagers act. Often times, it takes them so long to muster up their courage and to phone a doctor's office that when they make that contact, you should be receptive and get them—urge them if you think there's any possibility of pregnancy or even fear of pregnancy. Whether they've missed a period or not, they should be urged to come in. Not tomorrow or the next day, but right then and there.

[79] And always keep an open slot for—for a—a teenager. I think this is very important. And when they get to the doctor's office, they shouldn't be kept in the waiting room for any length of time because teenagers will disappear out of waiting rooms and lose their courage and not show up again for another month or two.

So they should be taken care of promptly. They should be put in another room. They should be treated with—it's—it's really very serious, that they should be given immediate attention.

If they're not pregnant, or they're fearful of it, then they should be given contraception or advised in regard to it, advised as to the risks of pregnancy and—and the alternatives and so forth. And the younger they are, the more this is the case.

And so I—I think it's something that the medical profession has been negligent about and I have earnestly tried to educate doctors in other fields as to the importance of—of delay.

* * * * *

[82] Q In evaluating pregnant teenagers, could you explain the risks of—what the particular risks are with continuing the pregnancy and going through childbirth for a teenager, as opposed to being able to obtain an abortion? I think you could start out your answer to that question by just what are the risks to the health of a teenager who is carrying through a pregnancy and childbirth.

A Well, the risks to a teenager are greater, of course, than they are for an adult simply because nature didn't intend it that way, even though women—even though teenagers are achieving menarche at an earlier age now than they did a few decades ago.

It's been estimated that the age of menarche is decreasing about four-tenths of a year every decade. And at the beginning of the century, women didn't begin menstruation until they were over 15. The average age was about 15.6 years, I believe. And now it's down to 12, a little over 12, just in the—within this last century.

But they're—when you see some of these children, it's obvious that they can't go through a pregnancy without having considerable distortion, from a physical point of view.

They're—they're apt to develop varicose veins. They develop abdominal changes in their—their **[83]** physique; muscle changes, abdominal changes. They lose the elasticity of their skin, the muscle—the elastic fibers are ruptured. They develop cardiovascular problems. They can have severe toxemia, which is based upon stress, which, of course, is always greater in the teenage pregnancy because of the social aspects. They may develop molar pregnancies.

I recall very vividly one of my first patients in Saint Paul was a 16-year-old that came in with a blood pressure of 200 and she had—as it turned out, we diagnosed a molar pregnancy.

Q Which is what?

A Which is a—it's a overgrowth of the afterbirth which destroys the—the fetus, per se, but the pregnancy continues and it's very—can be very dangerous. And this girl was really very seriously ill until we emptied her uterus of the molar pregnancy and she later recovered, but she was running a very dangerously high blood pressure and she could have had a cardiovascular accident and had a stroke or—or any number of complications; heart failure.

Q And do you think that the chances of developing such a pregnancy are higher in teenagers than adult women?

A The incidence of toxemia is definitely higher in the teenager. And the—

[84] Q Is molar pregnancy related to toxemia?

A Molar pregnancy causes—will cause toxemia. Yes, they can be related. They—

Q Are there differences in mortality rates for teenagers or for younger teenagers compared to the general adult woman population?

* * * * *

A Maternal mortality rates do run higher for the—for the teenager and—very slightly, however. And it has been argued that this is due to the fact that they don't have good prenatal care. And in—with select groups, they have been given special attention and watched very carefully through their prenatal period and the results are supposedly the same.

But it's just the nature of the teenager that they're not going to seek prenatal care early. They're not going to watch their diet. They tend to be very careless about **[85]** nutrition and dental care and observing all the rules of good prenatal care. And it's pretty difficult to make them all conform to this pattern.

Obviously, with an unwanted pregnancy, a patient is not motivated nearly as much to take care of themselves as an adult who is very much seeking that pregnancy.

So we see that—that teenagers are—are careless. They don't eat properly. They don't seek—they don't go to the doctor. They wait until the very last minute, if they have any prenatal care at all, and so the results are that the morbidity and the mortality rate is slightly higher in this group.

Q Do you have any idea about how much higher the risk of death is for teenagers under the age 15 compared to adult women?

MR. GALUS: Excuse me. What is—what is meant by adult women in that question?

MS. BENSHOOF: Women 20 to 24.

A Well, according to the statistics from the National Center for Health, from teenage—no, this is from "Teenage Pregnancy in Minnesota," actually. It's a—it's a—

[86] Q State.

A —publication—

Q From the State.

A From the State, in nineteen—1982. "Teenage Pregnancy in Minnesota." And they point out and these figures were originally obtained, I'm—I think from the National Center for Health Statistics and CDC. The children that—that the adolescent female is three and a half times more likely to die from toxemia of pregnancy than—than pregnant females in their twenties.

Q Excuse me. How many times?

A Three and a half times.

Q Isn't that one and a half (indicating)?

A Well, that's—I'm sorry. I read—yeah, it is one and a half.

* * * * *

[87] * * *

A The pregnant female is one and a half times more likely to die from toxemia. She's three and a half times more likely to die—the female under 15 is three and a half more times likely to die from toxemia. Those from 15 to 19 are one and a half times. I'm sorry to get that confused. They're 1.3 times more likely to develop anemia; and, of course, their nutritional reserves are depleted.

Q And is there a general maternal mortality figure for women under 15 compared to women 20 to 24?

A Well, this report claims that the maternal mortality is 60 percent higher for women under 15, and 13 percent higher for women 15 to 19 than for women 20 to 24.

Q You've discussed your—the statistical risks that a teenager faces either with pregnancy, terminating in abortion, or with continued pregnancy and childbirth, **[88]** and you had stated earlier in your testimony that it is 20 times safer for any woman to get an abortion in the first eight weeks of—of pregnancy than to continue the pregnancy and go through childbirth.

Do these statistical risks apply to teenagers who have specific medical problems or conditions?

A Well, teenager who has an underlying medical disorder, a complication obviously will carry much higher risks. This—this is just—these risks are figures for large group of—the overall group of women.

Q In your professional experience, have you ever had occasion to observe pregnant minors under the age of 18 who have had special health problems making abortions medically necessary, above the statistical necessity?

A Yes, indeed. I have had to carry some of them through pregnancy that have been very difficult. I can think specifically of youngsters with rheumatoid arthritis that are so crippled they could hardly move, and very severe diabetics. I can think of one that went through a pregnancy and later came into my office in the late '20s.

She was blind. And—

Q Do you think that having gone through pregnancy as a teenager attributed to this blindness?

A Well, the authorities in the field of diabetes—I can't give you any specific quotes on that, but the general **[89]** feeling over the years has been that allowing a pregnant woman to go through a pregnancy probably decreases her life expectancy about five years.

Q You mean a diabetic woman?

A A diabetic woman. And this would be even more true of a juvenile diabetic because they tend to be more—much more severe diabetics than the adult—the woman who acquires the diabetes in adulthood.

So for the juvenile diabetic to go through pregnancy, that really—it's—it's—to a degree, it's a life threatening thing if it's going to shorten her life three—five years; and, of course, precipitates the complications of diabetes which are retinitis and optic neuritis and blindness and—

Q So one of your patients did go blind?

A Yes, that's right.

Q You mentioned another teenage patient who had to go through a pregnancy with rheumatoid arthritis. What happened to her as far as future physical repercussions?

A Well, she was unable to care for that child and—because physically, she just wasn't able to. And I know she sought—she was pregnant a second time and sought an abortion. This was after abortion was legal and—

Q Was—during her first pregnancy, was abortion legal?

A No, it was not and she had had to carry—carry a [90] pregnancy through term then.

Q Were you her obstetrician?

A Yes.

Q Was it a wanted pregnancy?

A No.

Q What did she have to do to get through the pregnancy?

A Well, it was very hard—very, very difficult because she was in a good deal of pain and unable to care for herself, and it did not help the arthritis at all.

Q Was she bedridden?

A Essentially.

Q You stated she got pregnant a second time when abortion was legal?

A Yes.

Q Did you recommend that abortion for her would be medically necessary?

A Yes, she obtained one.

Q Have you ever had pregnant teenage patients who were drug or chemical dependent or alcoholics?

A Many, unfortunately. We—particularly at Saint Paul-Ramsey, we saw so many teenagers who were addicted drug abusers or alcoholics and they were aware of their inadequacies as far as parenthood is concerned. They—they seemed to just subconsciously realize that they couldn't parent a child and do it properly and it was [91] rather pathetic to see how they—their attitude toward the thing. They—in a way, they—it was very sad dealing with these young women.

And also, the women who are blind, the mentally retarded, even they would realize their inadequacies. Something seems to be subconscious that makes these women—they really become very objective about their own abilities.

And they worry, too. The—the ones that are on drugs worry about drugs that they have taken in early pregnancy affecting the pregnancy. And—

Q Is the physical risks for these women also higher?

A Oh, of course, because—

Q What could happen to them?

A Well, they're—a woman that is abusing drugs and—and alcohol and not eating properly can have all matter of nutritional deficiencies and is more susceptible to toxemia and infection and—

And prematurity is one of the big factors in teenage pregnancy. So many of the children deliver prematurely and they—the incidence of disease among the children. Particularly, nervous disorders are much higher. It's been estimated—again I'm quoting from "Teenage Pregnancy in Minnesota," page 52—that children born to females under the age of 15 have 2.4 times the number of brain [92] and nervous system disorders as children born to women over 15 and they're more likely to be of low birth weight and they have increased mortality rates, increased childhood morbidity and handicapping conditions such as blindness and deafness and cerebral palsy, and learning and behavioral disabilities.

Q You've discussed the physical biological effects of continuing pregnancies for teenagers. What are some of the emotional and psychological ramifications that you have seen in your career with pregnant teenagers?

A I think that's been the hardest thing for me to face and—and that was one of the reasons I wrote the editorial for "Minnesota Medicine" back in 1970 about teenage pregnancy in Minnesota. We were tolerating it. They report—there was a report of some pediatricians from General Hospital here on the—what happened to the infants of children under 15 that were delivered and how—what a high death rate there was among their offspring and the high incidence of a complication.

And there was—they reported on over a hundred cases, as I recall. And there was not a word said in the paper about averting these pregnancies, but allowing these youngsters, all 15 or less, to go through a pregnancy. And it was—it seemed—I pointed out the—what I considered the immortality of the situation [93] when we allow children to have children.

Q What about the psychological or emotional effects on children who have children?

A Well, it's not only hard for the mother involved, but it is—it has been definitely shown in numerous studies that these

children suffer from more psychological disorders, behavior problems, lower mentality, than—than in controlled groups.

And this—the pattern goes from one generation to another. It's sort of a vicious cycle. These are more apt to belong—to be born to women in a low income group on welfare and it's very difficult. They're—they're apt to become pregnant again, much more apt to—to become pregnant within the next two years than a—than a controlled group of the same age.

And they're sort of trapped in their environment and this vicious cycle of reproduction and welfare. And the children that are born into this type of situation tend to repeat the same thing. And I've lived long enough now to see this and see two or three or four generations, actually, of children having children. And it—it's very sad.

Q Have you ever had patients, teenage patients, who have gone through pregnancy, gone through childbirth, and whose mental or emotional wellbeing has been undermined **[94]** because of that experience?

A Yes. I think the psychological trauma is tremendous and that was one of the hardest things for me to face was to see the disillusionment in these youngsters as—they didn't know, many of them, even how they got pregnant, scarcely—the young ones—and they were products—the situation was something for—over which they had very little control.

I can think of children that I saw, their mothers brought them in. They were mothers who were seeking popularity in dating for their young high school daughters and would push them into social situations they weren't able to handle, allowing them to go to all night proms and that sort of thing at the age of 14. And these girls then would become pregnant and the mothers would bring them to me and be greatly distraught.

And then to have to—take care of these young women and—and follow them through a pregnancy, see them having to drop out of school, become socially ostracized, become more and more disillusioned and—and isolated, bitter. And their lives literally spoiled, their education stopped and at—and in that—at that time, and there still is a stigma to teenage pregnancy.

Q Have you ever had any teenage pregnant patients who've either attempted suicide or have been hospitalized for **[95]** psychiatric care?

A Yes. I saw a number of them at Saint Paul-Ramsey because in a—when you have a hospital service like that, you're aware of the inpatients in the other departments and I—a number of patients during the years that I was there would come in to the psychiatry ward with over—as overdose victims and it would turn out—I would be called to see them and it was amazing how many of them were pregnant or fearful of being pregnant.

And this has been pointed out in an article that we—that has been quoted frequently by Teicher, 1980, in which he pointed out that—that 22 percent of the adolescent suicidal cases were girls who thought they were pregnant or were pregnant, actually. And that is—

Q To follow that up—

* * * * *

Q Do you have an opinion as to whether the—whether or **[96]** not the psychiatric consequences of having an abortion are more or less than the psychiatric consequences of a teenager going through childbirth?

A From my experience, and also this is supported by numerous psychiatric studies that have been done comparing groups of women who have had abortions and women who have been denied abortions. Also, there have been studies done of the offspring of the women who have been denied abortions. And there's no questions that there is a higher incidence of mental and psychological disorders among the group that are compelled to go through pregnancy or denied abortion.

This has been repeatedly pointed out. There's a chapter in this—my textbook here by Figa Talamanica (ph), an Italian woman psychiatrist. A very extensive study. And she reviewed all the European and—and American literature on this subject and comes to the conclusion that as far as psychiatric complications are concerned or even minor psychological disturbances, that the abortion is less dangerous.

Q Is this true for minors as well as for adults?

A I—I think it's even more so because there are more—it's a more—pregnancy is a more complicated thing for a teenager than it is for an adult. So obviously, termination of that pregnancy is going to bring more relief.

[118] • • •

Q How many patients—pregnant patients seeking abortions do you think that you have personally seen and counseled as you've described?

A Minor, you mean, or—

Q Yes, minor.

A Oh, it runs into the thousands.

MR. GALUS: What is—what is minor? Under 18 or—

MS. BENSHOOF: Under 18.

A I'm sure it must be thousands. It would be hard to count, but I—it is several thousands of minors.

Q So you think you have a pretty good idea about how minors feel about abortion and pregnancy?

A Well, I—yes, I would expect so.

Q Based on this experience, what are any of the special problems that minors—that you see from your experience that minors have expressed to you or your patients have expressed to you?

A Well, it's—sometimes it's almost overwhelming the number of problems that these poor teenagers come in with. It's almost heartbreaking. You just wonder how they can keep from breaking under the strain.

I've already described the distances that some of **[119]** them have to come and the time schedules that they—they have to juggle in order to—if they want to protect their privacy; how difficult it is to make phone calls, even; and to raise the necessary funds just for these services; and how badly some of them need support and—and have no one to turn to.

I'm also impressed by the number of broken homes that these youngsters come from. I pulled at random—had them pull a dozen charts from the 1984 patients I had done in Duluth—

Q Minors?

A Minors.—this—this week and they were just simply random cases and—there were 12 of them. And 7 of them did not have fathers. They had stepfathers, but their own fathers had left and they were—and one—one of—there was one that was dead, as well, so that—but here were 7 out of the 12 that—that were the products of broken homes with no father figure in the house.

And the problems that some of these young women had were just so sad. They—couple of them didn't have a place to live. They—the harmony—there was so much disharmony at home that two of them weren't even living at home.

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Q When you consult teenagers, do you encourage—have some of them told one or both of their parents?

A Of the—the study that was done here in Minnesota—Ron Anderson at the University of Minnesota, and I think that was done about 1981—1980, I believe, or '81.

Anyway, in—in interviewing these patients, it was found that about 75 percent of them hadn't told both parents. Out of that group, another 25 percent would be willing to, but—but only about a third of those would be willing to tell both.

Q So do you have any idea about how many have told one or—

A How many had told one?

Q Right.

A Well, 75 percent had told one, but they hadn't told both. They'd be willing to tell one, but not both.

Q Right. I think your first testimony was that 75 percent had not told both.

A Yes.

Q I'm just wondering about—

A But they told one.

Q Some of them had told one. Is that your testimony?

[122] A No. I—I think that a—as I understood it, they'd all—the 75 percent had told one, but they hadn't told two; and that the—the remaining 25—that when—when it's—if you were to take all 100 percent of the group, 50 percent would not—

would not go along with the law. They will—they'll go to court. And that's the way things are working out when they're giving the—given the option.

About half of the minors that we see go to court and about half opt for notification and—isn't that right? I think that's what the figure—the way the figures go. Anyway—

Q What reasons do they give you for not notifying one or both parents?

A Oh, they are—they are numerous. They may be—be that they fear opposition, even to the point of violence and restraint, and they know that their positions—their parents' attitude on abortion or they're just not able to communicate with them.

Another common reason is that they don't want to hurt their parents. It's a matter of love for their parents and they don't want to spoil the relationship that they have with their parents.

Another reason is the health of one of the parents. Or a broken home where they've never seen or had very **[123]** little contact with the parent and they object to having to notify that one. They don't object to the—to the one person, one parent, but they objected to notifying the second one. So there are all kinds of situations.

But with the high incidence of single families—single parent families that we're seeing now, it's becoming more and more difficult to find that second parent. In this group of 12 patients of charts that I mentioned that I just pulled at random, it was amazing how there were—

There was one young woman whose mother hadn't been found since—or heard of since the girl was two years old and she was living with her grandmother. Her father had since gone to Chicago so he had to be notified, but the girl had to go to court anyway because the father—because the—they couldn't prove the death of the mother. There was no birth certificate, but they couldn't find her either so she went to court with her grandmother just to expedite the thing.

And it—it's—the situations are just too numerous to—to list almost. There are so many possibilities and so many very valid reasons why they—they simply cannot tell both parents.

Q Do you believe that it's medically contraindicated in some cases to tell both parents, one or both parents?

[124] A Absolutely. Some of these—there were two of the girls out of the twelve that said their stepfathers weren't speaking to them, that they had stopped communicating, and one had thrown her out of the house and I think that this is not the kind of—of reaction that is helpful in any way to family communication or helps to build better communication.

You can't suddenly expect a family that's not been communicating or talking freely about sexual matters to suddenly start just because the girl is pregnant. She's not going to suddenly open up, nor are the parents going to open up.

Q Do you have any examples from your patient history, and not necessarily limited to since this law, where teenage patients have reacted to trying to keep their pregnancies from their parents.

* * * * *

A There are many examples of situations in which patients have tried to keep their pregnancies from their families. And of **[125]** course everytime a patient goes to court here, they're—they're—that's what they're trying to do. And they—they have many difficulties sometimes in protecting their identity and—and keeping their parents from knowing where they're going and being able to get the family car. All of those things that make it very difficult, or having—

I remember a description last year of a patient, a teenager, who—she's now a counselor, who's describing to me how before abortion was legal, how she as a young teenager made an airplane trip all the way to New York early one morning and had her abortion and came back that same evening and her parents never knew she had left. And how—she just started to sweat, practically, while she was telling it to me and cried a little bit because it made such a—it had been so difficult for her to get through.

She was so happy that things were easier now for teenagers that they didn't have to go through what she did. But even with the law changed, they still have considerable trouble in protecting their privacy.

Q You mean the—the Roe v. Wade change?

A Yes, since Roe v. Wade. They still—the problems are still not solved because there are still problems with parents who will not be supportive of the child.

[126] Q Have you encountered patients where the parents have tried to stop an abortion?

A Yes, I have. One of the outstanding examples is a patient who was a deaf patient who was probably a victim of incest, although we never could document that, but very reluctant to—would give us no—could give us no story about the paternity.

She was a fairly intelligent 15-year-old and she—when she became pregnant, her mother took her out of school and kept her locked in the house. And it was only because she had a social worker on the basis of her deafness, the social worker discovered she was pregnant and wanted—and realized just what the situation was at home and managed to get the girl down to the clinic and make a diagnosis and get her down on a Saturday when she supposedly—had taken the girl to a birthday party for a couple of hours and we performed the abortion on the girl.

And—and this was prior to the notification law, just before—it was summer of '81 before the law became effective. And this patient—obviously, her mother was very violently opposed to—to abortion and was doing everything to keep the girl—to force her to continue the pregnancy.

Q Have you every had any teenage patients who have tried **[127]** to abort themselves to keep their pregnancy private?

A Yes, I have. And one outstanding case was a 14-year-old girl came to—to Saint Paul-Ramsey who—her friends had tried to help her induce an abortion by introducing some metallic object into her vagina and had torn her several times. And she bled and the pregnancy had continued in spite of this.

And she finally arrived at Saint Paul-Ramsey with—at about four or five—four months pregnant, I believe, or five months, and the cervix was so scarred, it would not dilate with ordinary means and we had to do a hysterotomy, a—similar to a Cesarean section, a uterine incision, in order to deliver her of this pregnancy.

Q Did this affect her future childbearing?

A Well, it means that she will always have to have Cesarean section.

Q Subsequent to the law or even before the law was in effect, have you received referrals on minors from teachers or social workers advising you that parents should not be involved?

A Well, yes, I—very recently, within the past year, a very sad case up in Duluth of a counselor from one of the Canadian border towns, a high school counselor—

Q About how far away from Duluth?

[128] A About 200 miles from Duluth. He brought down a 16-year-old girl with whom he was—that had come to him finally in desperation for help. Her parents were both school teachers in the school system in this town and there was a very active anti-abortion group in that community. And any girl that would—that would seek an abortion would be so ostracized and if a parent had supported a daughter, he, the counselor, felt that they would lose their jobs, actually on the school board, but—because the school board was so actively opposed.

So her parents were very much opposed to abortion and when she became pregnant, she knew that she could not get any help from them and she was pretty desperate and she sought help from this high school counselor who was the father of several daughters himself. And he realized that this girl would have to be—would be forced to continue her pregnancy, under the circumstances in that small town, that nothing else could ever happen.

And he wrote this in a very powerful letter to me after he had been to Duluth and he said if she had had to continue the pregnancy, she would have only been given a rose, but—and no—and—but she would have been subsidized, also, for continuing the pregnaney. But because she sought to take her own initiative and—seek the abortion, that she would have been very severely **[129]** punished.

So he arranged some school project, some trip, whereby she could be excused from school and he personally drove her to Duluth. And while she went through the court procedure, he was telling us about the situation at home.

And then he drove her back that night and it was difficult getting it all in one day because the girl needed laminaria, and she needed—first, pre-counseling, and then laminaria, and then the

court—I mean the court procedure and the whole business all in one day and drive back to—to this town and it was—it was very difficult. But he was very sincere and it was quite a touching story.

Q Have you encountered situations where one parent has come in with a teenage patient and that one parent does not feel they can notify the absent parent?

A Frequently. In those cases, of course, it is necessary then for the minor to go to court. And so frequently when they go to court, they have a parent with them.

Q What reasons do the parents give you as to why they can't tell the absent parent or spouse? I guess it could be either.

A Well, it may be a matter of not wanting to renew the relationship, if it's someone—if the parent has **[130]** deserted that child and the spouse and there may be no reason.

I know one case recently in which the mother had been denied custody of her daughter and yet she and her father had to go to court and they—or notify this mother who had been denied custody. These strange situations come up all the time so that the two-parent involvement makes it doubly difficult.

Q Do you ever have any situations where the mother of the teenager is a battered woman?

A Yes.

Q Could you explain?

A Well, it—I don't understand what there is to explain. I mean some women are battered and—

Q Did they believe—did they express to you that they believed they would be battered more if the father of the teenager were informed?

A Oh, I—yes. Oh, I see what you mean. The family relationship would be indeed strained; and if it was bad to begin with, it would be doubly so. A problem pregnancy like that, particularly if there is trouble between the spouses, the parents, why it's just only going to aggravate it.

Q Are any of your teenage patients victims of incest?

A Unfortunately, yes.

[131] Q Do you think it's medically advisable to notify the father when the father is—of the teenager is also the parent of the fetus?

A Well, these situations are very delicate and I—I couldn't begin to set down any rules. I think each one has to be handled individually. But there are many situations where it's not wise to notify one parent or the other, yes.

Q Have—

A Each one has to be judged on an individual basis.

Q Have parents come to you stating that the absent parent is ill or another reason why they feel it would harm the absent parent to be notified?

A Well, illness is a very common reason that's given; particularly, potential heart attacks, and—and I think of women that were dying of cancer and the father didn't want the mother to know.

Q You've had a patient where the patient's mother—the teenager's mother was dying of cancer?

A Oh, yes, yes. I've had several of those. That's not uncommon.

Q And you've actually spoken to their father?

A No, I—I can't swear that I spoke to the father, but I certainly was aware of the situation and knew—knew what was going on.

[132] Q So the one parent felt that to tell the dying parent about the pregnancy would not be healthy?

A Well, would—would be cruel. Not necessarily unhealthy, but not a kindness, shall we say. Often these—this refusal to—to communicate is a matter of kindness and love; it's not a matter of being difficult or uncooperative or—it's a matter of consideration.

Q Have you had any patients who do not know who their father is?

A Yes. That was a very—there was a very funny situation that I just learned about at the Fertility Control Clinic in Saint Paul in which—

Q You're working there now?

A Well, I stop by there on a regular—yes, I'm working at a clinic there two days a week and I—I know—pretty well have my finger on the pulse of what's going on at the Fertility Control Clinic.

And there was a two-week delay for one minor simply because when they notified the so-called natural father, he refused to acknowledge his paternity and so there had been considerable debate over who the father was. And so then the battle ensued between the mother and this man as to the paternity.

And after various documents had been brought in and **[133]** this had been debated for a couple of weeks, he finally—he must have been a fairly good Joe because he wrote a letter saying that whether he was the father or not, he would give his permission for this girl—minor to have her abortion. He didn't know who the father was and neither did anybody else, apparently. So that was—but that was an unnecessary delay, purely resulting from the law.

Q You say this particular patient lived with her mother and there was this two-week delay because she didn't—because there was a question as to whether—who her real father was?

A Correct, correct.

Q How do decisions about confidentiality and privacy relate to your role as a doctor treating a teenage patient?

A Well, they're going to be much more cooperative and better patients.

Q Well, let me just rephrase that. Is confidentiality a medical and professional concern for doctors? Is it part of treatment?

A Of course, because with confidentiality goes relaxation and peace of mind. If you have a relaxed patient that isn't scared to death and—or worried, tense, why they're going to be a much easier patient to operate on, particularly under local anesthesia.

[10] * * *

(JULY 12, 1985)
BY MS. BENSHOOF:

Q You—you stated that nine—that you—it's your belief that 13 hospitals in Minnesota perform abortions?

A Well, it's available. They can be done. I shouldn't say they all are providing the service as a hospital, but they wouldn't refuse a staff physician if they wanted to bring one

there to be done. But they don't regularly have abortion clinics where anyone can just walk in off the street.

There are—the—the only one of which I'm aware—there are two of which I'm aware would provide them. That would be Hennepin County General and Saint Paul-Ramsey, where a patient could just go into a clinic and have one. Otherwise, any hospital, such as Mount Sinai here in Minneapolis, wouldn't perform them, but a physician on the staff could bring one in.

* * * * *

[14] A Well, it entailed many problems because we had to—because of the—the use of laminaria in the teenagers, for example. It is considered medically advisable in the young, immature patient with a tight, narrow cervix to insert laminaria.

This is what it is (indicating). It's actually the—the stem of the seaweed. And this is inserted initially and allowed to remain in the cervical canal for several hours; preferably a minimum of 6 hours, up to 24, depending upon the stage of the pregnancy.

And this swells up and becomes three or four times this size and helps to soften and dilate the cervix so that it is possible to later introduce the cannula, such as this (indicating), through the cervix without causing any lacerations or damage to the cervix.

In teenagers, ten weeks and over, it's—unless they have an unusually patent canal, cervical canal, it's advisable to do this procedure and so it really involves two procedures. Sometimes we send them home overnight and have them come back the next morning and remove the laminaria and perform the procedure.

So the court process added to this meant that there was really much more than could ever be done in a—in one day, particularly where patients had to come a long distance, get up early in the morning and drive to **[15]** a clinic. They—and it's necessary, according to the court system in—in use at the present time, they have to have a pre-counseling exam and a—a session and examination and be instructed—given informed consent and go to court; and then come back, get the laminaria, wait four to six hours as a minimum, and have a procedure, and then

to go home a few hundred miles. You see, it's—it's an impossible situation.

So what happens is that in many of the clinics, the laminaria is omitted and the tendency is to—to—for the sake of the patient; otherwise, she's not going to get the procedure done at all. So just from the standpoint of time, it made it very difficult.

• • • • •

[21] • • •

Q Dr. Hodgson, you were discussing the problem of the court and laminaria scheduling. Do you believe that not using laminaria on a minor increases medical risks?

A Yes.

Q Are there any other effects of this law that you believe increase such risks?

A Yes. The delay is the—the prime effect.

• • • • •

[23] Q Have you observed minor patients of yours when they've come back from the court process?

A Yes, and some of them are wringing wet with perspiration. They're markedly relieved, many of them. They—they dread the court procedure often more than the actual abortion procedure. And it—it's frequently necessary to give them a sedative of some kind beforehand.

[27] • • •

Q Where do they wait? In the clinic?

A In the courthouse. They will have long waits and—so it is not easy for them. And many—and they haven't eaten. They're—we don't want them to come back for a procedure with a full stomach so they only can have liquids in the morning so they're hungry, they're tired, they've been up and come a long distance.

Q Can they have lunch?

A No. So then they come back to the clinic and—for—if they receive their authorization, which they do, so I—I don't see what difference it really makes. They just go through this routine. They're not turned down. They're—they're—they aren't denied, but they're just delayed. Then they come back to

the clinic and they have to receive their preoperative medications.

Q What is that?

A An anesthetic—I mean Atropine and Fentanyl, which is an analgesic, and atropine prevents—is a preoperative medication to reduce secretions and prevent nervous reactions which could cause the blood pressure to drop precipitously during any kind of a procedure such as this. And frequently, we have to give an additional sedative of Valium to the teenager, particularly. Then they go through the procedure and they're—we have [28] to hold them in the delivery room—in the recovery room to be sure they're not going to bleed or have problems afterward.

If they require laminaria, that's a new—it's an additional problem. Are we going to give it to them that afternoon, make them stay all night in a hotel and come back the next day for the procedure when there may or may not be a physician available?

I've frequently stayed overnight where I hadn't planned on it up there simply to take care of some of these. I was doing cases up to 16 weeks so that the—it was necessary for the laminaria to remain in a longer period of time.

But the trend—the tendency, of course, is the patient said, "I have to get home. My parents"—if—if their parents aren't with them, they—they have to get home and they have a long way to go, maybe driving all night. And so the tendency, of course, is to cut corners, which is not right for the patient and it's hard on the physician.

And—but after the procedure is completed and they are discharged from the delivery room—the labor room—recovery room, they then have to drive a long distance. So this all is extremely burdensome and it's—it's hazardous, often.

[29] I hesitate about sending some of these women on a long trip. Many of them are unaccompanied. Even whether—where they're with parents, it's very burdensome; and if they're with young people, it entails a lot of risk.

I don't see where the—I fail to see—and I've tried to see where in any situation the additional burden of this law is of any benefit to physician, patient, or society.

• • • • •

[49] • • •

Q Well, do you have examples where you've contemporaneously recorded the efforts to see that you comply with the law on particular patients?

A Well, yes. One—I dictated—in my frustration, I dictated into my dictaphone when I was working over at Midwest Health Center in Minneapolis. This was a—over a year after the law went into effect and I had run into so many problems with the minors' scheduling that I—I thought this I must record and I dictated into the dictaphone and—and they had it transcribed and these are—are my dictations that I made in August of—the end of August and first part of September in regard to scheduling.

And these were patients, I had seen them all and was involved and actually contacted the court myself in [50] some of the situations. And I can briefly condense this, unless you want me to read it verbatim, as I dictated—

Q Well, just give the example—

A Essentials.

Q —of what your observation was.

A On 8-19-82, I performed an abortion on L.H. who was 15 years of age. She had been delayed one week in getting into the court because of the back-up in their appointments. They were—apparently, they were having a three-day seminar and they were making no appointments whatsoever for one full week so that meant that everybody was put off a week.

And then, in addition, there were—it was busy and there was a real backlog.

Q Did that mean that you could not go ahead with an abortion on your minor patients who needed to go to court?

A At that—for that particular week, yes. And she was ten weeks pregnant and she is approaching the twelfth week; and she was also only 15, and she had been delayed for a whole week.

Then I—following this, I saw another 17-year-old who had been delayed exactly one week from the time she was diagnosed and ready to be done, simply because of the back-up in the court system.

A third young woman thought she had an appointment [51] today—this is still 8-19-82—at the court which she had made herself. She had gone—bypassed the clinic and made the appointment, she thought, with the court.

Q This was a patient of yours?

A Yes. And she—they—the court—she went to court and they were unable to confirm her appointment and they refused to see her so she came over to the clinic. And she was planning to leave the following day, the 21st of August, to—with a vacation with her parents to South Dakota for three weeks.

She was at that time ten weeks pregnant so we tried to get her into court immediately so she could be done before she had to go with her parents on this three-week vacation.

And when our—our counselor tried to get her into court the following day—the 20th—they refused saying they were all filled up; they only accept five patients. So I finally had to intervene and I called over and talked it over with David Knutson, the public defender, and he gave her a special appointment for 10:00 o'clock the next morning.

• • • • •

[142] BY MR. GALUS:

Q Doctor, did any of those 12 patients suffer any complication, medical complication, following their abortions?

A Not that I'm aware of, medical complications. I think that there was considerable emotional and psychological [143] trauma.

Q Due to various sources?

A Due to various problems, yes.

Q Even prior to the enactment of the parental notification statute and its becoming effective, at least in part, in August of 1981, even prior to then—

A Oh, absolutely.

Q —didn't you observe severe anxiety and stress among your—

A Oh, absolutely.

Q Excuse me. I'll have to finish the question. Even prior to this law, haven't you observed severe emotional distress and anxiety among your teenage abortion patients?

A I wrote a chapter on that in 1975 on the emotional stress that these minors undergo. And it is our hope that we can help eliminate of them as part of their health care.

* * * * *

[179] * * *

Q Doctor, based upon your experience and training, is it your opinion that a—an unplanned pregnancy for a minor woman is an extremely traumatic event?

A Yes.

Q Do you believe that minors in such situations; namely, confronted with an unplanned pregnancy, tend to be under extreme psychological stress?

A They're under psychological stress because of the unplanned pregnancy, not because of the termination. The termination brings relief.

Q That wasn't my question. I'm not—without reference **[180]** to the termination, do you believe that pregnant minors who find themselves with an unplanned pregnancy tend to be under extreme psychological stress?

A As long as they're pregnant.

Q Do you encourage parental involvement in every instance?

A Not in every instance because there are a number of times that parents are not qualified to be supportive.

Q Do you think it is extremely important—that parental involvement's extremely important?

A I think it's very important if it's good.

Q Do you think it's only in the rare case where it's impossible to obtain?

A Unfortunately, it's rather frequent that it's not good. With the number of broken homes, as I've pointed out, and the frequency of alcoholism and—and unfortunately, we have a lot of parents that I do not consider to be good parents who do not consider the welfare of their child ahead of their own feelings.

Q What are the benefits of parental involvement for the youngster or the young woman who finds herself faced with an unplanned pregnancy?

A Well, good parental—and if it's a good parent, obviously, that's ideal and I would encourage that they—their protection and moral support and economic support and health support. In every way, it's very helpful. **[181]** I've always encouraged parental involvement if I thought it was a good thing.

* * * * *

[182] * * *

Q In connection with your testimony in the Bellotti case, do you recall being asked the following question and **[183]** giving them the following answer: "Question: Have you also encountered situations where parental involvement would be helpful? Answer: Yes, indeed. I encourage it in every instance. I think it is extremely important and to be sought after, but there is the rare case where it is impossible to obtain."?

A Yes.

Q Do you recall giving that testimony?

A Yes.

Q Okay.

A I still feel the same way.

Q Do you believe that young pregnant—young women often have exaggerated or unfounded fears of adverse parental reaction should their—one or more of their parents be notified of the—their decision to have an abortion?

A Oh, absolutely.

Q And that's the usual situation, is it not?

A Not—sometimes it's very real. It—it can be either. It can be imaginary and it can be very real.

* * * * *

[199] * * *

Q Do you believe in the compulsory termination of pregnancy for any category of women?

A No.

Q Whether by age or whatever?

A Well, I—I think you get to a gray area where perhaps we should have compulsory pregnancy in the very young, the children 11-12 who don't know and it's hard to explain to them

what a term—I don't think we, as a society, should allow these children to be forced to go through a pregnancy because it is—it is just cruel and unusual punishment for something that—that they really are not responsible for in our society today.

Q I think you misspoke and referred to compulsory pregnancy in the context of that—

A I'm sorry. What?

Q I think you misspoke and referred to compulsory pregnancy in the context of that last answer.

[200] MR. PENTELOVITCH: You meant compulsory termination.

A Oh, I'm sorry.

Q Do you think there's a case to be made for compulsory termination for that—that particular group?

A Yes. I don't think they should have to undergo compulsory pregnancy, certainly. And I don't think they're old enough to know what they want at that—what they really do want because they aren't—and it's very difficult for a youngster that age or as well as for mentally retarded to understand.

Q And what age group are you referring to in that connection?

A Under 14.

Q Do you believe that as a general matter, it is pretty obvious that the best medical solution once pregnancy has occurred in a teenager is the interruption of that pregnancy?

A Up to a point. Again there are always exceptions.

Q Do you believe, based upon your experience and training that presumptively that's the best medical solution in that circumstance?

A The better of some bad alternatives.

Q Abortion is a bad alternative?

A Is the better of bad alternatives. Obviously, we would **[201]** prefer to intercept in this thing before the—a teenager ever gets pregnant. Primary intervention is to be preferred, but as long as—once pregnancy has occurred, if we haven't taught that patient to contracept or to abstain or whatever, if we haven't interfered at that point, then society, certainly, the next best thing is to intervene and is to intervene as early as possible.

Q And by intervene, you mean terminate the pregnancy?

A I mean termination of pregnancy. And that is—medically that is safer; and psychologically it's better. It's better for society. It's better for that individual's future life and family and everything.

Q Doctor, in your opinion, is it the normal, healthy reaction of the average teenager to want to terminate her pregnancy?

A Yes.

Q And is it your opinion that that's essentially a normal type of reaction?

A Yes.

Q And is it further your opinion that the ones; that is, the teenagers or the minors, who want to continue the pregnancy are the ones that need psychiatric help, generally speaking?

A Well, they're more apt to. They are the more dependent, passive individuals who do not live in the future. **[202]** They're not looking ahead.

Q Doctor, based upon your experience practicing in Minnesota since August of 1981, are you aware of any single instance in which any of your minor patients has sought an illegal abortion or attempted a self-induced abortion as a result of any of the requirements or obligations imposed by the parental notification statute?

A I'm not aware. I have suspected a few.

Q You have suspicions?

A Yes, but I have no proof. I can't document it.

Q Again, based upon your experience in the practice of medicine and more particularly in obstetrics and gynecology in the providing of abortions in Minnesota since August of 1981, are you aware of a single instance where parents have prevented, through physical restraint or otherwise, a daughter from having an abortion by virtue of any of the requirements or obligations imposed by the parental notification statute?

A Well, I don't think that's the effect of the law. Where the law—the law, of course, allows—they—it's mainly a delay, but it is—as far as it causing parents to become violent, I don't think that's the case.

* * * * *

[207] Q Now, of those patients you have seen, can you think of any case where the patient benefited from the parental notification statute, either by giving notice to the parents or by going through the court procedure?

A I've honestly tried, because afterall, it is a law in our state and I have to abide by it. I have really looked and given it considerable thought and I honestly think there is no benefit whatsoever.

Q And there hasn't been to your patients?

A It has not been for my patients nothing but problems. And the very fact that they're all granted anyway, you wonder, well, what is accomplished. I think we have one benefit. May I mention that? I think that it has helped to educate our judiciary in regard to the problems of teenage pregnancy, and that's good.

Q So that's a benefit to the judges more than to the patients?

A A benefit to society.

Q But not a direct benefit to your patient?

A Not the patients, no. I think they—they have—they've suffered.

* * * * *

PLAINTIFFS' EXHIBIT 122

PERCENT IN SECOND TRIMESTER

Minnesota Residents

	1978	1979	1980	1981	1982	1983
≤ 17	18.4	18.7	21.9	20.1	20.6	23.3
18-19	14.7	14.0	16.6	15.1	15.2	16.5
20-24	10.0	10.4	11.2	10.3	10.6	11.4
25 +	7.8	7.4	8.5	7.5	8.0	7.4
TOTAL	11.7	11.6	13.1	11.5	11.5	12.1

Plaintiffs' Exhibit 122
(as corrected by Defendants)
3-81-538 Civ.

DEFENDANTS' EXHIBIT NO. 19

TEENAGE PREGNANCY IN MINNESOTA D.EX. 19

Fetal Deaths

Approximately 57 of the pregnancies in Minnesota teenagers age 15 to 19 terminated in fetal death. This is approximately 0.5 percent of the pregnancies.

Risks Associated With Teenage Pregnancy

Statewide data on maternal morbidity is unavailable. However, national studies provide statistics on some of the risks associated with teenage pregnancy. For example:

1. Maternal mortality is 60 percent higher for women under age 15 and 13 percent higher for women 15 to 19 than for women 20 to 24.
2. Pregnant females age 15 to 19 are twice as likely to die from hemorrhage and miscarriage than pregnant females in their 20's.
3. Pregnant females 15 to 19 are 1.5 times more likely to die from toxemia than those who are pregnant in their early 20's.
4. The pregnant female under 15 is 3.5 times more likely to die from toxemia than pregnant females in their 20's.
5. Adolescent females are 1.3 times more likely to develop nonfatal anemia or toxemia during pregnancy than women 20 to 24.
6. For females under 16 years, pregnancy may deplete nutritional reserves needed for their own growth and place them at greater risk to other health problems.
7. The adolescent female is more likely to begin labor prematurely and have a difficult labor, thereby increasing the hazards to her and her baby.

8. A baby born to a female under 15 years is 2.4 times more likely to die in its first year than one born to a female 20 to 24 years.
9. Babies born to women under 20 are from 1.3 to two times more likely to be of low birth weight than infants born to women 20 to 24. Low birth weight is associated with increased risk of infant mortality and childhood morbidity and handicapping conditions, such as blindness, hearing disorders, cerebral palsy, and learning and behavioral disabilities.
10. Children born to females age 15 and under have 2.4 times the number of brain and nervous system disorders as children born to women over 15.

Poor health status is frequently correlated to low socioeconomic status. Of the teenagers who become pregnant:

1. Eight of ten who become mothers at or below 17 years of age never finish high school.
2. Three of five pregnant teen brides are divorcees within six years.
3. Teenage mothers are less likely to work and more likely to be on welfare than mothers who first give birth in their 20's.
4. Young mothers will have 1.3 times more children than women who begin to have children at age 20 to 24.

The data presented document that teenage pregnancy is an issue in Minnesota, as it is nationwide. Although the data shows that only 3.4 percent of Minnesota's teenagers are faced with a pregnancy, the alarming fact is that pregnancy among teenagers is increasing at a more rapid rate than pregnancy in other age groups. The reasons for this increase are complex. Among the motivational factors of teenagers risking pregnancy are lack of information on contraception and consequences of pregnancy, rebelliousness, low self esteem, and a sense of limited life alternatives. Programs and policies must be developed which

address these factors and respect the varied developmental stages of this population.

During the 1980 legislative session we presented concerns for consideration in studying teenage pregnancy. At this time we would like to review those issues and offer recommendations for policy consideration.

1. Many parents believe that sex education should be taught in the home, yet many feel incompetent to approach the subject.

   How can the state reinforce the perspective of these parents and assist them in meeting their responsibilities?

2. Although teenagers who become pregnant receive the most attention, over 60 percent of Minnesota teenagers are not sexually active.

   What can be done to support responsible decisions relative to sexual activity?

3. Most teenage males believe that contraception and pregnancy are the responsibility of the females.

   What programs can be implemented to encourage male involvement in responsible sexuality and reproductive decisions?

4. Of the 5,240 teenagers having abortions in 1978, 51.6 percent reported never having used a method of family planning and 35.9 percent report not using family planning at the time of conception.

   What legal and other barriers exist to the provision of family planning services to Minnesota teenagers?

DEFENDANTS' EXHIBIT 35

MINNESOTA REPORTED ABORTIONS—1980-1983

1983 Minnesota Reported Abortions

Average gestation weeks for minors (Patients age 17 and under) = 10.73

Complications per 1,000 for minors (Patients age 17 and under) = 6.98

Complications per 1,000 for adults (Patients age 18 and over) = 9.20

1982 Minnesota Reported Abortions

Average gestation weeks for minors (Patients age 17 and under) = 10.36

Complications per 1,000 for minors (Patients age 17 and under) = 6.39

Complications per 1,000 for adults (Patients age 18 and over) = 6.74

1981 Minnesota Reported Abortions

Average gestation weeks for minors (Patients age 17 and under) = 10.41

Complications per 1,000 for minors (Patients age 17 and under) = .00

Complications per 1,000 for adults (Patients age 18 and over) = 2.86

1980 Minnesota Reported Abortions

Average gestation weeks for minors (Patients age 17 and under) = 10.73

Complications per 1,000 for minors (Patients age 17 and under) = 2.58

Complications per 1,000 for adults (Patients age 18 and over) = 2.26

10.44.40.UCLP, AA, 030, 0.149KLNS.

CtNo 3-81-538 Civ
Def. EXHIBIT 35

DEFENDANTS' EXHIBIT 62

MINNESOTA SUPREME COURT ORDER
DATED 8/13/81

STATE OF MINNESOTA
IN SUPREME COURT

State of Minnesota, Supreme Court

I hereby Certify that the foregoing instrument is a true and correct copy of the original as the same appears on record in my office this 3rd day of March 1986.

Wayne Tschimperle, Clerk of Court

By: /s/ WAYNE TSCHIMPERLE
Clerk

In Re Procedure Relating to Minn. Stat. § 144.343, subd. 6 (1980).

ORDER

WHEREAS, the Minnesota Legislature recently amended Minn. Stat. § 144.343 (1980) to prescribe procedures for the notification of parents, guardians, and conservators prior to performing abortions on certain persons, 1980 Minn. Laws ch. 228, § 1; and

WHEREAS, Minn. Stat. § 144.343, subd.6(c) (1980) details the procedure to be employed in the event a pregnant woman elects not to allow the notification of a parent, guardian or conservator contemplated by Minn. Stat. § 144.343, subd. 2 (1980);

IT IS HEREBY ORDERED that the following procedure, effective this date, be employed to facilitate prompt judicial consideration of a petition pursuant to section 144.343, subd. 6(c):

(1) The petition shall initially be filed in and considered by the county court or, in the case of Hennepin and Ramsey Counties, in the district court, juvenile division. Section 144.343, subd. 6(c)(i)(ii)(iii).

(2) An order denying the petition shall be appealable on the record to one judge of the district court, including the district court of Hennepin and Ramsey Counties. Section 144.343, subd. 6(c)(iv).

Dated: 8/13/81

BY THE COURT:

By: /s/ ROBERT J. SHERAN
Chief Justice

SUPREME COURT
FILED
[AUGUST 14, 1981]
JOHN MCCARTHY,
Clerk

Court No. 3-81-538 Civ
EXHIBIT 62

DEFENDANTS' EXHIBIT 62a

MINNESOTA SUPREME COURT AMENDED ORDER
DATED 6/14/84

State of Minnesota, Supreme Court

I hereby Certify that the foregoing instrument is a true and correct copy of the original as the same appears on record in my office this 3rd day of March 1986.

Wayne Tschimperle, Clerk of Court

By: /s/ WAYNE TSCHIMPERLE
Clerk

C8-84-1051

IN RE PROCEDURE RELATING TO MINN.
STAT. § 144.343, SUBD. 6 (1981)

AMENDED ORDER

Effective July 1, 1984

WHEREAS, the Minnesota Legislature recently amended Minn. Stat. § 144.343 (1980) to prescribe procedures for the notification of parents, guardians, and conservators prior to performing abortions on certain persons, 1981 Minn. Laws ch. 228, § 1; and

WHEREAS, Minn. Stat. § 144.343, subd. 6(c) (1981) details the procedure to be employed in the event a pregnant woman elects not to allow the notification of a parent, guardian or conservator contemplated by Minn. Stat. § 144.343, subd. 2 (1981);

IT IS HEREBY ORDERED that the following procedure, effective this date, be employed to facilitate prompt judicial consideration of a petition pursuant to section 144.343, subd. 6(c):

(1) The petition shall initially be filed in and considered by the county court or, in the case of Hennepin and Ramsey Counties, in the district court, juvenile division or, in the case of a

unified judicial district, in the district court. Section 144.343, subd. 6(c) (i) (ii) (iii).

(2) An order denying the petition shall be appealable on the record to one judge of the district court, including the district court of Hennepin and Ramsey Counties or, in a unified judicial district, an order denying the petition shall be appealable on the record to two district court judges and if there be a division between said judges the order denying the petition shall stand.

Dated: June 14, 1984

BY THE COURT:

By: /s/ DOUGLAS K. AMDAHL
Douglas K. Amdahl
Chief Justice

OFFICE OF
APPELLATE COURTS
FILED
JUNE 14 1984
WAYNE TSCHIMPERLE
CLERK

Court No. 3-81-538 Civ
Exhibit 62a

EXCERPTS FROM DEFENDANTS' EXHIBIT 68

MAJOR STUDIES ON PSYCHOLOGICAL ILL EFFECTS OF INDUCED ABORTION

Compiled by Dr. Vincent Rue

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DEFENDANTS' EXHIBIT NO. 69

Petitions
Abortion Notification Statute
Minnesota Statutes § 144.343, Subd. 6,
1981 Supplement
August 1, 1981 to March 1, 1986

Judical District	No. of Counties	No. of Petitions Filed	No. of Petitions Granted	No. of Petitions Withdrawn	No. of Petitions Denied	No. of Petitions Appealed	No. of Petitions Affirmed	No. of Petitions Reversed
1.	7	78	77	1				
2.	1	793	793		1			
3.	11	52	51		3			
4.	1	2314	2311	1	2	1	1	
5.	15	4	1		1			
6.	4	279	278	2				
7.	10	7	5					
8.	13	2	2					
9.	17	6	6					
10.	8	38	34	2	2			
	87	3,573	3558	6	9	1	1	

Abortion Notification Statute
Minnesota Statutes § 144.343, Subd. 6,
1981 Supplement
August 1, 1981 to March 1, 1986

Judicial District	No. of Counties	No. of Petitions Filed	No. of Petitions Granted	No. of Petitions Withdrawn	No. of Petitions Denied	No. of Petitions Appealed	No. of Petitions Affirmed	No. of Petitions Reversed
First Judicial District								
Carver		1		1				
Dakota		62	62					
Goodhue		12	12					
LeSueur		1	1					
McLeod		0						
Scott		0						
Sibley		2	2					
Subtotal		78	77	1				
Second Judicial District								
Ramsey		793	793					
Subtotal		793	793					

Judicial District	No. of Counties	No. of Petitions Filed	No. of Petitions Granted	No. of Petitions Withdrawn	No. of Petitions Denied	No. of Petitions Appealed	No. of Petitions Affirmed	No. of Petitions Reversed
Third Judicial District								
Dodge		0						
Fillmore		0						
Freeborn		8	8					
Houston		0						
Mower		1			1			
Olmsted		37	37					
Rice		3	3					
Steele		0						
Wabasha		0						
Waseca		0						
Winona		3	3					
Subtotal	11	52	51		1			
Fourth Judicial District								
Hennepin		2314	2311		3			
Subtotal	1	2314	2311		3			

Judicial District	No. of Counties	No. of Petitions Filed	No. of Petitions Granted	No. of Petitions Withdrawn	No. of Petitions Denied	No. of Petitions Appealed	No. of Petitions Affirmed	No. of Petitions Reversed
Fifth Judicial District								
Blue Earth		0						
Brown		0						
Cottonwood		0						
Faribault		1		1				
Jackson		0						
Lincoln		0						
Lyon		1			1	1	1	
Martin		0						
Murray		0						
Nicollet		0						
Nobles		2	1		1			
Pipestone		0						
Redwood		0						
Rock		0						
Watonwan		0						
Subtotal	15	4	1	1	2	1	1	

Judicial District	No. of Counties	No. of Petitions Filed	No. of Petitions Granted	No. of Petitions Withdrawn	No. of Petitions Denied	No. of Petitions Appealed	No. of Petitions Affirmed	No. of Petitions Reversed
Sixth Judicial District								
Carlton		0						
Cook		0						
Lake		0						
St. Louis		279	278		1			
Subtotal	4	279	278		1			

Judicial District	No. of Counties	No. of Petitions Filed	No. of Petitions Granted	No. of Petitions Withdrawn	No. of Petitions Denied	No. of Petitions Appealed	No. of Petitions Affirmed	No. of Petitions Reversed
Seventh Judicial District								
Becker		0						
Benton		0						
Clay		0						
Douglas		0						
Mille Lacs		1		1				
Morrison		0						
Otter Tail		0						
Stearns		2	1	1				
Todd		4	4					
Wadena		0						
Subtotal	10	7	5	2				

Judicial District	No. of Counties	No. of Petitions Filed	No. of Petitions Granted	No. of Petitions Withdrawn	No. of Petitions Denied	No. of Petitions Appealed	No. of Petitions Affirmed	No. of Petitions Reversed
Eighth Judicial District								
Big Stone		0						
Chippewa		0						
Grant		0						
Kandiyohi		0						
Lac Qui Parle		0						
Meeker		0						
Pope		2	2					
Renville		0						
Stevens		0						
Swift		0						
Traverse		0						
Wilkin		0						
Yellow Medicine		0						
Subtotal	13	2	2					

Judicial District	No. of Counties	No. of Petitions Filed	No. of Petitions Granted	No. of Petitions Withdrawn	No. of Petitions Denied	No. of Petitions Appealed	No. of Petitions Affirmed	No. of Petitions Reversed
Ninth Judicial District								
Aitkin		0						
Beltrami		0						
Cass		1	1					
Clearwater		0						
Crow Wing		1	1					
Hubbard		0						
Itasca		0						
Kittson		0						
Koochiching		3	3					
Lake of the Woods		1	1					
Mahnomen		0						
Marshall		0						
Norman		0						
Pennington		0						
Polk		0						
Red Lake		0						
Roseau		0						
Subtotal	17	6	6					

Judicial District	No. of Counties	No. of Petitions Filed	No. of Petitions Granted	No. of Petitions Withdrawn	No. of Petitions Denied	No. of Petitions Appealed	No. of Petitions Affirmed	No. of Petitions Reversed
Tenth Judicial District								
Anoka		21	19	1	1			
Chisago		0						
Isanti		0						
Kanabec		0						
Pine		0						
Sherburne		3	3					
Washington		13	11	1	1			
Wright		1	1					
Subtotal	8	38	34	2	2			
	87							

DEFENDANTS' EXHIBIT 70

PARTIAL TRANSCRIPT OF REMARKS BY
SENATOR GENE WALDORF DATED 3/24/81

MINNESOTA SENATE COMMITTEE ON HEALTH,
WELFARE AND CORRECTIONS
March 24, 1981

Partial Transcript Remarks
Regarding Senate File 287 (Tape 1, Side A)
by Senator Gene Waldorf, Chief Author

SEN. GENE WALDORF:

Mr. Chairman, I don't want to burden you with more testimony. I think as a parent I'm almost ashamed to admit it after hearing about what we are, but I think it's utter nonsense to assume that even if families where there is good communication that a daughter is going to want to come to her parents and tell her about, and tell them about her problem. It's just nonsense, and everybody that's got kids that age knows it or that remembers they went through that period in time. They don't want their parents to know when they don't live up to what they think their parent's expectations are of them.

Just a week or so ago my daughter, we discovered, had skipped school on St. Pat's Day after she had asked me to allow her to go to the parade and I refused. And she skipped school and she got caught, and she went through a lot of trouble to convince the counselor at school not to tell her parents, because obviously she would be concerned about our reaction and how we might feel about her.

It wasn't any threat to her but I think that indicates what all minors, particularly those with this kind of problem, how they're going to feel. And I don't think that it's safe to assume that all of those who are unwilling to communicate that easily to their parents are in families where the parents are going to abuse them or are insensitive to their problems or will impose some other personal feelings on their children. I know in the

case of my own children that if they had that kind of problem, my primary concern would be them and their well-being and nothing else would take precedence over that. And I think I can speak for an awful lot of parents when I say that. Mr. Chairman, that's my wrapup.

. . .

SEN. GENE WALDORF:

One of the reasons for this bill is to make certain that the minor has good medical information available to—in the event that she has an abortion, that she has the benefits of support from her parents and whatever counseling they can offer. And I think in that case that you would agree that it's—and as most of the professionals have testified, that's an important factor.

DEFENDANTS' EXHIBIT 71

PARTIAL TRANSCRIPT OF REMARKS BY
SENATOR GENE WALDORF DATED 4/7/81

MINNESOTA SENATE COMMITTEE ON HEALTH,
WELFARE AND CORRECTIONS
April 7, 1981

Partial Transcript of Remarks
Regarding Senate File 287 (Tape 1, Side A)
by Senator Gene Waldorf, Chief Author

SENATOR WALDORF:

The reason for the bill is that under current law, common law, first if all, suggests that parents be notified in the case of medical procedures involving their minor children and there have been a number of exceptions, most were put into our statutes in 1971, dealing with specific cases. One of them, which is section 144.343, deals with pregnancy, venereal disease and alcohol or drug abuse. An exception is made there to the requirement of parental consent. That exception has also been implied to mean no requirement for parental notification. I might point out that this language was passed in 1971 as as result of an increase in venereal disease and specifically was not dealing with the abortion question at all because at that point in time abortion was still illegal. It—because of that interpretation of that consent exception, we are trying through Senate File 287 to deal with bringing the parent back into that—into that difficulty and allowing a—the parents of a minor woman to be notified in the event that she asks for an abortion procedure. By Supreme Court we are not allowed to require any kind of consent and I have taken great pains in this bill and with a great deal of very good assistance from our Senate counsel in trying to deal with that issue so that we don't, in the process that we are describing in this bill, inflict some kind of parental consent on the process. I might point out that even though the parents are notified of the requested procedure that the minor is still in control and can make the decision and as a matter of fact does not even—is not

even required in any way to consult with her parents. What I hope to accomplish in this bill is to bring back what I think is loving support for the minor who is faced with a very, very difficult decision, one that I think will stay with her and affect her for the rest of her life. The courts have repeatedly affirmed the importance of parental support for the minor children. I have a number of quotations from the *Quinlan* case and from other cases relating to this. I'll forego those unless the question becomes a discussion point.

DEFENDANTS' EXHIBIT 72

PARTIAL TRANSCRIPT OF REMARKS BY
SENATOR GENE WALDORF DATED 5/6/81

MINNESOTA SENATE SESSION, MAY 6, 1981

Partial Transcript of Remarks
Regarding Senate File 287 (Tape 1, Side A)
by Senator Gene Waldorf, Chief Author

CHAIRMAN:

We're back to Item No. 17 on the General Orders.

The Chair recognizes Senator Waldorf.

SENATOR WALDORF:

Mr. Chairman, members, let me briefly give you the reasons why Senate File 287 is before you. In the Supreme Court decision upholding the Utah statute, the Court restated the long-standing position that the custody, care and nurture of the child reside first in the parents whose primary function and freedom include preparation for obligations the State can neither supply nor hinder. The guiding role includes counseling them on important decisions. The decisions include the physical, emotional and spiritual health of the child. The parent, if he or she knows about the decision to—of the child to have an abortion—can supply medical history to insure an informed decision on the part of the minor and include the moral implications of the decision. Neither the doctor or other professionals involved in providing abortions can give that support. Mr. Chairman and members, when we heard this bill in committee we had a great deal of testimony about the role of the parents and, unfortunately, a good deal of that testimony came from professionals who are dealing with minors on this very issue and counseling them on whether or not they should consider abortion as a viable option. The unfortunate thing about all of the testimony running through those professionals' presentations was that they—that they demean the role that the parents are taking today in counseling their own children. They suggested

that parents are abusive to their children. They suggested that parents don't accept their responsibility towards their children. That they don't communicate with them and that they have abrogated their role. I as one parent object to the fact that my own daughters, if they were to seek counseling on a matter as serious as abortion, might be, that my role as a parent in counseling them would be demeaned by those professionals and that I wouldn't have equal opportunity to provide counseling and love and care and concern for my own daughters. I think all of us recognize, and as well as the Court, that those who are in the situation at that age, 17 and under, have an awful lot of pressure on them that they can't deal with very well. The Supreme Court in the Utah decision again asserted by saying that there is no logical relationship between the capacity to become pregnant and the capacity for mature judgment concerning the wisdom of an abortion.

(12) (12)

Nos. 88-1125 and 88-1309

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JANE HODGSON, M.D., *et al.*,

Petitioners,

—v.—

THE STATE OF MINNESOTA, *et al.*,

Respondents.

THE STATE OF MINNESOTA, *et al.*,

Cross-Petitioners,

—v.—

JANE HODGSON, M.D., *et al.*,

Cross-Respondents.

BRIEF FOR PETITIONERS

WILLIAM Z. PENTELOVITCH
REBECCA A. PALMER
Maslon, Edelman, Borman & Brand
1800 Midwest Plaza
Minneapolis, Minnesota 55402
(612) 339-8015

LINDA OJALA
Kurzman, Grant & Ojala
2445 Park Avenue South
Minneapolis, Minnesota 55404
(612) 871-9004

JANET BENSHOOF
(*Counsel of Record*)
RACHAEL N. PINE
LYNN M. PALTROW
JOHN A. POWELL
American Civil Liberties
Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800

SIMON HELLER
On The Brief

ROBERT S. HICKS
Minnesota Civil Liberties Union
1021 West Broadway
Minneapolis, Minnesota 55411
(612) 522-2423

95 pp

QUESTIONS PRESENTED

1. Whether the Eighth Circuit erred in failing to hold the Minnesota two-parent notification/judicial bypass statute unconstitutional, despite factual findings that after five years of operation the statute both failed to promote any legitimate state interest and impermissibly burdened minors' privacy rights.

2. Whether the Eighth Circuit erred in holding that the imposition of a mandatory waiting period of not less than forty-eight hours, and commonly seventy-two hours, after notification to both parents, was constitutional.

3. Whether the district court was correct in holding that the two-parent requirement cannot be severed from the remainder of the statute.

PARTIES TO THE PROCEEDING

Petitioners, Jane Hodgson, M.D.; Arthur Horowitz, M.D.; Nadine T., Janet T., Ellen Z., Heather P., Mary J., Sharon L., Kathy M., and Judy M., individually and on behalf of all other persons similarly situated; Diane P., Sarah L., and Jackie H.; Meadowbrook Women's Clinic, P.A., Planned Parenthood of Minnesota, a nonprofit Minnesota corporation; Midwest Health Center for Women, P.A., a nonprofit Minnesota corporation; Women's Health Center of Duluth, P.A., a nonprofit Minnesota corporation, were plaintiffs below.[1] Respondents and Cross-Petitioners, the State of Minnesota, Rudy Perpich, as Governor of the State of Minnesota; Hubert H. Humphrey, III, as Attorney General of the State of Minnesota, were defendants below.

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1 The caption on the Petition for Certiorari differs from those used in the courts below. The lower courts erroneously failed to use the substituted caption entered by order of the district court on April 3, 1986. This order is reprinted in the Appendix to the Petition for Certiorari at 6a-7a. Citations to the Appendix to the Petition for Certiorari are in the form "__ a." Citations to the Joint Appendix are in the form "J.A. __." Cites to other parts of the record are by Exhibit (P. Ex. __) or Transcript (Tr.) page.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the district court was issued on November 6, 1986. It is reported at 648 F. Supp. 756 (D. Minn. 1986). 10a-52a.

A panel of the Eighth Circuit Court of Appeals issued a decision on August 27, 1987. The decision was set for publication at 827 F.2d 1191 (8th Cir. 1987), 53a-72a, but was subsequently withdrawn by the court. 835 F.2d 1545 (8th Cir. 1987). 158a-159a. *See* 827 F.2d 1192-1202 (editor's note on withdrawal from bound volume).

The *en banc* opinion of the Eighth Circuit Court of Appeals was issued on August 8, 1988. It is reported at 853 F.2d 1452 (8th Cir. 1988). 74a-109a.

JURISDICTION

Plaintiffs' petition for writ of certiorari was filed on January 4, 1989. Defendant's cross-petition for certiorari was filed on February 4, 1989. The Petition and Cross-Petition were granted on July 3, 1989. Jurisdiction is proper pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Minnesota Statutes (Minn. Stat.) § 144.343(1)-(7) (1988). 1a-4a.

STATEMENT OF THE CASE

A. History Of The Legislation.

In 1971 the Minnesota legislature enacted the Minors' Consent to Health Services Act, which permits all minors to give effective consent for all medical, mental or other health services to treat pregnancy, venereal disease or drug abuse. Minn. Stat. § 144.343(1) (1988). 1a. This statute enables adolescents to obtain a wide variety of confidential medical services, including prenatal care, cesarean sections, contraceptives, and penicillin or other treatments for sexually transmitted diseases. Under the Act, the health professional treating the minor is permitted to notify parents only when a failure to do so would jeopardize the minor's health. Minn. Stat. § 144.346 (1988). 5a.

The statute at issue in this case is a 1981 amendment to the Minor's Consent Act that singles out abortion as a service requiring the health care provider to notify both of a minor's biological parents. Minn. Stat. § 144.343(2)-(7) (1988). 1a-4a; 21a. Subdivision 2 of the statute provides that no abortion may

be performed upon an unemancipated[2] minor until at least forty-eight hours after written notice has been delivered to both parents. 1a-2a.[3] There is no exception to the notification requirement for divorced or never-married parents. 21a. Even teenagers who are already mothers or married may find themselves in the anomalous situation of being able to consent to medical treatment for childbirth but not to a confidential abortion. J.A. 230-31. Subdivision 5 subjects anyone performing an abortion in violation of the statute to both criminal penalties and civil liability. 2a-3a.[4]

The statute further provides that if the two-parent notification provision of subdivision 2 is ever judicially enjoined, the statute will then be enforced with a judicial bypass as an alternative to parental notification. 3a-4a. Under the judicial bypass provision, a minor may seek a state court order permitting her to obtain an abortion without notification of both parents if she can convince a judge that she is "mature and capable of giving informed consent" or that an abortion without notice to both parents would serve her "best interests." 3a.[5]

---

2 There is no statutory definition of emancipation in Minnesota. *See Streitz v. Streitz*, 363 N.W.2d 135, 137 (Minn. Ct. App. 1985).

3 The statutory exceptions to the two-parent notice requirement are as follows: 1) where the physician certifies the minor's life is endangered such that there is no time for notification, § 144.343(4)(a); 2) where written consent is given by both of her parents, § 144.343(4)(b); and 3) where the minor is a reported victim of sexual or physical abuse, § 144.343(4)(c). 2a.

4 Violation of the statute is a misdemeanor and is also the basis for a civil action by a parent wrongfully denied notification. Minn. Stat. § 144.343(5). Conviction of a misdemeanor can be punished by up to 90 days in jail, up to a $700 fine, or both. Minn. Stat. § 609.02(3) (1988). Violation of the statute may also result in the imposition of discipline upon a physician by the Board of Medical Examiners. Minn. Stat. § 147.091(1)(f) (1988). Such discipline may include censure, reprimand, license suspension, license revocation and imposition of a civil penalty up to $10,000. Minn. Stat. § 147.141 (1988).

5 The statute further provides for a guardian *ad litem* and an attorney to be appointed by the court for the pregnant minor, § 144.343(6)(c)(ii), at 3a, for confidentiality and expedition in processing, § 144.343(6)(c)(iii), at 4a, and for expedited appeal and for access to the trial courts 24 hours a day, seven days a week, § 144.343(6)(c)(iv). 4a.

B. History Of The Litigation.

Plaintiffs[6] consist of a class of mature minors seeking abortions in Minnesota without the involvement of one or both of their parents, three divorced custodial mothers who support their minor daughters' abortion decisions and fear notice to their ex-husbands, four medical clinics in Minnesota which together perform nearly all the abortions in the state, and two physicians who provide abortion services to minors. Defendants are the State of Minnesota, its Governor, and its Attorney General. 11a-13a.

Plaintiffs challenged the statute on the ground that on its face and as applied it violated the equal protection and due process rights of minors under the United States and Minnesota Constitutions. 13a-14a. On July 31, 1981, a temporary restraining order enjoining subdivision 2, the provision requiring two-parent notice without a bypass, was granted, but section 144.343(2)-(6), establishing two-parent notice with a judicial bypass procedure, was permitted to go into effect on August 1, 1981. 14a. On March 22, 1982, a preliminary injunction was issued as to subdivision 2 but denied as to subdivision 6. 14a. On January 23, 1985, the district court granted defendants' motion for summary judgment on their claim that § 144.343(2)-(6) was constitutional on its face, but denied their claim that the statute was constitutional as applied. *Id.* Trial commenced in February 1986 after two-parent notice with a court bypass had been in effect in Minnesota for four and one-half years.

On November 6, 1986, the district court held that 1) subdivision 2, the notification requirement without bypass, was facially invalid; 2) subdivision 6, the notice/bypass requirement, was invalid to the extent that it requires two-parent notification and a forty-eight-hour waiting period instead of some shorter period; 3) the forty-eight-hour waiting period, but not the two-parent requirement, was severable; and 4) but for this Court's decision in *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983), the district court would have found the entire statute unconstitutional as applied because it failed to serve,

6 Petitioners will be referred to in this section as "plaintiffs" and respondents as "defendants."

and indeed undermined, the state's asserted interests. 32a-51a. The district court enjoined the entire statute because of the non-severability of the two-parent notification requirement. 51a.

On August 27, 1987, a panel of the Eighth Circuit affirmed the district court's decision. The panel agreed that compelling notice to both biological parents was "almost always disastrous" to minors and their families, 62a, and that the two-parent notification requirement was not severable from the remainder of the statute. 71a.[7] The panel specifically held that the two-parent requirement could not be saved by the presence of a judicial bypass system "where, as in this case, the underlying notification requirement impermissibly burdens the minor's abortion decision." 68a.

On November 13, 1987, the panel granted defendants' request for rehearing by the panel, vacated and withdrew its prior opinion, held any further decision in abeyance pending a decision by the United States Supreme Court in *Hartigan v. Zbaraz*, 108 S. Ct. 479 (1987), and denied rehearing *en banc* as moot. 158a-159a.

After an equally divided Supreme Court affirmed the decision of the Seventh Circuit without opinion in *Zbaraz*, the Eighth Circuit *sua sponte* granted the state's request for *en banc* review and issued its *en banc* opinion on August 8, 1988. 74a. The *en banc* court agreed with the district court and with the panel that Minnesota could not constitutionally require a minor to notify her parents of her intention to have an abortion without providing a judicial bypass option. 80a-81a. Again in agreement with the panel, the court declined to find the district court's factual findings clearly erroneous. 85a. However, the court reversed the panel and district court, holding that the Minnesota notice requirement with a bypass alternative was constitutional and that the "as applied" factual findings were immaterial because the Supreme Court had previously considered such facts in upholding the facial validity of "similar statut[es]." 85a.

The *en banc* court further held that the district court had erred in finding the two-parent notification requirement uncon-

7 The panel did not reach the question of the constitutionality or severability of the mandatory 48-hour waiting period.

stitutional in the following respects: 1) the district court had not given enough weight to independent "parental and family interests," 92a-96a; 2) the district court had given too much weight to the forty-two percent of minors who do not live with both biological parents, 91a-95a; and 3) the district court had incorrectly considered the impact of the two-parent notification statute in isolation from the bypass system. 96a. Citing similar reasons, the *en banc* opinion held that the forty-eight-hour delay requirement was not a significant burden. 96a-97a.

The Minnesota statute remains enjoined, however, because the Eighth Circuit granted a stay of the mandate of its *en banc* decision pending review by this Court. 110a-111a.

C. Facts

1. Introduction

This Minnesota criminal statute, requiring notice to both biological parents of minors seeking abortions, was imposed on thousands of pregnant teenagers between August 1, 1981 and November 4, 1986. In 1985 alone, nearly 3500 young women in Minnesota between the ages of fifteen and seventeen became pregnant and, in deciding how to resolve their pregnancies, had to contend with the parental notification law.[8]

This case involved five years of preparation and study, culminating in trial testimony by over fifty-seven witnesses, including single parents, minors, abortion clinic nurses and counselors, nationally renowned physicians, psychologists, psychiatrists, reproductive epidemiologists, seven state court judges who among them had heard nearly all the bypass cases, and many of the guardians *ad litem* and public defenders involved in the judicial bypass procedure.[9] Though some Minnesota legislators may have originally believed that this law would help minors, the facts presented at trial overwhelmingly demonstrate the opposite to be true. Minnesota's parental notification law

8 *See* Alan Guttmacher Institute, *Teenage Pregnancy in the United States* 24 (Table 8) (1989) (hereinafter "Guttmacher Institute").

9 For a description of the qualifications of Plaintiffs' expert witnesses, see Exhibit B in Appendix to this brief.

demonstrably raised the teenage birthrate in Minneapolis; caused there to be more teenage mothers with stunted and dependent lives; added a new generation of unwanted children with their attendant problems; undermined communication and family integrity, particularly in single parent families; and raised the level of physical violence and fear in many families. The law compromised sound medical care by significantly delaying the provision of abortion services to minors, and by increasing the number of teenagers forced to continue an unwanted pregnancy and undergo childbirth. When this law was in effect counselors had to focus on reducing the terror and anxiety of forced notice or the court proceeding rather than on the genuine medical and emotional needs of their teenage clients.

2. The Minnesota Criminal Notification Statute Seriously Harmed Minnesota Teenagers.

a. Privacy Is Critical To Assure That Pregnant Teenagers Seek Necessary Help.

Teenage pregnancy is a disturbing reality in Minnesota and across the nation. Teenage girls do not get pregnant by design; eighty-four percent of the 1.1 million teenage pregnancies in the United States each year are unintended.[10] Furthermore, most teenage girls do not focus on the decision whether or not to bear a child or how childbearing will affect their futures until forced to do so by an unintended pregnancy. When they do find themselves pregnant, forty-two percent of all teenage girls—married or unmarried—nationally,[11] and about the same percentage in Minnesota,[12] choose to resolve their unwanted pregnancies through abortion.

10 Jones, Forrest, Goldman, Henshaw, Lincoln, Rosoff, Westoff & Wulf, *Teenage Pregnancy in Industrialized Countries* 40 (1986).

11 Henshaw, *Characteristics of U.S. Women Having Abortions, 1982-1983*, 19 Fam. Plan. Persp. 5, 8 (Table 5) (1987).

12 Guttmacher Institute, *supra* note 8 at 24 (of the 3470 teenagers between 15 and 17 who became pregnant in Minnesota in 1985, 1490 chose to abort).

The record of this case overwhelmingly demonstrates that concerns about privacy dictate when, how and *if* a pregnant teenager will seek help. The unrebutted evidence adduced at trial reinforces the conclusions of studies of other parts of the nation: without guaranteeing confidentiality, a significant number of minors will not seek pregnancy evaluation, family planning, or abortion services.[13] Melton Tr. at 1154. Although the majority of teenagers in Minnesota, both before and after this law went into effect, tell at least one parent of their pregnancy, significant numbers go to great lengths to hide it from one or both parents. J.A. 111, 114-16, 137, 461. The result can be death,[14] or serious self-mutilation.[15] The desperation experienced by these young women is illustrated by the fact that one-half of the teenagers obtaining abortions in Minnesota while the law was in effect underwent what was perceived by them as an extreme hardship—the court bypass procedure—in order to avoid mandatory notice to both parents, J.A. 123, 459-61, even

13 *See* Chamie, Eisman, Forrest, Orr, & Torres, *Factors Affecting Adolescents' Use of Family Planning Clinics*, 14 Fam. Plan. Persp. 126, 137 (1982); Torres, *Does Your Mother Know . . . ?*, 10 Fam. Plan. Persp. 280, 281 (1978); Torres, Forrest, & Eisman, *Telling Parents: Clinic Policies and Adolescents' Use of Family Planning and Abortion Services*, 12 Fam. Plan. Persp. 284, 288 (1980) [hereinafter Torres & Forrest]; Zabin & Clark, *Institutional Factors Affecting Teenagers' Choice and Reasons for Delay in Attending a Family Planning Clinic*, 15 Fam. Plan. Persp. 25, 26 (1983); Zabin & Clark, *Why They Delay: A Study of Teenage Family Planning Clinic Patients*, 13 Fam. Plan. Persp. 205, 213 (1981); and Cartoof & Klerman, *Parental Consent for Abortion: Impact of the Massachusetts Law*, 76 Am. J. Pub. Health 397, 399-400 (1986).

14 A study of 17 deaths following illegal abortions reported in the United States between 1975 and 1979 revealed that a "desire for secrecy was the primary reason four women sought illegal abortions and was a secondary factor for five others." One who died was a 15 year-old honor student at a Roman Catholic girls' school. She was found dead in a bathroom of her home, a plastic tube in her vagina. Binkin, Gold & Cates, *Illegal-Abortion Deaths in the United States: Why Are They Still Occurring?* 14 Fam. Plan. Persp. 163, 165 (1982).

15 Dr. Hodgson testified that one of her patients, a fourteen year old, who tried to keep her pregnancy private had her friends insert a metallic object into her vagina; they tore her "several times." Her cervix was permanently injured. J.A. 462.

though many dreaded the hearing process more than the abortion procedure itself. 20a; J.A. 468.[16] The trial evidence on teenage class members' desperate need for confidentiality as a precondition for seeking help with such sensitive matters as a pregnancy is reinforced by standing legislation in all fifty states, the standards of professional health organizations, and findings by Congress, all of which support the proposition that guarantees of confidentiality are a necessary precondition for minors to avail themselves of certain critical health care services. *See* discussion *infra*, Point II(B). Indeed, Plaintiffs' counselors and doctors stressed that when a teenage patient came to the clinic with a parent, the minor's medical history had to be taken in the absence of the parent, since teenagers often will not tell the truth about their sexual history, including a previous abortion, with a parent present. J.A. 129, 439-40.

b. Delay Is The Most Significant Risk Factor For Teenagers Who Have Abortions And The Lack Of Abortion Facilities In Minnesota Exacerbates This Risk.

The district court stressed the importance of assessing the impact of the Minnesota statute against the backdrop of pre-existing hardships imposed on women needing abortions in

16 Minnesota is a large state. Many teenagers hitchhiked long distances from home under extreme weather conditions to undergo the judicial bypass procedure and obtain an abortion, coming to Duluth or the Twin Cities from the far corners of the state, northern Michigan, and Canada. J.A. 444; *see also* Welsh Tr. at 106-08. Lacking other accommodations, it was not uncommon for them to spend the night in the clinic lobby or in a car in the hospital parking lot. J.A. 137. One young woman from a small community with a particularly active anti-abortion constituency turned in desperation to a sympathetic high school counselor who arranged a school outing for her so she would not be missed at school and could spend the day going to court and having an abortion. J.A. 463-64.

Because some minors feared encountering someone at the courthouse who might recognize them, they arranged to come up a back elevator and meet with their attorneys in the bathroom. Welsh Tr. at 119-20. One felt obliged to have her hearing scheduled after regular court hours in order to protect her privacy. *Id.* at 120. Pregnant minors were so afraid of the hearing they turned mute in court, Wendt Tr. at 99, were "wringing wet with perspiration," J.A. 468, and frequently required a sedative. *Id.* Some vomited and one began to abort spontaneously during the court process. 129a.

Minnesota. 14a-16a. Virtually all of Minnesota's abortion providers are located in the two largest metropolitan areas of the state: Duluth and Minneapolis-St. Paul. 15a. Eighty-two out of eighty-seven counties in Minnesota have no readily available abortion provider, 14a, and access to information about abortion services, particularly in rural Minnesota, is limited. 15a.[17] Women often have to travel long distances to obtain abortion services,[18] and this can delay the diagnosis and treatment of pregnancy, increase the cost of obtaining an abortion, and jeopardize their privacy. 15a. These obstacles are reflected in the fact that even before the notification law went into effect, women of all ages obtained abortions later in their pregnancies in Minnesota than in the United States as a whole. 16a; J.A. 106.

Although the medical risks associated with legal abortion are relatively slight, every week of delay in obtaining abortion services increases the risk of complications and death to a statistically significant degree. 20a.[19] Minors, for a number of reasons, are more susceptible to delay than adults[20] and tend to obtain later, and therefore more dangerous, abortions. In fact,

17 In all of Minnesota's 87 counties, there are only two hospitals at which a woman can walk in and obtain an abortion. 15a.

18 Plaintiff Women's Health Center is the only abortion provider in Duluth, providing services to women in 24 counties in Minnesota, 14 counties in Wisconsin, four counties in Michigan and Ontario province in Canada. Welsh Tr. at 105-06. When one of its patients is delayed more than 15 or 16 weeks into pregnancy, she has to be sent to one of the two facilities in Minneapolis-St. Paul that is equipped to handle second trimester abortions. 119a; Welsh Tr. at 109.

19 The risk of death increases by 50% each week after the eighth week of pregnancy. J.A. 446. Morbidity also increases by 15-30% each week. Hodgson Tr., Vol. II at 21-22. But the health risks of having an abortion at any time are always less than the risks involved in carrying to term. *See* note 23, *infra*, p. 11.

20 Teenagers have little experience with the health care system, have few financial resources, and must account for an absence from home, school or work. Wendt Tr. at 24-25. Many teenagers, particularly the very young, fail to recognize early signs of pregnancy because it is common for adolescent girls to experience menstrual irregularities, which may mask initial symptoms of pregnancy. *Id.*

Dr. Willard Cates, former head of the Abortion Surveillance Branch of the United States Centers for Disease Control, has concluded that "delay [in obtaining an abortion] has the largest single effect on the risk to teenagers for complications and death from abortion." P. Ex. 6 at 20.

c. Minnesota's Two-Parent Notification Statute Forced Some Teenagers Into Unwanted Motherhood Which Imperiled Their Health And Stunted Their Futures.

Pregnant teenagers have two options: abortion or continued pregnancy and childbirth.[21] Abortion is one of the safest surgical procedures doctors perform, and generally safer for teenagers than for adult women.[22] Abortion is less risky the earlier in pregnancy it is performed, though at no time during pregnancy do the risks of abortion surpass the risks of continuing the pregnancy to delivery. Hodgson Tr., Vol. I. at 65-66; P. Ex. 4.[23] Furthermore, childbearing for minors is significantly riskier

21 Suicide, tragically, is a third option. Before abortions were legal and accessible to minors under conditions of confidentiality, a large proportion of teenage girls who attempted or succeeded in suicide thought they were, or actually were, pregnant. *McRae v. Califano*, 491 F. Supp. 630, 676 & n.45, 683 (E.D.N.Y.) (citing Teicher, *A Solution to the Chronic Problem of Living: Adolescent Attempted Suicide*, in *Current Issues in Adolescent Psychiatry* 129, 136 (J. Schoolar ed. 1973)), *rev'd on other grounds sub nom. Harris v. McRae*, 448 U.S. 297 (1980).

22 After adjusting for the significantly later gestational age at which teenagers' abortions are performed, teenagers have generally lower morbidity and mortality rates from abortion than do adult women. P. Ex. 6 at 21-22.

23 Tietze & Henshaw, *Induced Abortion: A World Review 1986* 4, 110-11 (1986) (hereinafter Tietze & Henshaw). A woman is ten times more likely to die from childbearing than from a legal abortion through the 15th week of pregnancy. P. Ex. 3 at 196. The rate of morbidity related to childbirth is also ten times higher than for abortion through the 15th week. Tietze & Henshaw at 130. From the time abortion was legalized in Minnesota in 1973 through 1984, there were no abortion-related deaths in the state, although during that same time period, 32 women died from pregnancy and childbirth. P. Ex. 93 at 26.

than for adults.[24] The Minnesota notification law, in operation, eliminated the less risky option of abortion for a significant number of teenagers.

Dr. Ehlinger, the Director of Personal Health Services for the Minneapolis Department of Health, identified the implementation of the notification law as the most important factor causing an increase in births to fifteen to seventeen year-olds. J.A. 342-343.[25] From 1980 to 1984, the birth rate to young women age fifteen to seventeen in Minneapolis went up 38.4%, 136a, compared to only a 0.3% rise in the birth rate to teens age eighteen to nineteen years, 137a, during the same period. Under normal circumstances, these two groups generally share childbirth and abortion trends, J.A. 99-101; the notification law was the only factor that uniquely affected the fifteen to seventeen year-old age group which could explain the difference. J.A. 342-43.

Pregnancy continuation poses not only greater physical risks for teenagers, but greater psychological,[26] economic and educational consequences as well. Teenage motherhood eliminates life choices,[27] not only for the teenage mother, but for her children.[28]

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24 Maternal mortality (death from pregnancy or childbirth) is 60% higher for women under 15 and 13% higher for women age 15-19 than for women age 20-24. Hodgson Tr., Vol. I at 87; D. Ex. 19 at 42. In females under age 16, continued pregnancy can deplete the nutritional reserves needed for their own growth and place them at a greater risk for other health problems. D. Ex. 19 at 42.

25 A study of the impact of mandatory parental notification corroborates Dr. Ehlinger's conclusion, showing that 23% of teenagers would not seek an abortion at a clinic which required parental notification. The research also indicates that 9% of pregnant teenagers seeking abortions would have an illegal or self-induced abortion if they could not obtain a legal abortion without their parents' knowledge, and an additional 9% would have the baby under those circumstances. Torres & Forrest, *supra* note 13, 12 Fam. Plan. Persp. at 288.

26 There are more adverse psychiatric consequences associated with carrying an unwanted pregnancy to term than with undergoing abortion; because pregnancy is more complicated for a teenager than it is for an adult, termination of an unwanted pregnancy brings even greater relief to a minor. J.A. 458-59; P. Ex. 6 at 22; *see also* Adler & Dolcini, *Psychological Issues in Abortion for Adolescents* in *Adolescent Abortion: Psychological and Legal Issues* 90 (G. Melton ed. 1986); American Psychological Association, Interdivisional Committee on Adolescent Abortion, *Adolescent Abortion: Psychological and Legal Issues*, 42 Am. Psychologist 73, 74 (Jan. 1987). In *McRae v. Califano*, *supra* n.21, Judge Dooling found that "an unwanted pregnancy can itself be productive of mental derangement." 491 F. Supp. at 675.

The World Health Organization conducted a study of this issue and in 1978 concluded that "[t]here is now a substantial body of data reported from many countries . . . suggesting frequent psychological benefit and low incidence of adverse psychological sequelae" due to abortion. J.A. 374. A study in Hawaii of young pregnant women (15-17) found that the young women who had had abortions, postponed their first birth well beyond the second birth of teenagers who had children, raising the social, educational and economic level of their households. J.A. 373.

27 Dr. Hodgson has had 39 years of clinical obstetrical and gynecological experience treating a patient load which has been about 30% teenagers. She testified, based on her experience, that the psychological trauma of becoming mothers as teenagers is tremendous; their lives can be "literally spoiled" and their education stopped. J.A. 456.

28 Dr. Henry David testified at trial concerning the results of a study that he has been conducting for 20 years of children of women who were denied abortions in Czechoslovakia, a study funded in part by the United States National Institutes of Health. David Tr. at 2525-26. Dr. David has found that children of women denied abortions have social problems which worsen as they get older as compared to a control group of "wanted" children. 138a-140a. They experience more alcoholism, more criminality, and greater difficulty forming close relationships. 139a.

d. Every Option Available To Minors Under The Statute Caused Serious Delay.

The Minnesota notification statute was in effect for five years before it was enjoined. During that time it encumbered thousands of teenagers seeking to resolve their pregnancy dilemmas, no matter what options they ultimately chose or were chosen for them. The statute's primary effect was to impose serious delays on minors, to their great detriment. While the law was in effect, the proportion of minors who obtained second trimester abortions increased dramatically. 135a. In 1978, 18.4% of

women seventeen and under received second trimester abortions; by 1983, that figure had jumped to 23.0%, 135a, while women in adjacent age groups (18-19, 20-24, and 25+) experienced relatively stable rates for second trimester abortions. For example, in 1978, only 7.8% of women over twenty-five obtained second trimester abortions; between 1978 and 1983, this figure increased only 0.1%. 135a.[29]

While the statute was in effect, nearly one-half of all the minors seeking abortions chose to go to court. J.A. 123. Judicial bypass delayed minors by an average of two or three days just to get a court appointment, with a total delay of one week or more before their abortions. 20a. The district court found that a one-week delay in obtaining an abortion significantly increased its attendant medical risks, 18a, 20a, 23a, and that such delays were "unavoidable" under the terms of the statute. 18a.[30] It further found that the judicial bypass procedure pushed some minors into the second trimester,[31] a contingency

29 There was additional evidence that the proportion of minors receiving second trimester abortions was increasing: Meadowbrook Women's Clinic reported that as of December 1985, over 30% of their minor patients seeking abortions were in the second trimester. 130a.

30 After minors call a clinic to find out what their options are, those who choose to go to court must call the court and get an appointment. Some counties in Minnesota have no sitting judges willing to hear bypass petitions. 18a-19a. Class members Heather P. and Sharon L. had to wait two weeks and one-and-a-half weeks respectively for abortions because of delays attributable to the bypass system. 115a, 124a.

31 The cost of a first trimester abortion averaged $225 (up to 12 weeks); a delay of even a few days raised this to $275 (12-14 weeks) for plaintiff minors. 16a. Since post 15-week abortions are not available in Duluth, a delay past that time entailed the additional cost of overnight travel to Minneapolis, where second trimester abortions are performed. 119a. After 21 weeks, plaintiff Meadowbrook Clinic in Minneapolis-St. Paul refers patients to St. Paul-Ramsey Hospital, where a later abortion (22 weeks) costs $1600-1800, or to Wichita, Kansas, where a late abortion (up to 24 weeks) costs $2000. These fees, of course, do not include the cost of transportation or lodging. Minnesota will fund abortions for indigent women only if the pregnancy is the result of rape or incest, or if continuing the pregnancy would endanger the life of the woman.

which the district court found "entails significantly greater costs, inconvenience, and medical risk." 20a.[32]

In many cases, minors who sought to invoke the exception to notice due to the death of a biological parent, § 143.343(3), found this process to be a more burdensome alternative than going to court. Because the statute requires written evidence of compliance, 2a-3a, and failure to comply is a criminal violation, clinics required such minors to submit documentation of a parent's death. J.A. 120; Baker Tr. at 475-76. Obtaining death certificates or funeral home receipts resulted in delays,[33] and minors qualifying for the exception focused on the parent's death during their limited counselling time rather than on their more immediate concerns. J.A. 121.[34]

Minors from broken or dysfunctional homes also met with delays in attempting to comply with the notification law. One minor who sought to notify her natural father suffered a two-week delay because he refused to acknowledge that he was indeed her father. Finally he wrote a letter saying whether he was her father or not he would give permission for the abortion.

32 Plaintiff Cynthia J. could not get an immediate court appointment in her home town. She ultimately had to schedule an appointment in St. Paul, but had to wait almost two weeks because the court clerk was unwilling to schedule an emergency weekend appointment. J.A. 76-79. This delay resulted in a second trimester abortion. J.A. 84. Bonnie L. was unable to schedule an emergency court hearing, resulting in a second trimester abortion. J.A. 93-97. Kathy M. had to wait almost a week for her court appointment and another three days for the judge's decision. J.A. 270-72. Because of the delay, she was unable to appeal the denial, and she had her abortion in another state. J.A. 272-73. One minor was delayed *three weeks* in obtaining an abortion because she could not get a court appointment any sooner than 11 days after she visited the Meadowbrook Clinic. J.A. 138. This minor progressed from 16 to 19 weeks of pregnancy before the abortion could be performed, increasing its cost by $100. *Id.*

33 One 15-year-old who lived with her widowed mother had to send to Massachusetts for her father's death certificate, causing a three-week delay. 129a; Welsh Tr. at 219-20.

34 Teenagers who had lost a parent or parents were often traumatized by the resurrection of unpleasant memories as they prepared to have an abortion. J.A. 121. One young woman had to supply the clinic with proof of her father's death, a suicide by gunshot wound to the head, and another, of her mother's murder. *Id.*

J.A. 466. Another minor forced to notify her father experienced delay because of his objections, and the family dispute which ensued culminated in her divorced mother's firing a gun through her father's door. J.A. 128.

Mailed notice, an option chosen by few minors, J.A. 125, Welsh Tr. at 140, also caused lengthy delays. If notice is mailed, constructive delivery occurs at noon on the next regular mailing day. The forty-eight-hour waiting period commences at this point. Consequently, minors in Minnesota who chose to notify their parents by certified letter commonly waited seventy-two hours between initiating the notification process and the abortion itself. 47a; J.A. 126. One pregnant minor who came to the clinic with her mother from some distance and at considerable hardship was forced to wait four days for medical help until notice was delivered to an absent father. J.A. 125. Finally, the district court found that the delays directly attributable to the notification law were compounded by "scheduling factors such as clinic hours,[35] transportation requirements, weather, a minor's school and work commitments, and sometimes a single parent's family and work commitments." 22a-23a.

3. Those Plaintiff Teenagers Who Seek Confidential Abortions Have Good Reasons For Not Notifying One Or Both Parents Of Their Pregnancies.

The district court found that with or without the parental notification law in Minnesota, the same proportion of minors seeking abortions told one or both of their parents. 41a. Minors who did not want to involve one or both parents, however, had good reasons for acting independently.[36] Minor plaintiffs testi-

35 Plaintiff Women's Health Center of Duluth is not open for abortions every day because it has to import out-of-town physicians to perform them. J.A. 442-43; 128a. Thus, mailed notice in Duluth meant that their patients often waited an entire week before the abortion procedure could be performed, even when the minor had one parent's consent. 128a-129a.

36 Judge George Peterson, of Ramsey County Juvenile Court in St. Paul, heard the vast majority of bypass cases in that city. He sent a letter to a Minnesota legislator which stated in part as follows:

(*Footnote continued on following page*)

fied that their decisions not to tell one or both of their parents of their pregnancy or their intent to abort were due to: the psy-

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I have now completed the data gathering and computations you requested on September 20 and to which I referred on September 27.

From August 1, 1981 through November 30, 1982, our Court has conducted 258 abortion-consent hearings.

In 80 of those cases, the parents of the girl were divorced. In 35 of those 80 cases, the girl discussed her abortion with her custodial parent but did not wish to notify her non-custodial parent of her desire to have an abortion.

In 20 of the 258 cases, the girl lived with both parents but wished to notify only one of them of her desire to have an abortion.

In another 48 of the 258 cases, the girl discussed the proposed abortion with an adult relative but wished not to notify either parent.

In many of the remaining cases, the girl had sought out the advice and counsel of other adults before going to professional counselors. Those adults include teachers, employers, parents of friends, parents of the potential father, ministers, priests and neighbors.

In 8 cases girls were seeking their second abortion.

Two girls already had a child at home.

Fourteen girls were living independently or were in foster homes.

. . .

The reasons they give for not wanting to tell one or both parents about the abortion are as follows:

Reason	*No.*	*Pct.*
Fear of damaging parent-child relationship:	76	29%
Parents opposed to abortion-have said would kick the girl out:	54	21
Parents opposed to abortion-would force the girl to keep the child:	14	5
Marital, financial or health problems already in home-this would aggravate:	47	18
Absent parent or parents not part of their lives and have no right to know:	35	14
Prior physical abuse feared to reoccur:	11	4
Fear of prior expressed threats:	10	4
One or both parents alcoholic:	9	4
Raped:	2	1
Totals:	258	100%

(*Footnote continued on following page*)

chiatric or physical illness of a parent;[37] chemical abuse and dependency on the part of a parent;[38] the anti-abortion stance of a parent;[39] the likelihood of a verbally, physically, or sexually abusive response by a parent[40] or the fact that the minor

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As you might imagine, the reasons girls express for wanting an abortion are many and varied. The desire to continue one's education and have a career is expressed in over 95% of the cases. Regardless of hopes and plans for the future, some feel they are simply too young to have a child.

J.A. 380-82.

37 Sharon L. testified that her mother had been hospitalized several times for schizophrenia, a condition that made her moods wildly unpredictable; she feared that telling her mother about her abortion "could have just broken her down emotionally . . . she could have completely slipped out." J.A. 223. Dr. Hodgson testified that often the patients' refusal to communicate about the abortion with an ill or dying parent is "a matter of kindness and love; it's not a matter of being difficult . . . ." J.A. 465.

38 Heather P.'s father, an alcoholic who at the time of the abortion had not lived with her in at least eleven years, had frequently hit Heather, her mother and her siblings when he lived with them and had beaten a subsequent wife severely enough that she required hospitalization. J.A. 176. Mary J., whose relationship to her alcoholic mother was "like her babysitter," J.A. 218, was afraid that if she told her mother about her abortion, her mother would resume the self-destructive drinking patterns she was attempting to break and "crumble the bridge" of communication they were trying to build. J.A. 219-20. *See also* Welsh Tr. at 220.

39 Rather than tell her father, a local politician known to the judge and known to be opposed to abortion, one teenage class member considered suicide or leaving the area. J.A. 64-66. One young woman's father, a doctor, had discussed the issue with her previously and had told her that he "would never allow her to have an abortion." J.A. 115. Wendt testified that another teenager believed that her mother, who opposed abortion for religious reasons, would have forced her to "stay pregnant and raise the child." J.A. 114. *See also* Welsh Tr. at 226.

40 Natalie C., a minor, testified at trial that she was afraid to notify her parents because she believed her stepfather, who had physically attacked her before, would "knock [her] around." J.A. 66. Kathy M., whose father had threatened in the past to shoot her mother, was so "terrified" of her father's reaction to her decision to abort that had her only option been to tell her father, she would have instead carried the pregnancy to term. J.A. 269-70. Another adolescent believed her father would have hit her if he had been told; when angry he would lean close to her face, "show his teeth" and "get

was not in contact with the parent. J.A. 466. Minors' fears of violence in the family were well-founded.[41]

Counselors and court-appointed guardians, judges, and other court personnel, all of whom were experienced in dealing with teenagers, testified at trial that minors are both truthful and accurate in their assessment and description of the family circumstances in which they live.[42] *See, e.g.*, J.A. 161, 203-04, 232-33; 125a-126a. There was overwhelming testimony that minors tend, if anything, to understate family problems, and are particularly reluctant to reveal matters of family violence and sexual abuse. *See, e.g.*, J.A. 116, 245, 461-62; Widseth Tr. at 21-24. Thus, instead of protecting pregnant teenagers, the notification law mandated parental involvement in situations where minors correctly understood that involvement of their parents would be harmful to their interests.

4. Compelled Parental Involvement Was Devastating To Many Families And Was Especially Disastrous In Single-Parent Homes And Abusive Family Situations.

Experts with extensive clinical experience counseling families and with knowledge of family communication patterns testified

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very violent and physical." J.A. 225-26. Ida B., the older sister of a teenaged class member, testified that she helped her younger sister through the court procedure because 20 years earlier, their father had reacted violently to Ida B.'s pregnancy, which caused Ida to marry at age 16. Ida B. Tr. at 1440-42. P.C., a minor, was forced to notify her natural mother and father—or go through the bypass procedure—even though she had been removed from her natural mother's home for sexual abuse, physical abuse and neglect, and there was a pre-existing court order forbidding her natural mother from seeing her daughter. Welsh Tr. at 154-55.

41 Extensive studies of family violence concluded that one of the specific times when violence is greatest is during pregnancy. Walker Tr. at 308-09.

42 Judge Martin testified that family violence is the "most common" reason that a minor refuses to notify one or both of her parents. He cited a case in which "the father frequently beat the petitioner and she had no doubt in her mind that the same would occur if she notified the father about her pregnancy." Similarly, a week or two before the trial, Judge Martin heard a case in which "the father had broken the petitioner's mothers [sic] wrist and had frequently abused both the mother and the petitioner." J.A. 204.

at trial that while family relationships generally benefit from voluntary and open communication, the effect of compelling communication within families is unpredictable and frequently disastrous. 21a-22a, 30a-31a; J.A. 132, 198; Benedek Tr. at 910-11, 993. Neither accidental nor coerced communication of personal information is based upon trust or the voluntary desire to share or to know, which are the hallmarks of productive communication patterns in a functional family. Benedek Tr. at 906, 930-31.

Under circumstances where trust is lacking or parents are unable to react reasonably to the news of a daughter's pregnancy, maintaining secrecy might be the most mature response on her part, as well as the one most likely to preserve and protect family relationships. Benedek Tr. at 906-09.[43] A decision not to reveal the fact of the pregnancy or abortion may avert "reintroduc[ing] [a] parent's disruptive or unhelpful participation into the family," 22a, a rupture or polarization of the marital relationship,[44] or intra-familial violence.

Indeed, the trial court found that the law did not promote, and in some cases actually inhibited, voluntarily initiated intra-family communication. 31a, 46a-47a.[45] Specifically, the court found that a sizable proportion of minors seeking abortions in Minnesota voluntarily notified at least one parent before the statute was enacted, and that there was no evidence this percentage had changed as a result of the statute's enactment.

43 Following notification that their teenage daughter is pregnant, some parents refuse to speak to her. P. Ex. 103 at 9, 12, 13 (deposition of Florence K.). Plaintiff Florence K. testified that when her father found out about her pregnancy despite her efforts to keep it from him, she and her father "didn't talk for like two or three months afterwards." P. Ex. 103 at 9.

44 Notification has also resulted in marital discord and divorce. J.A. 298.

45 Suzanne Smith, supervisor of the guardian *ad litem* program in Hennepin County, testified that some minors who would have considered telling one parent told neither because they were "absolutely sure" one parent could not be told and "they had to go to court anyway." J.A. 239.

41a.[46] It further found that some minors who ordinarily would have told one parent were "dissuaded" from doing so since they had to go to court anyway to avoid notification of the other. 31a. The Eighth Circuit panel agreed with the district court's assessment of the law's negative implications for intra-family communication: "[A]lthough family relationships benefit from voluntary and open communication, compelling parental notice has an opposite effect. It is almost always disastrous." 62a.

The district court found that compelling notification to both parents when they are divorced or separated could be especially harmful to the young woman's welfare. 30a-31a.[47] Even where the minor resides in a functional family, a non-custodial par-

46 The *en banc* court erroneously stated that under the statute parental notification had increased. 83a n. 9. This statement is not supported by the evidence and it contradicts the trial court's specific finding that no witness testified that the proportion of minors notifying their parents had changed after the statute was enacted, 41a, and that defendants failed to establish that the statute promotes either parent-child communications or the other values which it sought to promote. 29a. The evidence shows that prior to enactment of the statute "better than half" of the minors choosing abortion fully involved their parents in making their decision. Webber Tr. at 610-11; Tr. at 1586. The evidence further shows that while the statute was in effect, about half of the minors followed the judicial bypass and about half notified their parents. Hunter Tr. at 789-90; Welsh Tr. at 135. Thus, no change occurred under the statute. 41a. The trial court based its finding on the substantial evidence in the record that the statute had failed to promote family integrity or communication, 26a-27a, and the absence of contrary testimony. 41a. To the extent the *en banc* court thought there was evidence to support its contrary conclusion, it misread an ambiguous portion of the trial record, *see* J.A. 125-26, and had no basis to find the trial court's contrary interpretation of that testimony clearly erroneous. 41a. Further, as the *en banc* court itself noted, the defendants never contended that the incidents of parental notification had increased under the statute. 83a n. 9.

47 The district court found that "[n]ational statistics reveal that approximately [50%] of all marriages end in divorce. There [was] no testimony [at trial] indicating that the divorce rate in Minnesota differs from the national average. To the contrary, clinic experience indicates that only 50% of minors in the state of Minnesota reside with both biological parents. This figure is corroborated by one study that found that 9% of minors in Minnesota live with neither parent, 33% live with only one parent and thus 42% do not live with both biological parents." 29a.

ent's sudden involvement can be disruptive to the household; in abusive or otherwise dysfunctional families, compelled notification was especially dangerous because it could provoke violent and abusive reactions. The district court found that a large percentage of families in Minnesota in particular, and the United States in general, are dysfunctional. Reports indicate that there are an average of 31,200 reported assaults on women by their partners each year in Minnesota alone, and that family violence occurs in at least two million families across the United States. 30-31a; J.A. 128.[48] Dr. Lenore Walker, a clinical psychologist and national expert on family violence, testified that there was a consensus among researchers of abusive and dysfunctional families that family violence is at its height during a family member's pregnancy, immediately following childbirth, and during children's adolescence. Walker Tr. at 296; J.A. 193-94. She testified that pregnancy triggers violent reactions in abusive dysfunctional families "like showing a red cape to a bull." J.A. 194.

The trial court found no instances in which beneficial relations between a minor and an absent parent were reestablished following required notification. Instead, minors were often further alienated from their non-custodial parents as a result of the process. 30a. Moreover, the court found that "[t]he non-custodial parent often will reintegrate with the family in a disruptive manner." *Id.* The vast majority of voluntarily informed parents appearing in court with their daughters were divorced women, such as plaintiffs Diane P. and Sarah L., who had not seen their ex-husbands in years. 31a. The evidence showed that compelling young women either to notify a disinterested or abusive non-custodial parent or to seek court authorization not to do so was traumatic, burdensome, interfered with voluntarily initiated parent-child communication, and infringed upon the

48 Even these numbers substantially underestimate the problem because members of dysfunctional families are characteristically secretive about such matters and minors are particularly reluctant to report violence or abuse. 30a. Whatever the actual numbers, the court found that "[m]any minors in Minnesota live in fear of violence by family members; many of them are, in fact, victims of rape, incest, neglect and violence." *Id.*

privacy of both mother and daughter. 31a, 46a-47a; *see also* 21a-22a.[49] Notice to an abusive father could be threatening to the mother of the minor as well as to the minor herself. J.A. 131-32, 166-67, 194. The district court concluded that a "regulation requiring notification of both parents when the nuclear family unit either has broken apart or never formed is not reasonably designed to further the State's interest in protecting pregnant minors." 46a.

In considering the impact of the law as a whole on families with pregnant minors, the court found that "[f]ive weeks of trial have produced no factual basis upon which this court can find that Minn. Stat. § 144.343(2)-(7) . . . furthers in any meaningful way the State's interest in protecting pregnant minors or assuring family integrity," 29a, 41a, and that the statute had failed to improve family relations "more than it undermine[d] them." 29a.

5. The Judicial Bypass Was Not An Option For Many Teenagers Who Needed Confidential Abortions And The Statutory Exceptions Did Not Work.

In practice, the court bypass procedure was not available to many teenagers who sought abortions during the time the statute was in effect. 18a-19a. The trial court found that teenagers who were able to utilize the procedure were almost inevitably either mature or "best interest" minors. 27a.[50] The court also found that the bypass process was sufficiently daunting that some mature minors and some best interest minors could not avail themselves of the alternative procedure. 20a. Eighty-nine percent of all the minors who went to court in Minnesota were either sixteen or seventeen years old. J.A. 160. The testimony of the state court judges was that "[t]hey were typically middle to

49 For example, Jackie H., one of the three named single mother plaintiffs, testified at trial that while at state court with her daughter seeking an order under this statute, she was forced to reveal, in front of her daughter, that she had divorced her husband on account of his physical abusiveness. 117a-118a.

50 Except for a few anomalous situations, all minors who went through the bypass procedure were adjudged mature or best interests. 23a-24a.

upper-middle-class kids . . . the vast majority of them in school [with] . . . plans for the future. Typically they were white." J.A. 157, 184-85, 187.

Hardly any of the members of the plaintiff class of minors had ever been to court before their bypass hearings. The process involved revealing their personal histories to several strangers and encountering numerous other personnel in the courthouse who learned at least their first name and why they were there.[51] Upon a review of extensive testimony by witnesses involved in each aspect of implementation of the bypass procedure,[52] the district court concluded:

> [M]any minors resent having to reveal intimate details of their personal and family lives to these strangers [and] are left feeling guilty and ashamed about their lifestyle and their decision to terminate their pregnancy.

20a. Minors who were able, nonetheless, to avail themselves of the court bypass procedure testified uniformly that they found the court procedure anxiety-provoking.[53]

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51 These strangers included the other teenagers waiting for the bypass hearings, parents and boyfriends of other minors, secretaries, receptionists, court clerks, court reporters, the guardian *ad litem*, the public defender, the judge, and the judge's law clerk. J.A. 157, 184, 206; Honkala Tr. at 523, 526; Widseth Tr. at 35-38.

52 The public defenders, guardians *ad litem*, clinic personnel, and state judges uniformly testified at trial that court was a frightening, nerve-wracking, and traumatic experience for these young women. The director of the guardian *ad litem* program in Hennepin County, who supervised or saw 2264 minors go through the bypass procedure, testified that the teenagers were "very nervous, very scared. Some of them are terrified . . . . They are often exhausted" and "feel like a criminal." J.A. 234. Judge Sweeney, who adjudicated minors' petitions under the law, testified at trial that the level of apprehension that minors experienced was tremendous. "[O]ne young lady had her—her hands were turning blue and it was warm in my office . . . ." 26a; Sweeney Tr. at 1039.

53 Plaintiff Clara Z. described the experience as follows: "[E]verybody is pointing their finger at you saying you have done bad. It's scarey [sic]." P. Ex. 95 at 10. Rose C., another class member, said "[I]t almost made you feel that you were doing something really wrong . . . ." P. Ex. 98 at 23.

The district court found that the exception in the statute exempting abused teenagers did not work because a precondition was that such abuse be "reported." 21a.

> Minors who are victims of sexual or physical abuse often are reluctant to reveal the existence of the abuse to those outside the home. More importantly, notification to government authorities [as this exception requires the clinics to do] creates a substantial risk that the confidentiality of the minor's decision to terminate her pregnancy will be lost. Thus, few minors choose to declare they are victims of sexual or physical abuse despite the prevalence of such abuse in Minnesota, as elsewhere.

Id. Dr. Walker, an expert on such abusive or dysfunctional families, testified that it would be exceptionally difficult for minors in such families to choose and carry out the bypass procedure because the "rules of those families are secrecy . . . . Going to court would be an exposure of a risk [of more abuse] and it would be very difficult for a minor to do that." J.A. 196.

As is apparent from the foregoing discussion, the district court did not decide this case based upon hypotheses or abstract theories about what a parental notification statute could or could not accomplish. More than five weeks of trial and testimony from fifty-seven witnesses, a large number of whom had significant contact with the statute in actual operation during the preceding four-and-a-half years, created a panoramic factual setting in which the issues of this case were decided by the district court. Now this Court has the unique opportunity to consider these issues against a fully developed factual record.

SUMMARY OF ARGUMENT

Laws which impinge upon the right of a minor to choose to terminate a pregnancy are valid only where narrowly drawn to serve the state's interest in protecting immature minors. Such laws must be drafted with particular sensitivity to the privacy rights of minors.

Minnesota's two-parent notice statute is unconstitutional under these standards. No case previously addressing the constitutionality of a two-parent parental involvement law sustained such a law without exception for minors living in one- or no-parent households. *See H.L. v. Matheson*, 450 U.S. 398, 413 (1981); *Bellotti v. Baird*, 443 U.S. 622, 649 (1979) (plurality) [hereinafter *Bellotti II*]. Further, no prior case sustaining the facial constitutionality of either a one- or two-parent notice or consent requirement, did so in the presence of a comprehensive record of the actual impact of the law in operation. *See, e.g., Planned Parenthood Ass'n of Kansas City v. Ashcroft*, 462 U.S. at 491-92.

The Eighth Circuit erred in sustaining the challenged statute "as a matter of law" and in failing to assess whether the law impermissibly burdened minors' constitutional rights, actually served the state's interests, or proved in fact to be narrowly tailored to promote the legitimate interests the state sought to promote. In failing to review the constitutionality of Minnesota's law in operation, the Court abdicated its judicial duty under *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803), and rendered factual assumptions irrefutable.

Had the Eighth Circuit examined the evidence, it would have concluded, as the district court did, that Minnesota failed to prove Minn. Stat. § 144.343 (2)-(7) was narrowly drawn or actually served the state's purported interest in protecting pregnant minors, promoting parent-child communication, and improving family relations in any meaningful way. The Eighth Circuit's view that any unconstitutional burdens imposed by the statute are negated by the existence of a statutory judicial bypass mechanism is erroneous. This Court never intended the bypass to be an all-purpose cure for the improper infringement of minors' rights, but rather a means of determining which minors may be subjected to the inherent burdens of an otherwise constitutional notice requirement. The Eighth Circuit further erred in holding that the two-parent notice requirement was justified by unarticulated, independent rights and interests of biological parents. This Court has never treated any such

rights and interests as equal to or paramount over the fundamental privacy rights of minors.

Courts have uniformly struck down waiting periods of fixed duration before an abortion could be performed. Thus, the Eighth Circuit erred in upholding Minnesota's waiting period of forty-eight (and commonly seventy-two) hours after notification has been mailed to both parents. Finally, the Minnesota legislature deliberately chose to enact a statutory scheme which mandated notification to both biological parents. This scheme cannot be revised without eviscerating the intent of the law. Therefore, the two-parent requirement cannot be severed and the entire statute must fall.

ARGUMENT

I. MINNESOTA'S TWO-PARENT NOTIFICATION AND JUDICIAL BYPASS STATUTE IS UNCONSTITUTIONAL.

Minnesota requires a minor seeking an abortion to notify both biological parents. The statute provides no exception for minors whose parents are divorced, separated, never married, or for minors who have never even met their absent parents. Minn. Stat. § 144.343 (3),(4); Exhibit G. As such, it is one of the most restrictive laws of its type in the country. The disastrous impact of this law on the health and lives of the plaintiff class is undisputed.

This Court has repeatedly recognized that "[m]inors, as well as adults, are protected by the Constitution and possess constitutional rights." *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976) (citations omitted); *see also Bellotti II*, 443 U.S. at 633, and cases cited therein; *In re Gault*, 387 U.S. 1, 13 (1967) ("neither the Fourteenth Amendment nor the Bill of Rights is for adults alone"). In particular, minors are guaranteed the constitutional right to choose abortion for "there are few situations in which denying a minor the right to

make [such] an important decision will have consequences so grave and indelible." *Bellotti II*, 443 U.S. at 642.[54]

No prior decision of this Court has addressed or sustained the constitutionality of a two-parent involvement requirement as drastically out-of-step with the reality of family life across this nation as Minnesota's.[55] Although this Court has held that abortion restrictions on minors' abortion rights may be justified by some "significant" state interests other than the compelling interests necessary to sustain restrictions on the abortion rights of adult women, "[t]he need to preserve [this] constitutional right and the unique nature of the abortion decision, especially when made by a minor, require a State to act with particular sensitivity when it legislates to foster parental involvement in this matter." *Bellotti II*, 443 U.S. at 642. Statutes such as the notification law at issue here are permissible only if they are narrowly tailored to serve the "State's interest in protecting immature minors."[56] *Planned Parenthood Ass'n of Kansas City v. Ashcroft*, 462 U.S. at 490-91 (Powell, J.); *see H.L. v. Matheson*, 450 U.S. at 413 (such laws must "plainly serve[ ] important state interests [and be] narrowly drawn to

54 As this Court added "[T]he potentially severe detriment facing a pregnant woman, . . is not mitigated by her minority. Indeed, considering her probable education, employment skills, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor." *Bellotti II*, 443 U.S. at 642.

55 Indeed, this Court has properly confined its opinions concerning the facial constitutionality of statutes requiring the involvement of both parents to situations in which "the parents are together and the pregnant minor is living at home." *Bellotti II*, 443 U.S. at 649; *see also H.L. v. Matheson*, 450 U.S. at 407 (holding limited to minor "(a) . . . living with and dependent upon her parents, (b) . . . not emancipated by marriage or otherwise, and (c) . . . [who has] made no claim or showing as to her maturity or as to her relations with her parents"). The two other cases concerning minors and abortion previously decided by this Court involved statutes requiring the consent of only one parent. *See City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 439 (1983); *Ashcroft*, 462 U.S. at 479 n. 4. *See also* 46a.

56 The burden is on the state to show that its law restricting a minor's rights satisfies these stringent standards. *See Danforth*, 428 U.S. at 75; *Matheson*, 450 U.S. at 413; *Carey v. Population Servs. Int'l*, 431 U.S. 678, 693 n.15 (1977) (plurality); *id.* at 702-03 (White, J., concurring).

protect only those interests"); *Zbaraz v. Hartigan*, 763 F.2d 1532, 1536-37 (7th Cir. 1985), *aff'd per curiam by an equally divided court*, 108 S. Ct. 479 (1987).[57] Minnesota's law is unconstitutional under these standards.

A. The Effect Of Minn. Stat. § 144.343(2)-(6) In Operation Is Central To The Constitutional Analysis.

Minnesota's two-parent notice and judicial bypass law operated in full force for five years before it was enjoined following trial. 56a; 81a. The district court's conclusions were based on a unique and comprehensive record of the law in operation.[58] In the presence of such a record, the traditional distinction between "facial" and "as applied" analysis breaks down. The constitutionality of Minnesota's law depends, therefore, on an examination of the Minnesota experience and the trial record.

Despite the fact that this Court has never addressed the issue presented in this case, the Eighth Circuit found two-parent notification to be constitutional "as a matter of law." 85a. Yet the question of whether a statute actually burdens plaintiffs, *see Storer v. Brown*, 415 U.S. 724, 740 (1974), or serves the state's interests, *see Plyler v. Doe*, 457 U.S. 202, 228 (1982), *Horton v. Marshall Pub. Schools*, 769 F.2d 1323, 1330 (8th Cir. 1985), has always been considered one of fact. *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 153-54 (1938); *New Jersey Citizen Action v. Edison Township*, 797 F.2d 1250, 1260 (3d Cir. 1986), *cert. denied sub nom. Piscataway Township v. New Jer-*

57 States must thus allow mature minors and those whose best interests require confidentiality to choose an abortion without parental involvement. *See Akron*, 462 U.S. at 428 n.10 (1983); *Bellotti II*, 443 U.S. at 643-44; *Danforth*, 428 U.S. at 75. It is for this reason that the Court has required the sort of judicial bypass procedure provided by § 144.343(6) of Minnesota's statute. *Bellotti II*, 443 U.S. at 643-44; *see also Ashcroft*, 462 U.S. at 491 (quoting *Akron*, 462 U.S. at 439-40).

58 The district court made detailed findings of fact based on testimony by witnesses with first-hand knowledge of nearly 100% of the minors who were affected by the statute. For example, the state court judges who testified at trial collectively saw 90% of the minors who invoked the bypass, 25a, and the testimony of clinic personnel was drawn from experience with nearly every one of these minors. 26a.

sey Citizen Action, 479 U.S. 1103 (1987). *See also* Karst, *Legislative Facts in Constitutional Litigation*, 1960 Sup. Ct. Rev. 75, 84.[59]

Even the legitimacy of the state's interests cannot be sustained based on "archaic and overbroad generalizations" unsupported by evidence of any kind. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 730 n.16 (1982); *see Carey v. Population Servs. Int'l*, 431 U.S. at 696 (plurality) ("attempt to justify . . . burden [on rights] . . . requires more than a bare assertion, based on a conceded complete absence of supporting evidence"); *see also Thomas v. Review Bd.*, 450 U.S. 707, 718-19 (1981); *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 789-90 (1978); *Craig v. Boren*, 429 U.S. 190, 200-02 (1976). Consequently, "[n]either sentiment nor folklore . . . [have] cause[d this Court] to shut [its] eyes" to the truth. *In re Gault*, 387 U.S. at 21-22. *See also* 36a.[60]

Because application of these constitutional standards requires knowledge of the facts, this Court has never precluded a full review of the facts when assessing statutes challenged as

59 Indeed, commentators have noted that the "principal justification for giving the independent review of legislation to the judiciary lies in the ability of a court to weigh constitutional claims on the basis of experience which was not available when the legislature acted." *Karst*, 1960 Sup. Ct. Rev. at 76-77 & n. 8 (citing Hart & Wechsler, *The Federal Courts and the Federal System* 77-79, 93 (1953)). *See generally* Pine, *Speculation and Reality: The Role of Facts in Judicial Protection of Fundamental Rights*, 136 U. Pa. L. Rev. 655, 658-68 (1988), and commentators cited therein; Biklé, *Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action*, 38 Harv. L. Rev. 6, 19 (1924) (legislative findings cannot bind courts "since this would furnish a simple means of preventing judicial review of . . . legislation").

60 This Court has emphasized the importance of a full factual record to the adjudication of constitutional claims. *See, e.g., Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 815 (1986) (O'Connor, J., dissenting); *Alabama State Fed'n of Labor v. McAdory*, 325 U.S. 450, 461-62 (1945). *Cf. Vasquez v. Hillery*, 474 U.S. 254, 257-60 (1986). Indeed, the Court has often refused to decide constitutional questions in the absence of a sufficient factual record. *See, e.g., National Treasury Employees Union v. Von Raab*, 109 S. Ct. 1384, 1397 (1989) (record inadequate to decide issue).

applied. For example, in *Bowen v. Kendrick*, 108 S. Ct. 2562 (1988), this Court concluded that a federal statute did not violate the Establishment Clause on its face, *id.* at 2579, but remanded to the district court "for consideration of the evidence . . . insofar as it sheds light on the manner in which the statute is presently being administered." *Id.* at 2580. *See also id.* at 2581 (O'Connor, J., concurring). Similarly, in *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court sustained an election financing law but noted that facial validity of the law would not preclude a future finding of unconstitutionality based on "factual proof" that the law discriminated against "minor" political parties in operation. *Id.* at 97 n. 131; *see also Storer*, 415 U.S. at 740; *Seagram & Sons v. Hostetter*, 384 U.S. 35, 52 (1966); *McAdory*, 325 U.S. at 461-62; *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395-97 (1926).

Nowhere did the Eighth Circuit explain why it exempted this statute from these black letter principles. While the Eighth Circuit properly "recognize[d] that a statute may be facially valid, yet upon full development of a factual record be considered unconstitutional in operation," 85a (footnote omitted), it summarily failed to review Minnesota's statute as applied, concluding "that approval given to similar statutory [parental involvement] plans mandates approval in this case." *Id.* In so holding, the court of appeals ignored any distinction between "facial" and "as applied" cases and confused this Court's holding in *Ashcroft* with a proposition far broader than the case entailed.

Ashcroft neither resolved the facial constitutionality of a two-parent notice law, *see* discussion *supra*, n.55, nor addressed the constitutionality of such laws in operation. *See* 462 U.S. at 491-92. A single narrow question was before the Court: Whether the court of appeals had erred in its "interpretation" of the "plain language of [the challenged] statute." *Planned Parenthood Ass'n v. Ashcroft*, 50 U.S.L.W. 3928 (U.S. May 25, 1982) (No. 81-1255) (question presented). No previous decision by this Court reviewed a parental involvement

statute in operation.[61] "Indeed, in [those] . . . case[s], it was clear that only a facial challenge could have been considered, as the Act[s in question] had not been implemented." *Kendrick*, 108 S. Ct. at 2569; *Seagram*, 384 U.S. at 41. Evidence regarding the real operation and impact of the law was simply unavailable. *See Bellotti II*, 443 U.S. at 656 & n.4 (Stevens, J., concurring).[62]

In treating the constitutionality of Minn. Stat. § 144.343(2)-(6) as a pure "matter of law," 85a, the Eighth Circuit treated some factual assumptions as irrefutable.[63] These assumptions include (1) that the state's asserted interests in family integrity and promoting the health and decision-making of immature minors are actually served rather than undermined by Minnesota's two-parent notice/bypass statute, 86a; (2) that there is no significant difference in interference between one-parent and two-parent involvement, 89a-90a; (3) that the degree of burden from a notice/bypass scheme is determinate and fixed by law, 86a; (4) that the degree of burden of a mandatory notice statute is less than that of a consent statute, 94a; (5) that every state's

61 The statute in *Bellotti II* was judicially restrained before the statute's effective date and "never [was] . . . enforced by Massachusetts." 443 U.S. at 625 n.1. The statute at issue in *Ashcroft* was similarly enjoined before it went into effect. *See Planned Parenthood Ass'n v. Ashcroft*, 483 F. Supp. 679, 683 (W.D. Mo. 1980). In *Matheson*, 450 U.S. at 401, the only facts before the Court were those regarding a single named appellant, and the Opinion of the Court "primar[il]y" addressed appellant's standing to challenge the statute as applied to mature minors. *See Akron*, 462 U.S. at 440 n.30. As the district court below itself noted, "it [was] the first ever to examine a parental notification or consent substitute statute in actual operation." 39a.

62 Justice Stevens, in fact, predicted that the constitutional questions presented in *Bellotti II* would "appear quite different" in the presence of a factual record revealing the real impact of an operating bypass law. 433 U.S. at 656 n.4.

63 In facial constitutional analysis, courts generally construe a statute to be valid where possible. *See, e.g., DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 108 S. Ct. 1392, 1397 (1988); *INS v. Chadha*, 462 U.S. 919, 944 (1983). Where a statute is challenged as applied or in operation, however, the actual facts are of increased importance to the analysis and courts are more loathe to rest constitutional determination on assumptions of fact. *Cf. Kendrick*, 108 S. Ct. at 2580.

judicial bypass procedure, no matter how it is designed, provides a viable alternative for minors who need to utilize the procedure, 90a; and (6) that the promotion of biological parental authority will strengthen family integrity. 94a-95a.

To uphold Minnesota's law based on such factual assumptions disregards the district court's findings,[64] effectively freezes the premises of past decisions into constitutional law, *see Thompson v. Oklahoma*, 108 S. Ct. 2687 (1988) (O'Connor, J., concurring), and abdicates the "very essence of judicial duty." *See Marbury v. Madison*, 5 U.S. at 178.

B. The Minnesota Two-Parent Notice/Bypass Law Impermissibly Burdened Minors' Privacy Rights.

Minnesota's statute failed to achieve the state interests and burdened minors and their families in a multitude of ways neither intended by the legislature nor permitted by the Constitution. In seeking, in part, to protect a hypothetical class of immature minors whose best interests require parental involvement, Minnesota's statute sweeps broadly and blindly without the sensitivity the Constitution requires.[65]

"[T]he lines drawn in a state['s] regulation [of abortion] must be reasonable." *Akron*, 462 U.S. at 438; *Matheson*, 450 U.S. at 413. There must be a " 'fit between the legislature's end and the means chosen to accomplish those ends,' . . . a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served,' . . . a means narrowly tailored to achieve the desired objective." *Bd. of Trustees of the State Univ. of New York v. Fox*, 109 S. Ct. 3028, 3035 (1989) (citations and quotations omitted). Minnesota's "regulation requiring notification of both parents even when the nuclear family

64 Many of the assumptions made by the *en banc* court directly conflicted with those found by the district court. *See* Statement of Facts *supra*; *see* discussion *infra*. The Eighth Circuit, however, failed to address whether the trial court's findings were "clearly erroneous" upon examination of the record. *See* Fed. R. Civ. P. 52(a); *Anderson v. City of Bessemer*, 470 U.S. 564, 573-75 (1985).

65 These immature, non-best-interests minors are precisely the minors the statute failed to serve. 27a-28a.

unit has either broken apart or never formed is not reasonably designed to further the state's interest in protecting minors." 46a.

Minnesota's law in operation failed to provide all mature and best interests minors with a real alternative to parental involvement. Facts, *supra*, at § 5. Some carried unwanted pregnancies to term and others travelled out of state. 20a. Mature and best interest minors who did utilize the bypass were able to avoid destructive parental involvement, but were delayed, frightened and compelled to disclose the most intimate family matters to an array of public employees. Facts, *supra*, at § 5. Immature and non-best-interests minors carried to term rather than notifying their parents. 27a. Minors who voluntarily involved one parent were nevertheless compelled to obtain judicial approval for the decision not to involve a violent, terminally ill, or psychologically disturbed parent. Facts, *supra*, at § 3. Many of the fifty percent of Minnesota minors living in one- or no-parent households were compelled to involve a non-custodial or absent biological parent with whom they had no communication, trust or relationship. Facts, *supra*, at § 4. These minors frequently went to court with single parents, usually mothers with custody, who were divorced, battered, or remarried, to obtain the approval of a juvenile court judge and avoid reinvolving the second biological parent in their lives. 31a. These single mothers were forced to disclose stories about their divorces. 117a-118a.

The Minnesota legislature may indeed have intended to exempt certain minors from the burdens of both compelled notice and the judicial bypass procedure; the record demonstrated, however, that this effort also failed. While the statute purports to apply only to "unemancipated" minors, Minn. Stat. § 144.343(2), at 1a, the absence of a statutory definition of emancipation meant that minors had to go to court to be declared eligible for this exemption. *See Streitz v. Streitz*, 363 N.W.2d at 137;[66] P. Ex. 13 and 14. Similarly, minors with a deceased biological parent, while also ostensibly exempt, Minn. Stat. § 144.343(3), at 2a, were asked by providers to give written proof of the parent's death. Facts, *supra*, at § 2(d).[67] This severely upset members of plaintiff class such as G.K., and delayed their abortions. *Id.* Finally, while the legislature may have hoped to avoid imposing further burdens on minors who were already victims of sexual or physical abuse, this effort, too, was unsuccessful. Most of these minors did not reveal that they were abused, 21a, but even those who did could not both be exempt from the statute and retain their privacy because the statute requires that abuse be reported to state authorities, Minn. Stat. § 144.343(4)(c), at 2a, thus creating a substantial risk of disclosure. 21a.

Compounding the statute's far-flung burdens was its utter failure, as the district court found,[68] to achieve any of the state's legitimate aims more than it undermined them. 29a.[69] Minnesota sought to protect the health and welfare of its teenagers. Yet the statute drove them from health care, Facts, *supra*, at § 2(a), interfered with the care they obtained, 20a, and gave many no choice but unwanted motherhood. Facts, *supra*, at § 2(c). Minnesota also sought to foster communication between minors and their parents regarding their abortion choice. Yet five weeks of trial revealed no proof that communi-

66 Minors who were mothers, married, or living independently from their parents generally had to go to court. J.A. 230-31.

67 This is because subd. 5 of the statute requires written proof of compliance. 2a-3a.

68 The district court found that Minnesota did have one purpose, "to deter and dissuade minors from choosing to terminate their pregnancies," 25a, which may have been achieved. But since this purpose is not legitimate, *see Thornburgh*, 476 U.S. at 759, the fact that it was achieved, *see* Facts, *supra*, at § 2(c), argues against the constitutionality of the statute.

69 The district court said:

> The court did not expect defendants to establish that in every case Minnesota's parental notification law protects pregnant minors, promotes parent-child communication, and improves family relations generally. Defendants did establish that notification can serve these interests in individual cases. Defendants failed, however, to establish that the law promotes these values more than it undermines them. Five weeks of trial have produced no factual basis upon which the court can find that Minn. Stat. § 144.343(2)-(7) on the whole furthers in any meaningful way the State's interest in protecting pregnant minors or assuring family integrity.

29a.

cation had, in fact, increased. 41a. Moreover, the requirement that both parents be notified actually decreased the voluntary communication between some minors and their single parents. 22a. Finally, Minnesota had hoped to improve family integrity by mandating the involvement of both parents in the minor's decision. Yet in doing so, Minnesota imposed a rigid, idealized definition of family on the varied and too often dysfunctional family circumstances in which a majority of its teenaged citizens live. 29a-30a.[70]

The Eighth Circuit's response to these facts was to assert baldly that an "undue burden" on one group of minors—no matter how large—does not "render the statute unconstitutional for all." 95a. In so holding, it relied heavily on its erroneous view of the bypass option as a panacea for the statute's unconstitutional ills.

C. The Presence Of A Judicial Bypass Procedure Does Not Immunize All Underlying Statutory Requirements From Constitutional Scrutiny.

The Eighth Circuit made a fundamental error when it held, without reference to the record or to the trial court's findings, that "[a]ny added burden the two-parent notification require-

70 Courts in Minnesota themselves recognize that family structure and good communication cannot be created by judicial fiat. For example, in *Chapman v. Chapman*, 352 N.W.2d 437 (Minn. Ct. App. 1984), the Minnesota court of appeals reversed the trial court's award of joint custody, because "[a]lthough ideally the parents should make major decisions concerning their children jointly, joint legal custody should not be used as a 'legal baseball bat' to coerce cooperation" between parents who cannot "cooperate and amicably settle disputes about the children." *Id.* at 441. Minnesota law also recognizes that disputes between parents can "endanger[ ] the children's emotional well-being by placing them in the middle of a 'tug-of-war.' " *Andros v. Andros*, 396 N.W.2d 917, 922 (Minn. Ct. App. 1986). *See also Tollefson v. Tollefson*, 403 N.W.2d 857, 859-60 (Minn. Ct. App. 1987); *Heard v. Heard*, 353 N.W.2d 157, 161-62 (Minn. Ct. App. 1984); *Andersen v. Andersen*, 360 N.W.2d 644, 646 (Minn. Ct. App. 1985); *Bateman v. Bateman*, 382 N.W.2d 240, 250 (Minn. Ct. App. 1986); *Wolter v. Wolter*, 382 N.W.2d 896, 898-99 (Minn. Ct. App. 1986); *Tuma v. Tuma*, 389 N.W.2d 529, 531 (Minn. Ct. App. 1986); *Estby v. Estby*, 371 N.W.2d 647, 649 (Minn. Ct. App. 1985).

ment imposes in individual cases is negated by the judicial bypass mechanism . . . ." 93a. The statement reflected the court's unwillingness to assess the constitutionality of Minnesota's two-parent notice requirement in operation.[71]

This analysis flies in the face of prior decisions of this Court. Even with the limited facts then available, see discussion in Point I(A) *supra*, this Court in *Bellotti II* carefully analyzed the state's interests and whether the proposed statute was narrowly drawn to serve them. *See Bellotti II*, 443 U.S. at 644-50. A judicial bypass procedure was suggested by this Court in *Bellotti II* "not for the purpose of making an unconstitutional notice provision constitutional, but because even a valid notice requirement may be imposed only on minors who are immature or whose best interests would not be served by making the abortion decision without parental involvement." 102a (Lay, C.J., dissenting).

The circuit court's formulation of the bypass as an "all-purpose cure" would not only impose unconstitutional burdens on teenagers in Minnesota under this law, but could have further absurd and draconian consequences. States could require teenagers to notify the putative father of the minor's child (with or without exception for rape or incest), his parents[72] or any and all adults claiming an interest in the minor's health and welfare, such as grandparents, school officials or friends. Indeed, conditions other than notification, such as mandatory religious classes on when life begins, could be imposed.

In sum, the circuit court's analysis would drown minor's privacy rights in a hoard of regulatory measures bearing no compelling, significant or reasonable connection to the state's

71 Referring to the district court's conclusion that the two-parent requirement was unconstitutional and not severable from the remainder of the statute, the Eighth Circuit stated: "We confess some confusion as to why the district court examined the two-parent notice and the 48-hour delay requirements in isolation and applied its conclusions to invalidate the entire statutory procedure it had just approved." 92a.

72 Indeed, one early draft of Minn. Stat. § 144.343(2)-(6) proposed that both parents of the putative father be notified in addition to the pregnant minor's own biological parents. *See* Exhibit G (excerpts from Minnesota Legislative Journal).

legitimate interests. These requirements would be imposed on all minors, and for two classes of minors, they would be unavoidable: immature, non-best interest minors, and minors who are unable to navigate the judicial system. *See* Facts, *supra*, § 5. Minors, like the majority of plaintiff class members, who voluntarily confide in one or both parents, would be forced to go to court to bypass additional senseless conditions. The bypass mechanism would become a "super review board" for the abortion decision of nearly every minor who does not flee the state or carry her unwanted pregnancy to term.[73] *See generally* 104a (Lay, C.J., dissenting).

For these reasons, and because the bypass procedure together with the two-parent requirement operated to impose devastating burdens on minors, *see* Facts, *supra*, § 4 and Point I(B) *supra*,[74] the Eighth Circuit erred in upholding the constitutionality of Minnesota's two-parent notification requirement.

II. THE EIGHTH CIRCUIT ERRED IN HOLDING THAT THE INDEPENDENT RIGHTS AND INTERESTS OF BIOLOGICAL PARENTS JUSTIFY MINNESOTA'S TWO-PARENT NOTIFICATION REQUIREMENT.

After noting the substantial burdens which the district court found to have been imposed by the statute on the forty-two percent of Minnesota minors living in one- or no-parent households, 91a-92a, the Eighth Circuit nevertheless concluded that "the principles enunciated by the Supreme Court as to the parental role . . . apply to non-custodial parents as well as custodial parents," 95a, and "to both no-parent and one-parent households . . . ." 92a. In thus equating the interests of non-custodial parents with those of custodial parents and in elevating parental rights and interests above those of the minor, 92a-96a, the court of appeals plainly erred.[75]

73 Such review boards have been rejected by this Court. *Doe v. Bolton*, 410 U.S. 179, 197-98 (1973). *See also Morgentaler v. The Queen*, 44 D.L.R. 4th 385, 403-04 (Can. 1988).

74 21a-22a, 29a-31a.

A. Parental Authority Over Minors Is Not Independent From Or Weightier Than A Minor's Liberty And Health Interests.

In the area of minors' reproductive decision-making, the decisions of this Court embrace the role of parents only insofar as parents may help to insure that a minor's interests are protected. The court of appeals sustained Minnesota's two-parent notice requirement based on an unarticulated independent right of parents which it treated as paramount to the interests of the minor. 92a.[76]

75 The court of appeals found that the district court erred in failing to "consider whether parental and family interests (as distinguished from the interests of the minor alone) justified the two-parent notice requirement." 92a.

76 Whatever rights a parent may have, this Court has repeatedly emphasized that biological parenthood, without more, does not automatically carry with it a constitutionally protected right to the care and control of minor children, nor even to notice of events in their lives. Indeed, sharp distinctions have been drawn between the rights and interests of parents who are able to demonstrate a significant relationship with their children and those who are not. In a long line of cases, this Court has required more than a biological connection for the successful assertion of parental interests in the lives of children. *See Lehr v. Robertson*, 463 U.S. 248, 261-62 (1983) (unwed biological father who never had a significant custodial, personal, or financial relationship with his daughter had no constitutional right to notice and a hearing prior to her adoption); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1975) (unwed father, who had never exercised actual or legal custody over his child, suffered no constitutional deprivation from statute denying him the right to block his child's adoption); *Caban v. Mohammed*, 441 U.S. 380, 394 (1979) (to grant unwed mother, but not unwed father, the right to block an adoption by withholding consent violates equal protection on the ground that classification "discriminate[s] against unwed fathers even when their identity is known and they have manifested a significant paternal interest in the child."); *id.* at 392 ("where the father never has come forward to participate in the rearing of his child, nothing in the Equal Protection Clause precludes the State from withholding from him the privilege of vetoing the adoption of

This Court, however, has never held that parental interests carry greater weight in the constitutional analysis than the privacy interests of the mature minor. In *Danforth*, this Court found that:

> Any independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant.

428 U.S. at 75.[77] The subsequent decisions of this Court *extend* this principle by requiring that even immature minors be provided with a forum in which they may demonstrate that an abortion without parental involvement is in their best interests. *Ashcroft*, 462 U.S. at 490-491; *Bellotti II*, 443 U.S. at 643-44. This Court's decisions outside the privacy context are not inconsistent with these principles. The oft-cited cases of *Prince v. Massachusetts*, 321 U.S. 158 (1944), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), do not support broad parental authority to control a minor's choice between abortion and motherhood. In *Prince*, this Court recognized the liberty interests of parents but held that the state's interest in preventing severe harm to children was of sufficient weight to override such parental interests. 321 U.S. at 165-170 (sustaining a child labor law). In *Pierce*, this Court found a compulsory public school attendance statute to "interfere with the liberty of parents and guardians to direct the upbringing and education of

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that child"). In each of these cases, the Court has recognized the basic principle that "*[p]arental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring.*" *Lehr*, 463 U.S. at 260 (emphasis in original) (quoting *Caban*, 463 U.S. at 397 (Stewart, J., dissenting)); *id.* at 262 (where the natural father fails to accept any responsibility for the child's future "the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interest lie").

77 While this Court has since noted that there may be "no logical relationship between the capacity to become pregnant and the capacity for mature judgment," *Matheson*, 450 U.S. at 408, the record unequivocally supports the district court's finding that there *is* a relationship between maturity and the desire for privacy regarding the abortion choice. 28a, 42a.

children under their control." *Id.* at 534-535. Neither of these cases involved a conflict between the interests of parents and the rights of their minor children and neither involved the right of a minor to make a decision "[so] personal and intimate, [so] properly private, or [so] basic to individual dignity and autonomy," as that between pregnancy termination and unwanted parenthood. *See Thornburgh*, 476 U.S. at 772.[78]

Where, however, a conflict between parents and their children has been presented, courts have relied heavily on the language in *Prince* to the effect that "neither rights of religion nor rights of parenthood are beyond limitation." 321 U.S. at 166.[79] If parental rights and interests were not thus limited, forcing the risks of pregnancy and childbearing on a pregnant teenager, *see*

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78 Indeed, in the highly personal and individual decision regarding which parent should have custody of a child, Minnesota courts, for example, have accorded considerable weight to the child's choice even above and beyond the preferences of natural parents. A leading custody case, *Pikula v. Pikula*, 374 N.W.2d 705 (Minn. 1985), sets up a custody preference for the "primary caretaker" and later cases have consistently held that "*Pikula* directs that the child's preference be of significant weight if the child is old enough." *Stienke v. Stienke*, 428 N.W.2d 579, 582 (Minn. Ct. App. 1988); *Nies v. Nies*, 407 N.W.2d 484, 487 (Minn. Ct. App. 1987); *Peterson v. Peterson*, 394 N.W.2d 586, 588 (Minn. Ct. App. 1986); *Mowers v. Mowers*, 406 N.W.2d 60, 63-4 (Minn. Ct. App. 1987). The court has further stated that not only is the child's preference an important factor, but may be "in close cases *a deciding factor* as to which parent will have custody of the child." *Uhl v. Uhl*, 395 N.W.2d 106, 109-10 (Minn. Ct. App. 1986) (emphasis added) (citing *Schultz v. Schultz*, 383 N.W.2d 379, 382 (Minn. Ct. App. 1986)). *See also Maxfield v. Maxfield* 439 N.W.2d 411, 414-15 (Minn. Ct. App. 1989).

79 In *Parham v. J.R.*, 442 U.S. 584 (1979), however, this Court upheld a statute that granted parents the right to voluntarily commit their child to a state mental hospital. Although the Court affirmed the presumption "that natural bonds of affection lead parents to act in the best interests of their children," *id.* at 602 (citation omitted), the presumption was premised on the presence of some level of functional family relationship between the child and the parents. It strains belief to suggest that the Court in *Parham* contemplated commitment of a minor by a biological parent who has never met her over the objections of the minor and/or her custodial parent. *See id.* at 604. Note also that *Parham* involved a decision to commit a child which, unlike a decision to compel pregnancy, childbirth or motherhood, is revocable. Indeed, the Court in *Parham* specifically required subsequent review of the parental decision. *Id.* at 607.

Facts, *supra*, § 2(b) would be a parental prerogative,[80] as would the similarly invasive acts of forcing an abortion,[81] preventing life-saving medical treatment,[82] or preventing medical treatment not necessary to save the life of the minor.[83]

The rule emerging from these decisions is not new. Blackstone already recognized that "[t]he *power* of parents over their children is derived from . . . their duty." 1 W. Blackstone, *Commentaries* *452. Following an exhaustive analysis of Blackstone on this point, the British House of Lords recently upheld the discretion of a physician to provide contraceptives to a minor without parental knowledge or consent. *Gillick v. West Norfolk and Wisbech Area Health Authority*, 3 A11 E. R. 402

80 For example, in an Oklahoma case, a 12-year-old girl was raped by three teenagers and, as a result, contracted VD and became pregnant. Her mother sought to prevent her from having an abortion. The district court of Oklahoma found that the life of the minor was endangered as a result of the pregnancy, ordered that the girl be made a ward of the court and authorized the abortion and any other necessary medical treatment. The state Supreme Court affirmed. *In re D.C.*, JF No. 81-1555 (Okla. Dist. Ct. Okla. Cty., Sept. 22, 1981), *aff'd*, No. 57,472 (Okla. Sup. Ct. Sept. 28, 1981), reprinted in Exhibit E. Subsequently, the girl decided that she no longer wanted the abortion, and the district court order was dissolved. *See* The Daily Oklahoman, Oct. 7, 1981, at 1.

81 In *In re Mary P.*, 111 Misc. 2d 532, 444 N.Y.S.2d 545 (N.Y. Fam. Ct. Queens Cty. 1981), for example, a mother sought to have her 15-year-old daughter adjudged "a person in need of supervision" because the minor refused to have an abortion. The court not only rejected this attempt by the parent to interfere with the minor's choice, but issued an order prohibiting future interference with the minor's "determination to deliver her child." 111 Misc. 2d at 536, 444 N.Y.S.2d at 548; *see also In re Smith*, 16 Md. App. 209, 295 A.2d 238 (1972).

82 *See, e.g., People ex. rel. Wallace v. Labrenz*, 411 Ill. 618, 104 N.E.2d 769, *cert. denied*, 344 U.S. 824 (1952) (ordering blood transfusion over parents' objection); *Morrison v. State*, 252 S.W.2d 97 (Mo. App. 1952) (same); *cf. Jehovah's Witnesses v. King Cty. Hospital*, 278 F. Supp. 488 (W.D. Wash. 1967) (three-judge court), *aff'd*, 390 U.S. 598 (1968) (per curiam) (dismissing constitutional challenge to state statute authorizing blood transfusions to children over objection of parents).

83 *See In re Jensen*, 54 Or. App. 1, 633 P.2d 1302 (1981); *In re Karwath*, 199 N.W.2d 147 (Iowa 1972); *In re Sampson*, 29 N.Y.2d 900, 901, 328 N.Y.S.2d 686, 687 (1972) (per curiam).

(H.L. 1985). Lord Fraser stated that the "parental rights to control a child do not exist for the benefit of the parent. They exist for the benefit of the child and are justified only in so far as they enable the parent to perform his duties towards the child, and towards other children in the family." *Id.* at 410.[84]

There is, thus, no support in either present law or history for the broad assertion of parental interests employed by the court of appeals to sustain Minnesota's law.

B. States Have Universally Recognized The Paramount Importance Of Confidentiality To The Health And Welfare Of Minors.

States have uniformly elected to protect the confidentiality of minors seeking health care. All fifty states have enacted statutes that protect the confidentiality of a minor's decision to seek health care for medical problems related to sexual activity. *See generally* Exhibit C. For example, every state but one specifically allows minors to consent to medical treatment[85] for what they label as either sexually transmitted diseases (twelve states), venereal disease (thirty-six states), or diseases which must be reported to government health officials (one state). *Id.*[86] Indeed, a majority of states specifically authorize minors to consent to pregnancy-related health care such as pregnancy test-

84 Analyzing Blackstone further, Lord Fraser wrote:

> The principle [in Blackstone] is that parental right or power of control of the person and property of the child exists primarily to enable the parent to discharge his duty of maintenance, protection and education until he reaches such an age as to be able to look after himself and make his own decisions . . . the [basic] principle [is] that parental right endures only so long as it is needed for the protection of the child.

Id. at 421. *See also id.* at 410-413.

85 South Carolina, the exception, permits older minors to consent to any medical treatment except operations. *See* Exhibit C.

86 In a recent trend, states have also begun to enact statutes permitting minors to consent to testing for AIDS. *See, e.g.*, Cal. Health & Safety Code § 199.27(a)(1) (West Supp. 1989); Del. Code Ann. tit. 16, § 1202 (Supp. 1988).

ing, prenatal care, cesarean sections and other delivery services (twenty-seven states). *Id.* Moreover, a total of forty-three states specifically insure the confidentiality of minors seeking drug and/or alcohol treatment. *See* Exhibit D. Even where states do not specifically grant to minors a right to consent to medical treatment, it is widely accepted that parents may not make health care decisions if those decisions will jeopardize the life or health of their children. *See* cases cited *supra* at Point II(A). Finally, the majority of states permit emancipated minors, "mature minors," or older minors to consent to all medical treatment.[87]

The statutory trend affording minors the right to consent to medical treatment reflects a legislative judgment that parental involvement in medical decisions is unnecessary due to the overall competence of minors to make medical decisions in consultation with health professionals. *See* Facts, *supra*, § 2(a). It is also a recognition that parental involvement in health care decisions can be abusive.[88] Finally, and of quintessential importance, it is a recognition that minors will be deterred from seeking critical medical care if confidentiality is not guaranteed.

87 *See* English, *Adolescent Health Care: Barriers to Access—Consent, Confidentiality, and Payment* in *Special Issue, Clearinghouse Review* 481, 483 (1986) (footnotes omitted); Brown & Truitt, *The Right of Minors to Medical Treatment*, 28 De Paul L. Rev. 289, 294, 305 (1979); *Principles of Pediatrics, Health Care of the Young* 525 (Hoekelman ed. 1978); Katz, Schroeder & Sidman, *Emancipating our Children: Coming of Legal Age in America*, 7 Fam. L. Q. 211 (1973).

88 As Judge Nanette Dembitz of New York State Family Court observed:

> [parents] who have opposed their unmarried daughters' efforts to secure abortions variously have expressed a vengeful desire to punish the daughter for her sexual activity by making her suffer the unwanted child, a fervor to impose a religious conviction the mother has failed to instill in her daughter, a hope of caring for her daughter's baby as her own because of an inability or unwillingness to bear another child herself, a defensive or resentful attitude because [the mother of the pregnant minor] bore illegitimate children without seeking or being able to secure an abortion, or a general distaste for abortion. None of these parental reasons for objecting relates to the daughter's well-being—only to that of the mother.

Dembitz, *The Supreme Court and a Minor's Abortion Decision*, 80 Colum. L. Rev. 1251, 1255 (1980). *See* Facts, *supra* at § 3.

The Eighth Circuit's elevation of parental interests would threaten to invalidate a large number of these confidentiality statutes as well as the very statute of which Minnesota's two-parent notification requirement is a part. *See* Minn. Stat. § 144.343(1). 1a.[89] Indeed, to the extent the state would argue that this is not true, the state's asserted interests appear disingenuous. For if a legislature can dispense with parental involvement in health care decisions, particularly health decisions involving contraception and the treatment of pregnancy, these same parental interests cannot provide an independent constitutional basis for parental involvement in the abortion decision alone.

III. THE MINNESOTA STATUTE'S REQUIREMENT THAT THE MINOR WAIT FORTY-EIGHT HOURS AFTER NOTICE TO HER PARENTS IS UNCONSTITUTIONAL.

A waiting period of at least forty-eight and commonly seventy-two hours between written notification and the abor-

89 Federal statutes recognizing these same considerations would be jeopardized as well. *See, e.g.*, cases construing Title X, Public Health Service Act, 42 U.S.C. § 300(a) et seq. (Supp. 1989): *Planned Parenthood Fed'n v. Heckler*, 712 F.2d 650, 659-61 (D.C. Cir. 1983) ("Thus Congress made clear that confidentiality was essential to attract adolescents to the Title X clinics; without such assurance, one of the primary purposes of Title X—to make family planning services readily available to teenagers—would be severely undermined"); *New York v. Heckler*, 719 F.2d 1191 (2d Cir. 1983); *Planned Parenthood Ass'n v. Matheson*, 582 F. Supp. 1001 (D. Utah 1983); and cases construing Title XIX of the Social Security Act ("Medicaid") 42 U.S.C. § 1396d(a)(4)(c) (Supp. 1989): *T.H. v. Jones*, 425 F. Supp. 873, 878 (D. Utah 1975) ("The legislative history of the 1972 amendments bears out Congress' concern that AFDC and Medicaid family planning services be provided to sexually active minors who desire them on a confidential basis; in this way Congress has sought to stem the rising number of births out of wedlock . . ."), *aff'd mem. on statutory grounds*, 425 U.S. 986 (1976); *Planned Parenthood Ass'n of Utah v. Dandoy*, 810 F.2d 984 (10th Cir. 1987).

tion procedure is mandated by Minn. Stat. § 144.343(2).[90] The circuit court's approval of this requirement contradicts the decisions of nearly every other court that has considered the constitutionality of a waiting period, including this Court's decision in *Akron*.[91] 462 U.S. at 450 (twenty-four hour waiting period was unconstitutional because the city "failed to demonstrate that any legitimate state interest is furthered by an arbitrary and inflexible waiting period"). *See also Zbaraz*, 763 F.2d at 1537-38 (7th Cir. 1985), *aff'd per curiam by an equally divided court*, 108 S.Ct. 479 (1987); *American College of Obstetricians and Gynecologists v. Thornburgh*, 737 F.2d 283, 293 (3d Cir. 1984), *aff'd on other grounds*, 476 U.S. 747 (1986); *Planned Parenthood Ass'n of Kansas City v. Ashcroft*, 655 F.2d 848, 866 (8th Cir. 1981), *aff'd in part, rev'd in part on other grounds*, 462 U.S. 476 (1983); *Indiana Planned Parenthood v. Pearson*, 716 F.2d 1127, 1142-43 (7th Cir. 1983).

The circuit court found that the waiting period was justified by "Minnesota's interest in ensuring that notification results in parental involvement." 97a (footnote omitted). Though this

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90 The statute prohibits the abortion from being performed "until at least forty-eight hours after written notice of the pending operation has been delivered." Minn. Stat. § 144.343(2), at 1a. When the notice is mailed, "time of delivery shall be deemed to occur at 12 o'clock noon on the next day on which regular mail delivery takes place, subsequent to mailing." Minn. Stat. § 144.343(2)(b) at 1a-2a. If notice were mailed just prior to midnight, slightly more than 60 hours would pass between mailing and the time the abortion could be performed. However, the district court found, and the circuit court agreed, that minors who notified their parents by mail "commonly waited 72 hours between initiating the notification process and the abortion itself," 22a, 96a, reflecting the fact that most such mail is sent during the business day. Although the statute permits notice by personal delivery, Minn. Stat. § 144.343(2)(a), the personal delivery option was in practice confused with a consent requirement. *See* J.A. 287-88.

91 Although *Akron* involved a waiting period after informed consent by an adult woman, the Minnesota statute's waiting period applies both to mature minors capable of informed consent who choose to notify their parents rather than go through the bypass procedure and to emancipated minors who have the legal status of adults. More importantly, the Court's decision in *Akron* seems to be based less on the fact that the woman was capable of informed consent than on the arbitrariness of the requirement. 462 U.S. at 450-51.

state interest may be legitimate, it does not follow that an "arbitrary and inflexible" forty-eight hour waiting period is narrowly tailored to serve that state interest. As the district court noted, "a shorter waiting period would effectuate that interest as completely" as a full three-day period. 49a; *see also* 32a. Further, the burden imposed by the inflexibility of the waiting period is clearly demonstrated in situations where a minor who has fully consulted with both her parents about the abortion must nonetheless wait three days after formal mailed notice or two days after personal notice. Therefore, the Minnesota forty-eight hour waiting period is not narrowly drawn to serve the state's interest in fostering parental involvement,[92] and should be held unconstitutional by this Court.

IV. THE TWO-PARENT NOTIFICATION REQUIREMENT IS INTEGRAL TO THE STATUTE AND NOT SEVERABLE.

The district court correctly ruled that the statute's two-parent definition of "parent," 2a, was "inseparably intertwined within Minn. Stat. § 144.343(2)-(7)," and enjoined the statute in its entirety. 51a.[93] The appellate panel agreed, but the *en banc*

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92 The circuit court's suggestion that the minor could avoid the 48-hour waiting period by resorting to the bypass, 96a-97a, distorts the purpose of the bypass. *See* Point I(C) *supra*. A minor otherwise willing to notify her parents about her abortion choice should not be deterred from seeking parental involvement or channelled into the judicial system in order to avoid an arbitrary waiting period. Further, it is frequently the case that the bypass procedure takes longer than 48 hours, so there would be no time saved by taking the bypass route. 18a, 20a.

93 The district court wrote that:

> The Minnesota legislature would not have enacted a statute requiring notification of a minor's parents prior to the abortion without identifying the individuals entitled to such notice. More importantly, the remainder of the statute cannot be given effect without the offending language. . . . In addition, this court is ill-situated to determine what alternative definition the legislature would employ to remedy the constitutional infirmity identified in this decision. . . . Any [such alternatives], however, would leave Minn. Stat. 144.343(2)-(7) with little resemblance to the program actually intended by the Minnesota legislature.

51a.

court did not reach the issue. Should this statute's two-parent requirement be invalidated, the district court's holding on severability should be affirmed.[94]

The trial court's construction of a state statute is entitled to deference unless "clearly erroneous." *See, e.g., Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 499-500 & n.9 (1985). The district court properly applied the test required by this Court for determining severability: "whether the statute will function in a *manner* consistent with the intent of [the legislature]." *Alaska Airlines v. Brock*, 480 U.S. 678, 685 (1987). Since severance of the two-parent definition of parent would eviscerate the intent of the statute, the entire statute must fall if the two-parent notice requirement is found unconstitutional.

An essential goal of the Minnesota legislature was to provide both biological parents with notice. *See* Exhibit G. Severance of that requirement would render the statute "incapable of accomplishing the legislative purposes." *Brockett*, 472 U.S. at 506 (quoting *State v. Anderson*, 81 Wash.2d 234, 236, 501 P.2d 184, 185-186 (1972)). Indeed, the statute itself recognizes in subd. 6 that the provision for two-parent notice without bypass might be enjoined, and provides as an alternative two-parent notice with bypass. But either alternative requires notice to both biological parents as its central feature.[95]

Judicial rewriting of the statute is made impossible by the language of § 144.343(6)(c)(i). While subd. 3 defines the singular "parent" to mean "both parents," subd. 6(c)(i) uses the plural "parents" not once, but twice. Severing or editing subd. 3 would not solve the problem this choice of words creates. Eliminating the word "parents" from either or both places in subd. 6(c)(i) would render its operative provisions meaningless. The only solution would be to change the plural word "parents" to the singular word "parent." To do that would be to create a new statute which indisputably conflicts with the language and intent of the law as passed by the legislature. Thus,

94 If this Court invalidates this statute on grounds other than the two-parent requirement alone, this case should be remanded for full briefing on all issues of severability.

95 Subd. 3, defining "parent" as "both parents of the pregnant woman if they are both living," applies to both subd. 2 and subd. 6.

the district court was correct in concluding that it was "ill-situated" to choose between the many possible ways of rewriting the statute. 51a.[96]

CONCLUSION

Petitioners respectfully request this Court to reverse the judgment of the Eighth Circuit Court of Appeals and to declare that Minn. Stat. § 144.343(2)-(6) is unconstitutional.

Respectfully submitted,

WILLIAM Z. PENTELOVITCH
REBECCA A. PALMER
Maslon, Edelman, Borman & Brand
1800 Midwest Plaza
Minneapolis, Minnesota 55402
(612) 339-8015

LINDA OJALA
Kurzman, Grant & Ojala
2445 Park Avenue South
Minneapolis, Minnesota 55404
(612) 871-9004

JANET BENSHOOF
(Counsel of Record)
RACHAEL N. PINE
LYNN M. PALTROW
JOHN POWELL
American Civil Liberties Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800

SIMON HELLER
On The Brief

ROBERT S. HICKS
Minnesota Civil Liberties Union
1021 West Broadway
Minneapolis, Minnesota 55411
(612) 522-2423

96 When unconstitutional and constitutional portions of a statute "are necessary parts of one system . . . the whole Act will fall with the invalidity of one clause." *Huntington v. Worthen*, 120 U.S. 97, 102 (1887); *accord Field v. Clark*, 143 U.S. 649, 695-96 (1892).

APPENDIX

Exhibit A

Thirty-one states have parental notification or consent statutes[1] which are either in effect, under judicial review, or facially unconstitutional and generally not enforced.[2]

I. *NOTIFICATION*—eleven states

ARKANSAS: 1989 Ark. Acts 270; **GEORGIA:** Ga. Code Ann. § 15-11-112 (Supp. 1988); **IDAHO:** Idaho Code § 18-609(6) (1987); **ILLINOIS:** Ill. Ann. Stat. ch. 38 para. 81-64.4 (Smith-Hurd Supp. 1988); **MARYLAND:** Md. Health-Gen. Code Ann. § 20-103 (1987); **MINNESOTA:** Minn. Stat. § 144.343(2)-(6); **MONTANA:** Mont. Code Ann. § 50-20-107 (1987); **NEVADA:** Nev. Rev. Stat. § 442.255 (1987); **OHIO:** Ohio Rev. Code Ann. § 2919.12 (Anderson 1987); **UTAH:** Utah Code Ann. § 76-7-304 (1978); **WEST VIRGINIA:** W. Va. Code § 16-2F-3(a) (1985).

A. *Enforced*—two states

ARKANSAS, WEST VIRGINIA

B. *Enjoined*—five states

GEORGIA: *Planned Parenthood Ass'n of Atlanta v. Harris*, 691 F. Supp. 1419 (N.D. Ga. 1988) (preliminary injunction); **ILLINOIS:** *Zbaraz v. Hartigan*, 584 F. Supp. 1452 (N.D. Ill. 1984), *vacated in part and remanded*, 763 F.2d 1532 (7th Cir. 1985), *aff'd by an equally divided Court*, 108 S. Ct. 479 (1987) (*per curiam*); **MINNESOTA:** *Hodgson v. Minnesota*, 648 F. Supp. 756 (D. Minn. 1986), *aff'd*, 827 F.2d 1191 (8th Cir. 1987), *vacated and withdrawn*, 835 F.2d 1545 (8th Cir. 1987) (*per curiam*), *reh'g en banc granted*, 835 F.2d

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1 The Maine statute, Me. Rev. Stat. Ann. ch. 22, § 1597A (1989), is excluded from this list because it contains a provision for the physician to obtain consent solely from the minor.

2 This list does not contain those state laws which have been permanently enjoined and are not currently on appeal.

1546 (8th Cir. 1987), *rev'd*, 853 F.2d 1452 (8th Cir. 1988) (*en banc*), *stayed pending appeal*, Nos. 86-5423, 5431 (8th Cir. Oct. 7, 1988) (*en banc*) (110a), *cert. granted*, 109 S. Ct. 3240 (1989); **NEVADA:** *Glick v. McKay*, 616 F. Supp. 322 (D. Nev. 1985) (preliminary injunction); **OHIO:** *Akron Center for Reproductive Health v. Rosen*, 633 F. Supp. 1123 (N.D. Ohio 1986) (permanent injunction), *aff'd sub nom. Akron Center for Reproductive Health v. Slaby*, 854 F.2d 852 (6th Cir. 1988), *prob. juris. noted sub nom. Ohio v. Akron Center for Reproductive Health*, 109 S. Ct. 3239 (1989).

C. *Facially Unconstitutional, Generally Not Enforced*[3]—four states

IDAHO: Idaho Code § 18-609(6) (Supp. 1987); **MARYLAND:** Md. Health-Gen. Code § 20-103(a-c) (1987);[4] **MONTANA:** Mont. Code § 50-20-107(1)(b) (1987); **UTAH:** Utah Code Ann. § 76-7-304(2) (1978).

II. *CONSENT*—twenty states

ALABAMA: Ala. Code § 26-21-1 to 26-21-8 (Supp. 1988); **ALASKA:** Alaska Stat. § 18.16.010(a)(3) (1986); **ARIZONA:** Ariz. Rev. Stat. Ann. § 36-2152 and 36-2153 (Supp. 1988);[5] **CALIFORNIA:** Cal. Health & Safety Code § 25958 (Deering Supp. 1988); **DELAWARE:** Del. Code Ann. tit. 24 § 1790(b)(3) (1987); **FLORIDA:** Fla. Stat. Ann. § 390-001(4)(a) (West 1986); **INDIANA:** Ind. Code Ann. § 35-1-58.5-2.5 (West Supp. 1988); **KENTUCKY:** Ky. Rev. Stat. Ann. § 311.732 (Baldwin Supp. 1988); **LOUISIANA:** La. Rev. Stat. Ann. § 40:1299.35.5 (West Supp. 1988); **MASSACHUSETTS:** Mass. Gen. Laws Ann. ch. 112,

3 Unless otherwise indicated, these laws are presumed unconstitutional because they lack a judicial bypass. *Bellotti v. Baird*, 443 U.S. 622 (1979).

4 Unconstitutional per Opinion of the Attorney General, No. 85-035 (Dec. 31, 1985).

5 On May 22, 1989, Arizona enacted a new parental consent statute; § 36-2152 and 36-2153 (1989). This new statute will go into effect on September 15, 1989.

§ 12S (West 1983); **MISSISSIPPI**: Miss. Code Ann. § 41-41-53 (Supp. 1988); **MISSOURI:** Mo. Ann. Stat. § 188.028 (Vernon Supp. 1989); **NEW MEXICO:** N.M. Stat. Ann. § 30-5-1(c) (1984); **NORTH DAKOTA:** N.D. Cent. Code § 14-02.1-03.1 (Supp. 1987); **PENNSYLVANIA:** 18 Pa. Cons. Stat. Ann. § 3206 (Purdon 1983); **RHODE ISLAND:** R.I. Gen. Laws § 23-4.7-6 (1985); **SOUTH CAROLINA:** S.C. Code Ann. § 44-41-30(b) (1985) (unmarried women under the age of 16); **SOUTH DAKOTA:** S.D. Codified Laws Ann. § 34-23A-7 (1986); **TENNESSEE:** Tenn. Code Ann. § 37-10-303 (Supp. 1988); **WYOMING:** Wyo. Stat. § 35-6-118 (1989).[6]

A. *Enforced*—nine states

ALABAMA, INDIANA, KENTUCKY,[7] LOUISIANA, MASSACHUSETTS, MISSOURI, NORTH DAKOTA, RHODE ISLAND, WYOMING

B. *Enjoined or Declared Unconstitutional*—six states

ARIZONA: *Roe v. Collins*, No. CIV. 85-2118 PHX CLH (D. Ariz. August 14, 1987) (permanent injunction); **CALIFORNIA:** *American Academy of Pediatrics, California District IX v. Van de Kamp*, No. 884574 (Calif. Super. Ct., San Francisco Cty. Dec. 28, 1987) (preliminary injunction); **FLORIDA:** *In Re: T.W.*, No. 89-893 (5th Dist. Fla. Ct. App. May 13, 1989); **MISSISSIPPI:** *Barnes v. Mississippi*, No. J86-0458(W) (S.D. Miss. July 24, 1986) (preliminary injunction); **PENNSYLVANIA:** *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 686 F. Supp. 1089 (E.D. Pa. 1988) (preliminary injunction); **TENNESSEE:** *Planned Parenthood Association of Nashville v. McWherter*, No. 3:89-0520 (M.D. Tenn. June 30, 1989).

6 This law requires the notice and consent of one parent for all minor women seventeen or under.

7 The district court partially enjoined the law, but upheld it as modified. *See Eubanks v. Wilkinson*, No. C82-0360-L(A), slip op. at 35-36 (W.D. Ky. Aug. 23, 1988), *appeal docketed*, No. 88-6085 (6th Cir. Sept. 22, 1988), No. 89-5353 (6th Cir. Mar. 21, 1989).

C. *Facially Unconstitutional, Generally Not Enforced*[8]—five states

ALASKA: Alaska Stat. § 18.16.010(a)(3) (1986);[9] **DELAWARE:** Del. Code Ann. tit. 24 § 1790(b)(3) (1987);[10] **NEW MEXICO:** N.M. Stat. Ann. § 30-5-1(c) (1984); **SOUTH DAKOTA:** S.D. Codified Laws Ann. § 34-23A-7 (1986); **SOUTH CAROLINA:** S.C. Code Ann. § 44-41-30(b) (1985).

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8 Unless otherwise indicated, these laws are presumed unconstitutional because they lack a judicial bypass. *Bellotti v. Baird*, 443 U.S. 622 (1979).

9 Unconstitutional per Opinion of the Attorney General, No. 8 (Feb. 10, 1978).

10 Policy of nonenforcement announced by the State Attorney General on March 24, 1977, and reprinted in *Delaware Women's Health Org. v. Wier*, 441 F. Supp. 497, 499 n.9 (D. Del. 1977).

Exhibit B

For the convenience of the Court, plaintiffs provide this brief description of their expert witnesses:

Dr. Stanley Henshaw testified about the effect of the notification laws on teen pregnancy and abortion rates and on the need for abortion services. He is the Deputy Director for Research and Planning of the Alan Guttmacher Institute, where he directs research on abortion studies including periodic surveys of all abortion providers in the United States, the availability of abortion services throughout the country and the number of abortions which take place each year in each geographical area of the United States. In addition, Dr. Henshaw is the author or co-author of eighteen publications, including a study of teenage pregnancy in the United States and the developed countries. *See* P. Ex. 26 (resume); Henshaw Tr. at 2.

Dr. Lenore Walker testified about the effect of forced notification on abusive and dysfunctional families. Dr. Walker is licensed to practice psychology in Colorado and New Jersey. Dr. Walker has published extensively in the area of family violence, and is the sole author of five books, and the contributing author of several other books. In addition, she has written articles in professional journals, and has presented approximately 100 papers at various professional meetings and conferences. *See* P. Ex. 36 (resume); Walker Tr. at 289.

Dr. Steven Butzer testified with regard to issues of adolescent sexuality and decision making. He is a board certified psychiatrist and faculty member of the Department of Psychiatry at the University of Minnesota, School of Medicine. Dr. Butzer also has a large clinical practice in which roughly a quarter of his patients are adolescents. Dr. Butzer has served as staff psychiatrist at the Naval Regional Medical Center in Oakland, California and at St. Paul-Ramsey Medical Center, St. Paul, Minnesota where he was also Director of In-Patient Psychiatry Service. *See* P. Ex. 37 (resume); Butzer Tr. at 1335.

Dr. Gary Melton testified as to the ability of adolescents to consent to abortion procedures and on the psychological effects of the Minnesota statute. He is currently a Professor of Psychology and Law and Director of the Law/Psychology Program at the University of Nebraska. Dr. Melton has also been in private practice since 1980. He has extensive experience in the area of child and family psychology. Part of Dr. Melton's position entails running periodic workshops, mostly under the auspices of the National Council of Juvenile and Family Court Judges. In addition, Dr. Melton has published over 100 articles, books and papers, including a book, *Adolescent Abortion: Psychological and Legal Issues* (1986). Dr. Melton has acted as consultant to the National Council of Juvenile and Family Court Judges and the American Academy of Judicial Education. *See* P. Ex. 38 (resume); Melton Tr. at 1104.

Dr. Elissa Benedek is a nationally recognized expert in the areas of child and adolescent psychiatry. She is the Director of Research and Training at the Center of Forensic Psychiatry in Ann Arbor, Michigan, Clinical Professor of Psychiatry at the University of Michigan Medical Center, and is Associate Clinical Professor of Psychiatry at both Wayne State Medical Center in Detroit and Michigan Medical Center in Lansing. Prior to her present position, Dr. Benedek worked at a residential treatment center for children and adolescents. Dr. Benedek has published four books and 37 articles in scientific journals; contributed chapters in 20 books; written 34 book reviews and over 100 abstracts, papers and panel discussions. *See* P. Ex. 40 (resume); Benedek Tr. at 849.

Dr. Jane Hodgson, one of the plaintiffs, provided testimony on the issues of abortion safety, teen pregnancy and decision making. Her patient load is about 30 percent teenagers. She has personally counseled several thousand minors about their pregnancies. Dr. Hodgson has had over 45 years of experience as an obstetrician and gynecologist. She is a founding fellow of the American College of Obstetrics and Gynecology. In 1983 she was nominated woman Physician of the Year by the Medical Women of Minnesota. She was Director of the Fertility Control Clinic at St. Paul-Ramsey Hospital from 1973-1979 and Medical Director of Planned Parenthood of Minnesota from 1980-1983, directing the work of three clinics during this period. Dr. Hodgson has published over 47 pregnancy-related articles. *See* P. Ex. 1 (curriculum vitae); Hodgson Tr., Vol. I at 1.

Dr. Henry David testified about reproductive behavior and psychological sequelae following abortions. He is a psychologist with a subspecialty in international and domestic adolescent and adult abortion behavior. Dr. David is Director of the Transnational Family Research Institute and Associate Clinical Professor of Psychology in the Department of Psychiatry at the University of Maryland Medical School. In 1963, Dr. David became Associate Director of the World Federation for Mental Health and a Consultant for the World Health Organization. Dr. David has done original research and published extensively in the area of adolescent and adult reproductive behavior and psychological sequelae. *See* P. Ex. 123 (resume); David Tr. at 2522.

Dr. Edward Ehlinger testified on the effect of the notification statute on teen pregnancy and abortion rates in the City of Minneapolis. He is the Director, Division of Personal Health Services, Minneapolis Health Department. The division includes Maternal and Child Health, Dental Health, Nutrition, Health Education, and Public Health Laboratory. Dr. Ehlinger is a board certified physician in both pediatrics and internal medicine. He is also a Clinical Assistant Professor, Program in Maternal and Child Health, at the School of Public Health, University of Minnesota, and an Instructor, Department of Pediatrics, at the School of Medicine, University of Minnesota. *See* P. Ex. 115 (curriculum vitae); Ehlinger Tr. at 2017.

Exhibit C

Every state has enacted a specific statute allowing minors themselves to consent to health services for venereal disease or sexually transmitted diseases, or has enacted a general medical treatment consent statute.

Venereal Disease:

ALABAMA: Ala. Code § 22-8-6 (1984) (medical, health or mental health services to determine the presence of, or to treat venereal disease); **ALASKA:** Alaska Stat. § 09.65.100(a) (4) (1983) (diagnosis and treatment of venereal disease); **ARIZONA:** Ariz. Rev. Stat. Ann. § 44-132.01 (1987) (hospital or medical care related to diagnosis or treatment of venereal disease); **ARKANSAS:** Ark. Stat. Ann. § 20-16-508(a)(1) (1987) (medical or surgical care or services for venereal disease); **COLORADO:** Colo. Rev. Stat. § 25-4-402(4) (1982) (diagnostic examination, prescription and treatment for venereal disease); **CONNECTICUT:** Conn. Gen. Stat. § 19a-216 (1989) (examination and treatment for venereal disease); **GEORGIA:** Ga. Code Ann. § 31-17-7(a) (1985) (medical or surgical care or services for venereal disease); **HAWAII:** Hawaii Rev. Stat. § 577A-2 (1985) (medical care and services for venereal disease); **ILLINOIS:** Ill. Ann. Stat. ch. 111, § 4504 (Smith Hurd Supp. 1989) (medical care or counseling related to the diagnosis or treatment of venereal disease); **INDIANA:** Ind. Code Ann. § 16-8-5-1 (Burns 1983) (any person may consent to medical or hospital care or treatment for venereal disease); **IOWA**: Iowa Code Ann. § 140.9 (West 1989) (diagnosis or treatment for venereal disease); **KANSAS:** Kan. Stat. Ann. § 65-2892 (1985) (diagnostic examination and treatment for venereal disease); **KENTUCKY:** Ky. Rev. Stat. Ann. § 214.185(1) (Bobbs-Merril Supp 1988) (diagnostic examination and treatment for venereal disease); **LOUISIANA:** La. Rev. Stat. Ann. § 40:1065.1(A) (West 1977) (medical or surgical care or services for venereal disease); **MAINE:** Me. Rev. Stat.

Ann. tit. 32, § 3292 (1988) (medical care for treatment of venereal disease); **MARYLAND:** Md. Health-Gen. Code Ann. § 20-102(c)(3) (1987) (treatment for or advice about venereal disease); **MASSACHUSETTS:** Mass. Gen. Laws Ann. ch. 111, § 117 (West 1983) (physical examination and treatment of venereal diseases); **MICHIGAN:** Mich. Comp. Laws Ann. § 333.5257(1) (West 1980) (medical or surgical care, treatment, or services for venereal disease); **MINNESOTA:** Minn. Stat. § 144.343(1) (1989) (medical, mental and other health services to determine presence of or to treat venereal disease); **MISSISSIPPI:** Miss. Code Ann. § 41-41-13 (1981) (medical care for treatment of venereal disease); **MISSOURI:** Mo. Ann. Stat. § 431.061(1)(4)(b) (Vernon Supp. 1989) (surgical, medical or other treatment or procedures for venereal disease); **MONTANA:** Mont. Code Ann. § 41-1-402(1)(c) (1987) (prevention, diagnosis or treatment for venereal disease); **NEVADA:** Nev. Rev. Stat. § 129.060 (1987) (examination or treatment, or both, for venereal disease); **NEW JERSEY:** N.J. Stat. Ann. § 9:17A-4 (Supp. 1989) (medical or surgical care or services for venereal disease); **NEW MEXICO:** N.M. Stat. Ann. § 24-1-9 (1986) (examination and treatment for venereal disease); **NORTH CAROLINA:** N.C. Gen. Stat. Ann. § 90-21.5(a)(i) (Supp. 1988) (medical health services for the prevention, diagnosis and treatment of venereal disease); **NORTH DAKOTA:** N.D. Cent. Code § 14-10-17 (Supp. 1989) (14 or older may consent to examination or treatment of venereal disease); **OHIO:** Ohio Rev. Code Ann. § 3709.24.1 (Baldwin 1980) (diagnosis or treatment of venereal disease); **OKLAHOMA:** Okla. Stat. Ann. tit. 63, § 1-532.1 (West 1984) (examination and treatment for venereal disease); **OREGON:** Or. Rev. Stat. § 109.610 (1987) (hospital, medical or surgical care for diagnosis or treatment of venereal disease); **PENNSYLVANIA:** Pa. Stat. Ann. tit. 35, § 521.14a (Purdon 1977) (treatment of venereal disease); **SOUTH DAKOTA:** S.D. Codified Laws Ann. § 34-23-16 (1986) (diagnostic examination and treatment for venereal disease); **VERMONT:** Vt. Stat. Ann. tit. 18, § 4226 (1982)

(12 or older may consent to medical treatment and hospitalization for venereal disease); **VIRGINIA:** Va. Code § 54.1 2969 (D)(1) (Supp. 1989) (medical or health services needed to determine the presence of or to treat venereal disease); **WEST VIRGINIA:** W. Va. Code § 16-4-10 (1985) (examination, diagnosis, or treatment for venereal disease); **WYOMING:** Wyo. Stat. § 35-4-131(a) (1988) (examination and treatment for venereal disease).

Sexually Transmitted Diseases:

CALIFORNIA: Cal. Civ. Code § 34.7 (West 1982) (12 or older may consent to hospital, medical and surgical care related to the diagnosis or treatment of sexually transmitted diseases); **DELAWARE:** Del. Code Ann. 16 § 710 (1981) (12 or older may consent to diagnostic, preventive, medical or surgical treatment for any sexually transmitted diseases); **FLORIDA:** Fla. Stat. Ann. § 384.30(1) (West Supp. 1989) (diagnostic examination and treatment for sexually transmissible diseases); **NEBRASKA:** Neb. Rev. Stat. § 71-504 (Supp. 1988) (examination and treatment for sexually transmitted disease); **NEW HAMPSHIRE:** N.H. Rev. Stat. Ann. § 141-C:18 (II) (Supp. 1988) (14 years or older may consent to medical diagnosis and treatment for a sexually transmitted disease); **NEW YORK:** N.Y. Pub. Health Law § 2305(2) (Consol. 1987) (diagnosis or treatment for sexually transmissible disease); **RHODE ISLAND:** R.I. Gen. Laws § 23-11-11 (Supp. 1988) (examination and treatment for sexually transmitted disease); **TENNESSEE:** Tenn. Code Ann. § 68-10-104 (Supp. 1987) (examination, diagnosis or treatment for sexually transmitted diseases); **TEXAS:** Tex. Fam. Code Ann. § 35.03(a)(3) (Vernon Supp. 1989) (diagnosis and treatment of reported diseases including all sexually transmitted diseases); **UTAH:** Utah Code Ann. § 26-6-18(1)(2) (Supp. 1989) (medical care or services for sexually transmitted disease); **WASHINGTON:** Wash. Rev. Code Ann. § 70.24.110 (Supp. 1989) (14 or older may consent to hospital, medical and surgical care related to the diagnosis or

treatment of a sexually transmitted disease); **WISCONSIN:** Wis. Stat. Ann. § 143.07(1m) (West Supp. 1989) (treatment, examination and diagnosis for sexually transmitted disease).

General Medical Treatment Consent Statutes:

IDAHO: Id. Code § 39-3801 (1985) (14 or older may consent to hospital, medical or surgical care related to diagnosis or treatment of any reportable infectious disease); **SOUTH CAROLINA:** S. C. Code Ann. § 20-7-280 (Lawyers Co-op 1985) (16 or older may consent to health services other than operations).

Pregnancy-Related Health Care:

Twenty-seven states have minor consent statutes specifically authorizing minors to consent to pregnancy-related health services, including pregnancy testing, prenatal care and delivery services:

ALABAMA: Ala. Code § 22-8-6 (1984) (legally authorized medical, health or mental health services to determine the presence of, or to treat pregnancy); **ALASKA:** Alaska Stat. § 09.65.100(4) (1983) (diagnosis, prevention or treatment of pregnancy); **ARKANSAS:** Ark. Code Ann. § 20-9-602(4) (1987) (any surgical or medical treatment or procedures recommended by physician in connection with pregnancy or childbirth); **CALIFORNIA:** Cal. Civ. Code Ann. § 34.5 (West 1982) (hospital, medical, surgical care related to the prevention or treatment of pregnancy); **DELAWARE:** Del. Code Ann. tit. 13, § 708 (a), (b) (1981) (minor twelve or older may consent to diagnostic, preventive, lawful therapeutic procedures, medical or surgical care and treatment, including X-rays); **FLORIDA:** Fla. Stat. Ann. § 743.065(1) (West 1986) (medical or surgical care or services relating to her pregnancy); **GEORGIA:** Ga. Code Ann. § 31-9-2(a)(5) (1985) (surgical or medical treatment or procedures not prohibited by law for pregnancy); **HAWAII:** Hawaii Rev. Stat. § 577A-2 (1985) (medical care and services by

hospital, clinic or physician); **KANSAS:** Kan. Stat. Ann. § 38-123 (1986) (hospital, medical or surgical care related to pregnancy where no parent or guardian available); **KENTUCKY:** Ky. Rev. Stat. Ann. § 214.185(1) (Bobbs-Merril Supp. 1988) (diagnostic examination and treatment regarding pregnancy); **LOUISIANA:** La. Rev. Stat. Ann. § 40:1299.53 (e) (West 1977) (surgical or medical treatment or procedures including autopsy in connection with pregnancy or childbirth); **MARYLAND:** Md. Health-Gen. Code Ann. § 20-102 (c)(4) (1987) (treatment for or advice about pregnancy); **MICHIGAN:** Mich. Comp. Laws Ann. § 333.9132 (West Supp. 1989) (provision of prenatal and pregnancy related health care); **MINNESOTA:** Minn. Stat. § 144.343(1) (1989) (medical, mental and other health services to determine the presence of or to treat pregnancy and related conditions); **MISSISSIPPI:** Miss. Code Ann. § 41-41-3 (i) (Supp. 1988) (surgical or medical treatment or procedures not prohibited by law, in connection with pregnancy or childbirth); **MISSOURI:** Mo. Stat. Ann. § 431.061(1)(4)(a) (Vernon Supp. 1989) (any surgical, medical or other treatment not prohibited by law for pregnancy); **MONTANA:** Mont. Code Ann. § 41-1-402 (1)(c) (1987) (medical or surgical care or services for the diagnosis, prevention and treatment of pregnancy); **NEW JERSEY:** N.J. Stat. Ann. § 9:17A-1 (West 1976) (hospital, medical or surgical care and procedures related to her pregnancy or her child); **NEW MEXICO:** N.M. Stat. Ann. § 24-1-13 (1986) (examination and diagnosis by licensed physician for pregnancy); **NEW YORK:** N.Y. Pub. Health Law § 2504(3) (Consol. 1987) (medical, dental, health and hospital services relating to prenatal care); **NORTH CAROLINA:** N.C. Gen. Stat. § 90-21.5(a)(ii) (Supp. 1988) (medical health services for the prevention, diagnosis and treatment of pregnancy); **OKLAHOMA:** Okla. Stat. Ann. tit. 63, § 2602(A)(3) (West 1984) (services by health professionals for prevention, diagnosis and treatment of pregnancy. Health professional must also assume responsibility for counseling minor); **PENNSYLVANIA:** Pa. Stat. Ann. tit. 35, § 10103 (Purdon 1977) (medical and health services to determine the presence of or to treat pregnancy); **TENNESSEE:** Tenn. Code Ann. § 63-6-223 (1986) (examination, diagnosis and treatment for purpose of prenatal care); **TEXAS:** Tex.

Fam. Code Ann. § 35.03(a) (4) (Vernon Supp. 1989) (hospital, medical or surgical treatment related to her pregnancy); **UTAH:** Utah Code Ann. § 78-14-5(4)(F) (1987) (any female regardless of age, any health care not prohibited by law in connection with pregnancy or childbirth); **VIRGINIA:** Va. Code Ann. § 54.1-2969(D)(2) (Supp. 1989) (medical or health services required for pregnancy).

Exhibit D

Thirty-one states have minor consent statutes specifically covering health services related to both drug abuse and alcohol abuse and dependency; ten states have statutes covering health services related to drug abuse but not alcohol abuse; and two states have statutes covering health services related to alcohol abuse but not drug abuse.

Drug and Alcohol Abuse:

ALABAMA: Ala. Code § 22-8-6 (1984) (medical health or mental health services to determine the presence of, or treat drug dependency or alcohol toxicity); **ARIZONA:** Ariz. Rev. Stat. Ann. § 36-2024(A) (Supp. 1988) (an alcoholic may apply for evaluation and treatment; if the applicant is a minor, he, parent, or legal guardian shall make such application); Ariz. Rev. Stat. Ann. § 44-133.01 (1987) (any minor aged 12 or older who is found to be under the influence of a dangerous drug or narcotic by a licensed physician is to be regarded as having consented to hospital or medical care for treatment); **CALIFORNIA:** Cal. Civ. Code § 34.10 (a-c) (West 1982) (minor aged 12 years or older may consent or medical care and counseling to the diagnosis and treatment of a drug or alcohol related problem); **COLORADO:** Colo. Rev. Stat. § 13-22-102 (1987) (examination, prescription, and treatment of a minor addicted to drugs); Colo. Rev. Stat. § 25-1-308(1) (1982) (an alcoholic, including a minor, may apply for voluntary treatment directly to an approved treatment facility); Colo. Rev. Stat. § 25-1-309(1) (1987) (intoxicated person or person intoxicated or incapacitated by alcohol, including a minor, may voluntarily admit himself to an approved treatment facility); **CONNECTICUT:** Conn. Gen. Stat. § 19a-382 (Supp. 1989) (minor may request treatment and rehabilitation for drug dependence); Conn. Gen. Stat. § 17-155t(a)(d) (Supp. 1989) (an alcoholic minor may apply for voluntary treatment directly to a public treatment facility; request for discharge from an

inpatient facility shall be made by a parent, legal guardian or minor if he was applicant); **FLORIDA:** Fla. Stat. Ann. § 397.099 (West 1986) (rehabilitative or medical treatment for drug abuse or dependency); Fla. Stat. Ann. § 396.082(1) (West 1986) (treatment for alcoholism); **GEORGIA:** Ga. Code Ann. § 37-7-8(b) (1982) (medical or surgical services for treatment of drug abuse); Ga. Code Ann. § 37-8-31(a) (1986) (an alcoholic minor may make application for voluntary treatment of alcoholism; for a discharge from an inpatient facility, a written request shall be made by a parent, legal guardian or by the minor if he was the original applicant); **HAWAII:** Haw. Rev. Stat. § 577-26(e) (1985) (diagnosis, counseling and related activities for alcohol and drug abuse); **IDAHO:** Idaho Code § 37-3102 (1977) (minors aged 16 or older may consent to treatment or rehabilitation for drug addiction or dependency); Idaho Code § 39-307(1)(4) (Supp. 1989) (alcoholic or addict, including minors, may apply for voluntary treatment directly to any approved treatment facility; if minor leaves facility, request for discharge may be made by parent, guardian, or minor if he were (sic) the original applicant); **ILLINOIS:** Ill. Ann. Stat. ch. 111, para. 4504 (Smith-Hurd Supp. 1989) (minor 12 years or older who is determined to be an addict, alcoholic, or an intoxicated person may consent to medical care or counseling related to the diagnosis and treatment of drug use or alcohol consumption); **INDIANA:** Ind. Code Ann. § 16-13-6.1-23 (Burns 1983) (treatment for alcoholism, alcohol abuse, or drug abuse); **IOWA:** Iowa Code Ann. § 125.33(1) (West 1987) (treatment or rehabilitation services for alcohol or drug/chemical dependency); **KENTUCKY:** Ky. Rev. Stat. Ann. § 214.185 (Baldwin Supp. 1988) (diagnostic examination, prescription, advice and treatment for alcohol or other drug abuse or addiction); **MAINE:** Me. Rev. Stat. Ann. tit. 22, § 1823 (Supp. 1988) (treatment for drug or alcohol abuse in a hospital); Me. Rev. Stat. Ann. tit. 32, § 3292 (1988) (medical care for treatment of drug or alcohol abuse); **MICHIGAN:** Mich. Comp. Laws Ann. § 333.6121(1) (West 1980) (substance

abuse related medical or surgical care, treatment or services); **MINNESOTA:** Minn. Stat. § 144.343(1) (medical, mental and other health services to determine the presence of or to treat conditions associated with alcohol or drug abuse); **MISSISSIPPI:** Miss. Code Ann. § 41-41-14 (1981) (minors aged 15 or older may consent to treatment relating to mental or emotional problems caused by or related to alcohol or drugs); **MISSOURI:** Mo. Ann. Stat. § 431.061 (1)(4)(c) (Vernon Supp. 1989) (surgical or medical treatment for alcohol and drug abuse); Mo. Ann. Stat. § 631.115 (Vernon 1988) (a minor may apply for admission to treatment facility to receive treatment or rehabilitation for drug or alcohol abuse); **MONTANA:** Mont. Code Ann. § 41-1-402(c) (1987) (provision of medical or surgical care or services for drug and substance abuse, including alcohol); **NEBRASKA:** Neb. Rev. Stat. § 71-5041 (1986) (alcohol or drug abuse counseling or treatment); **NEW JERSEY:** N.J. Stat. Ann. § 9:17A-4 (West Supp. 1989) (a minor who is suffering from the use of drugs or is a drug dependent person may consent to treatment for drug use or drug abuse); N.J. Stat. Ann. § 26:2B-15 (West 1987) (any person who is an alcholic may voluntarily apply for treatment); **NORTH CAROLINA:** N.C. Gen. Stat. § 90-21.5(a)(iii) (Supp. 1988) (medical health services for the prevention, diagnosis and treatment of abuse of controlled substances or alcohol); **NORTH DAKOTA:** N.D. Cent. Code § 14-10-17 (Supp. 1989) (minor aged 14 or older may consent to examination, care, or treatment for alcoholism or drug abuse); **OHIO:** Ohio Rev. Code Ann. § 3719.012(A) (Baldwin 1989) (diagnosis or treatment by a physician for abuse of drugs, beer or intoxicating liquor); **OKLAHOMA:** Okla. Stat. Ann. tit. 63, § 2602(A)(3) (West 1984) (services for prevention, diagnosis and treatment of drug and substance abuse or abusive use of alcohol); **RHODE ISLAND:** R.I. Gen. Laws § 14-5-4 (Supp. 1988) (parent consent not required for non-invasive non-custodial treatment of substance abuse or chemical dependency if in the judgment of a qualified professional, such consent would be deleterious to the minor voluntarily

seeking treatment); R.I. Gen. Laws § 40.1-4-9(1)(4) (Supp. 1988) (a minor may apply for voluntary treatment for alcoholism; a request for discharge from a treatment facility shall be made by a parent, guardian or the minor if he was the original applicant); **SOUTH CAROLINA:** S.C. Code Ann. § 44-52-20 (Law. Co-op. Supp. 1988) (minor aged 16 years or older may apply for admission to a treatment facility for treatment of chemical dependency on alcohol or other drugs); **SOUTH DAKOTA:** S.D. Codified Laws Ann. § 34.20A-50 (1986) (minor may make application to an accredited facility for treatment of drug and alcohol abuse); **WASHINGTON:** Wash. Rev. Code Ann. § 69.54.060 (1985) (minor aged 14 years or older may consent to counseling, care, treatment or rehabilitation for drug or alcohol abuse); **WEST VIRGINIA:** W. Va. Code § 60A-5-504(e) (1989) (examination, diagnosis, and treatment for any addiction to or dependency upon the use of a controlled substance); W. Va. Code § 60-6-23 (1989) (examination, counseling, diagnosis, and treatment for any addiction to or dependency upon the use of alcoholic liquor or non-intoxicating beer); **WISCONSIN:** Wis. Stat. Ann. § 51.47(1) (West 1987) (preventive, diagnostic, assessment, evaluation or treatment services for the abuse of alcohol or other drugs).

Drug Abuse:

KANSAS: Kan. Stat. Ann. § 65-2892a (1985) (examination and treatment for drug abuse, misuse, or addiction); **LOUISIANA:** La. Rev. Stat. Ann. § 40:1096(A) (West 1977) (drug treatment and medical or surgical treatment); **MASSACHUSETTS:** Mass. Gen. Laws Ann. ch. 112, § 12E (West 1983) (minor aged 12 years or older may consent to hospital and medical care related to diagnosis or treatment of drug dependency); **NEVADA:** Nev. Rev. Stat. Ann. § 129.050(1)(a)(b) (Michie Supp. 1989) (hospital, medical, surgical or other care for the treatment of drug abuse or related illnesses); **NEW HAMPSHIRE:** N.H. Rev. Stat. Ann. § 318-B: 12-a (1984) (minor aged 12

or older may voluntarily submit himself to treatment for drug dependency or any problem related to drug use); **NEW MEXICO:** N.M. Stat. Ann. § 26-2-14(A) (Supp. 1987) (drug abuse treatment); **OREGON:** Ore. Rev. Stat. § 109.675(1) (Supp. 1988) (minor 14 years or older may consent to outpatient diagnosis or treatment of chemical dependency, excluding methadone maintenance); **PENNSYLVANIA:** Pa. Stat. Ann. tit. 71, § 1690.112 (Purdon Supp. 1989) (medical care or counseling related to diagnosis or treatment for use of any controlled or harmful substance); **TENNESSEE:** Tenn. Code Ann. § 63-6-220(a) (1986) (treatment for drug abuse by physician); **TEXAS:** Tex. Fam. Code Ann. § 35.03(6) (Vernon Supp. 1989) (examination and treatment for chemical addiction, chemical dependency, or any other condition related to chemical use); **VIRGINIA:** Va. Code Ann. § 54.1-2969(D)(3) (Supp. 1989) (medical or health services needed for treatment and rehabilitation for substance abuse).

Alcohol Abuse:

DELAWARE: Del. Code Ann. tit. 16, § 2210(b) (1983) (minor aged 12 or over may consent to voluntary treatment of alcoholism); **NEW YORK:** N.Y. Mental Hyg. Law § 21.11(c) (McKinney 1988) (parental involvement and consent not required for treatment of alcoholism on minor if such involvement and consent would be detrimental to minor's treatment or if such treatment is in best interests of minor).

Exhibit E

IN THE
DISTRICT COURT OF OKLAHOMA COUNTY,
STATE OF OKLAHOMA

JF NO: 81-1555

IN THE MATTER OF: D C

AN ALLEGED CHILD IN NEED OF SUPERVISION

JOURNAL ENTRY

Now on this 23rd day of September, 1981, this cause comes on for hearing.

Whereupon, the Juvenile's answer and cross-petition as a DEPRIVED child was presented with arguments of counsel. The State of Oklahoma confessed the cross-petition and the matter was heard as a DEPRIVED action.

Whereupon, all parties were advised of their statutory and constitutional rights; and no demand having been made for jury trial, witnesses were sworn and testimony taken.

The Court, after reviewing the files, hearing sworn testimony, receiving evidence, and being fully advised in the premises, finds:

That the material allegations set forth in the cross-petition on file herein are true; that the said cross-petition should be sustained by reason of testimony; and that said child should be made a ward of the Court as DEPRIVED under the provisions of 10 OSA 1101 (d).

Further the Court finds that said child is twelve (12) years of age; in the first trimester of pregnancy; that said pregnancy occurred as a result of rape; that said child desires an abortion;

that the life of the said child is endangered by this pregnancy as well as the life of the unborn fetus; and that said child had a venereal disease.

Further the Court finds that the respondent Mother of this Juvenile opposes abortion on religious grounds and desires that Juvenile continue her pregnancy to full term.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED BY THE COURT that said child be and is hereby made a ward of the Court as DEPRIVED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED BY THE COURT that the custody of said child should be and is hereby placed with the Department of Human Services with the authority to place and with the authority to consent to any medical treatment necessary for pre-natal care, venereal disease or any other medical treatment which may be required by said child.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED BY THE COURT that said pregnancy of said child be terminated by surgical procedure at the earliest possible date commensurate with the health and best interest of said child.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED BY THE COURT that the termination of pregnancy BE STAYED temporarily pending certification of this Order to the Supreme Court of the State of Oklahoma.

Certification of this Order is requested most urgently due to the finality of said Order should it be carried out; said question raised by this Order has not previously been addressed by the Supreme Court of Oklahoma; statutory provisions are nil; there is no case law in this State nor has the question been squarely addressed in other jurisdictions including the Supreme Court of the United States.

IT IS FURTHER ORDERED that this matter be set down for Disposition on a day certain subsequent to a decision by the Supreme Court of Oklahoma on the certification of the Order before this honorable court.

Donald C. Manning /s/
JUDGE OF THE DISTRICT COURT

I, Donald C. Manning, Judge of the District Court of Oklahoma County, do hereby certify to the Supreme Court the above question is one which has not been heretofore answered by the Oklahoma Supreme Court and that the import of the above question is one which needs an immediate decision due to the nature of the circumstances.

Donald C. Manning /s/
JUDGE OF THE DISTRICT COURT

IN THE
SUPREME COURT OF THE STATE OF OKLAHOMA

No. 57,472

RE: D.C., a Child under Eighteen (18) years of age

ORDER

On consideration of the Mother's appeal from order declaring D. C., a child twelve (12) years of age, to be a deprived child and from one directing that her pregnancy be terminated,

THE COURT FINDS the evidence undisputed in support of the trial court's finding that her life is endangered by the pregnancy, and that the termination of her pregnancy is hence necessary.

The trial court's orders are not against the clear weight of the evidence and are affirmed.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE this 28th day of September, 1981.

PAT IRWIN /s/
CHIEF JUSTICE

Exhibit F*

JOURNAL of the SENATE
STATE OF MINNESOTA
SEVENTY-SECOND LEGISLATURE
INCLUDING FIRST AND SECOND SPECIAL SESSIONS
1981

February 9, 1981

[880] Mr. Solon from the Committee on Health, Welfare and Corrections, to which was referred

S.F. No. 287: A bill for an act relating to health; prescribing procedures for notification of parents, guardians, and conservators prior to performing abortions on certain persons; providing a penalty; amending Minnesota Statutes 1980, Section 144.343.

Reports the same back with the recommendation that the bill be amended as follows:

Delete everything after the enacting clause and insert:

"Section 1, Minnesota Statutes 1980, Section 144.343, is amended to read:

* An authenticated copy of these relevant excerpts from the official Minnesota Senate Legislative Journal has been lodged with this Court by counsel for Petitioners. Each house of the Minnesota legislature is constitutionally required to keep a journal of its proceedings. Minn. Const. art. IV, § 15. *See also* Minn. Revisor's Office, *Minnesota Revisor's Manual with Styles and Forms* 34 (1984).

144.343 [PREGNANCY, VENEREAL DISEASE AND ALCOHOL OR DRUG ABUSE.]

Subdivision 1. **[MINOR'S CONSENT VALID.]** Any minor may give effective consent for medical, mental and other health services to determine the presence of or to treat pregnancy and conditions associated therewith, venereal disease, alcohol and other drug abuse, and the consent of no other person is required.

Subd. 2. **[NOTIFICATION CONCERNING ABORTION.]** *No abortion operation shall be performed upon a minor or upon a woman for whom a guardian or conservator has been appointed pursuant to sections 525.54 to 525.551 because of a finding of incompetency, until at least 48 hours after written notice of the pending operation has been delivered in the manner specified in subdivisions 2 to 4.*

(a) If the pregnant woman is unmarried and is living with her parent, the notice shall either be delivered personally to her parent and the putative father's parent or be delivered to the parents' usual places of abode and left with a person of suitable age and discretion residing therein other than the pregnant woman or the putative father.

(b) If the pregnant woman is unmarried and is not living with her parent, the notice shall either be delivered personally to her parent and the putative father's parent or be delivered to the parents' usual places of abode and left with a person of suitable age and discretion residing therein.

In lieu of the delivery required by clauses (a) and (b), notice may be made by **[881]** *certified mail receipted for by the persons specified for delivery in clauses (a) and (b).*

Subd. 3. **[PARENT; DEFINITION.]** *For purposes of this section, "parent" means both parents of the pregnant woman, or both parents of the putative father, as applicable, if they are both living, one parent of the pregnant woman, or one parent of the putative father, as applicable, if only one is living or if the second one cannot be located through reasonably diligent*

effort, or the guardian or conservator, if the pregnant woman, or the putative father, as applicable, has one.

Subd. 4. **[LIMITATIONS.]** *No notice shall be required under this section if:*

(a) *The attending physician certifies in the pregnant woman's medical record that the abortion is necessary to prevent the woman's death and there is insufficient time for providing the required notice; or*

(b) The abortion is authorized in writing by the person or persons who are entitled to notice; or

(c) The pregnant minor woman declares that she is a victim of sexual abuse, neglect, or physical abuse as defined in section 626.556. Notice of that declaration shall be made to the proper authorities as provided in section 626.556, subdivision 3.

Subd. 5. **[PENALTY.]** *Performance of an abortion in violation of this section shall be a misdemeanor and shall be grounds for a civil action by a person wrongfully denied notification. A person shall not be held liable for failure to deliver required notice if the person relied in good faith upon the representations of the pregnant woman regarding information necessary to deliver notice as required by this section or if the person has attempted with reasonable diligence to deliver notice but has been unable to do so."*

And when so amended the bill do pass. Amendments adopted. Report adopted.

Exhibit G**

Excerpt from Transcript of Remarks by
Minnesota State Sen. Gene Waldorf
at Minnesota Senate Session Regarding Senate File 287
(May 6, 1981)

CHAIR: Senator Waldorf has moved that when this Committee do arise that Senate File 287 be recommended to pass. Senator Waldorf.

WALDORF: On page 1 of the bill, the first new language is in subdivision 2, which deals with the notification requirements. It says "no abortion operation shall be performed on a minor—upon a minor or upon a woman for whom a guardian or conservator has been appointed without a 48 hour waiting period after written notice has been provided." And then it [sic] Clause A it deals with the unmarried woman who is living with their [sic] parents. Subclause B deals with [a] pregnant woman who is unmarried and not living with her parent. And then finally, an alternate form of delivery, rather than the personal delivery by the physician or his [sic] assistant. The language on lines 10-12 offer the opportunity to make notice by way of certified mail. Subdivision 3 defines a parent for purposes of this section. "Parent means both parents of the pregnant minor or both parents of punitive [sic] father." The punitive [sic] father, for those of you that don't know what that means, punitive [sic] means presumed or alleged father. That language was added by amendment in committee and I intend to remove that language with

** A copy of relevant portions of transcripts of tapes of Minnesota Senate Committee hearings, including the contents of this Exhibit, has been lodged with this Court by counsel for Petitioners.

one of my amendments. And it goes on to describe those who should be notified.

Subdivision 4 is an important one in that it provides some exclusions from this notification requirement. Those exclusions are: if the attending physician certifies that the woman—in the pregnant woman's medical record that the abortion is necessary to prevent her death and there is insufficient time for providing notice; if the abortion has already been authorized in writing by the parent; and finally, if the pregnant minor woman declares that she is a victim of sexual abuse, neglect or physical abuse as defined in our statutes, then notice does not have to be given, but in that particular section of law there is a very specific and prescribed requirement that the Welfare Department or two other agencies be notified that the declaration has been made so that they can bring into play the normal investigation which goes on in all cases of alleged child abuse. But in that case the abortion could be performed without notification.

Finally, subdivision 5 is a penalty and that penalty is the criminal penalty of a misdemeanor that would be charged against the person who was not—I mean who should have notified, and that would be the physician who performed the abortion who did not make an attempt or proper attempt to notify the parent and also includes civil action by the parent who was wrongfully denied notification. And finally, there is a—the last part to that subdivision deals with the definition of what is a reasonable attempt at notification and also what standard may be used for the information provided to the doctor who is going to perform abortion by the minor. In the case where the minor would present some false information and it was reasonably prudent on

his [sic] part to accept that information then, of course, he would not probably be found guilty by the court.

Mr. Chairman, that is the extent of the bill as it exists now.

* * *

WALDORF: This bill does not deal with consent, but I think that the legal staff who have looked at this agrees that, should the question come to the courts of a minor who is living at home but may be considered mature if she objected to the notification provisions, that there may have to be some sort of court override, or process by which she can appeal to the court that her parents should not be notified. And that's also in the bill.

Those are the three major provisions in the bill. There are some other smaller provisions which relate to delivery, but that's the effect of this amendment. I urge your support and, Mr. Chairman, I think I may as well call for a roll call vote on this.

CHAIR: The chair recognizes Sen. Bergland.

BERGLAND: Mr. Chairman and Sen. W. It really would have been a lot easier to follow this if you have had a strick [sic] everything amendment, but since we don't I have some questions. Are you maintaining in Subd. 3, the definition of "parent" meaning both parents of the pregnant woman?

CHAIR: Sen. W.

WALDORF: Mr. Chairman, Sen. Bergland, is that one the bill?

BERGLAND: Yeah, it's in the bill, on page 2. Under definition of parent.

WALDORF: Mr. Chairman, it means both parents, if they're both living. One parent if only one is living and the—or if the second one cannot be located through reasonably diligent effort. So in the case of a divorce the parents in two different locations, an attempt should be made to locate the second parent but only with reasonable diligence.

CHAIR: Sen. B.

BERGLAND: Mr. Chairman, Sen. W., then if the pregnant woman agrees to have one of her parents notified but not both of them, then your remedy is that she would be going to court, is that what the amendment does?

CHAIR: Sen. W.

WALDORF: Mr. Chairman, I believe that would be the case, yes.

BERGLAND: And, Mr. Chairman and Sen. W., the reason you're offering this amendment is because you believe it will make the bill constitutional? that what you said?

CHAIR: Sen. W.

WALDORF: Mr. Chairman and Sen. B., that's what we're trying to do is to make the bill constitutional. I am not aware of any court decisions, supreme court [sic] decisions that would not give status to the natural parent who is divorced.

[redacted]

[redacted]

Petitioners,

v.

THE STATE OF MINNESOTA, et al.,

Respondents.

THE STATE OF MINNESOTA, et al.,

Cross-Petitioners,

v.

JANE HODGSON, M.D., et al.,

Cross-Respondents.

[redacted]

CROSS-RESPONDENTS

[redacted]

[redacted]

[redacted]

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the Eighth Circuit was correct in holding unconstitutional a criminal statute requiring that both biological parents of minors be notified at least forty-eight hours prior to any abortion procedure with no opportunity for mature minors (including emancipated or married minors, and minors with children), or minors whose best interests require confidentiality (including sexually abused minors) to avoid such notice?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

Nos. 88-1125 and 88-1309

JANE HODGSON, M.D., *et al.*,

Petitioners,

—v.—

THE STATE OF MINNESOTA, *et al.*,

Respondents.

THE STATE OF MINNESOTA, *et al.*,

Cross-Petitioners,

—v.—

JANE HODGSON, M.D., *et al.*,

Cross-Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR CROSS-RESPONDENTS

STATEMENT OF THE CASE

Plaintiffs re-affirm the Statement of the Case in B.P. at 2-25.[1]

SUMMARY OF ARGUMENT

It is settled as a matter of law that mandatory parental involvement statutes such as Minn. Stat. § 144.343(2) (hereinafter "subdivision 2") must provide an effective procedure by which mature minors and those minors whose best interests require confidentiality may avoid mandatory parental involvement of any sort. *Bellotti v. Baird*, 443 U.S. 622, 643-44 (1979) (hereinafter *Bellotti II*); *H.L. v. Matheson*, 450 U.S. 398, 420 (1981) (Powell, J., concurring); *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 439-40 (1983). Subdivision 6 of Minnesota's statute recognizes this principle by providing for a judicial bypass alternative. Subdivision 2, however, in effect requires all minors, including emancipated minors, married minors, minors with children, physically abused minors, minors from broken homes, and minors pregnant through incest, to notify both biological parents forty-eight hours prior to any abortion, no matter what the benefit or result may be. Such a statute is not narrowly drawn to protect significant state interests. *H.L. v. Matheson*, 450 U.S. at 413; *Carey v. Population Services International*, 431 U.S. 678, 707-8 (1977) (Powell, J., concurring).

Employing long-settled standards, the trial court made extensive findings regarding both the severe burdens Minn. Stat.

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1 Citations to Petitioners' Brief in No. 1125 are in the form "B.P._____." Citations to Cross-Petitioners' Brief in No. 1309 are in the form "B.C-P._____." As in our brief as Petitioners in No. 1125, citations to the Appendix to the Petition for Certiorari are in the form "_____a," citations to the Joint Appendix are in the form "J.A. _____," and citations to other parts of the record are by Exhibit (P. Ex. _____) or Transcript (Tr.) page. Throughout this brief, Cross-Petitioners are referred to as "defendants," and Cross-Respondents are referred to as "plaintiffs."

144.343(6) (hereinafter "subdivision 6") (two-parent notice with bypass) imposed on minors and single parents, and its utter failure to advance any state purpose other than deterring abortion. 25a, 29a, 41a. Faced with the mandate of subdivision 2, many minors will nevertheless avoid notification at any cost; others will encounter emotional or physical abuse in seeking to avoid teenage motherhood. Even abused and emancipated minors face the Hobson's choice between notifying their parents under the statute and effectively notifying them under the "exceptions" to the requirement. The district court found that forced notice to both parents, even with a bypass option, can constitute an absolute veto over a minor's abortion choice. *A fortiori*, the harsher requirements of subdivision 2 are invalid under any standard as a "kind of government-mandated harm" that violates due process. *Carey*, 431 U.S. at 716 (Stevens, J., concurring).

The "right to know" theory advanced by defendants to justify this statute, a right claimed to be more "fundamental" than the right to privacy, constitutes a new and far-reaching theory as yet unrecognized by this Court. What purports to be a reasonable accommodation of this "right" ignores the prevalence of voluntary parental notice and the selectivity with which Minnesota itself invokes this alleged "right to know." Minors in Minnesota are given specific statutory protection of confidentiality for every other aspect of their pregnancy. Minn. Stat. § 144.343(1). Further, married minors and minors who are parents can consent to all medical care for themselves and their children. Minn. Stat. § 144.342. Only in the case of abortion does Minnesota assert that a constitutionally based "right to know" requires notice to both biological parents. Minn. Stat. § 144.343(1).

Since the burdens of notification to both biological parents without a bypass are so severe, and the trial record proves that no legitimate state interests would be served by such a requirement, subdivision 2 is unconstitutional.

ARGUMENT

I. THE EIGHTH CIRCUIT WAS CORRECT IN HOLDING THAT SUBDIVISION 2 OF THE MINNESOTA CRIMINAL NOTIFICATION STATUTE IS UNCONSTITUTIONAL.

A. Settled Law, Set Forth By This Court And Every Lower Court To Consider The Issue, Requires That Mandatory Parental Notification Laws Provide A Bypass Option.

This Court has firmly established that minors, as well as adults, have a constitutionally protected right to privacy which encompasses the right to terminate pregnancy. *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 72-75 (1976); *Bellotti II*, 443 U.S. 622 (1979). Because this right necessarily involves both autonomy and anonymity in decision-making, *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977), and represents an intensely personal decision, this Court has concluded that it is beyond the power of the state to impose a blanket requirement of third-party participation. *Danforth*, 428 U.S. at 74. Thus, state legislation requiring the involvement of a minor's parents in her abortion choice must not only be narrowly drawn to serve some "significant" state interest, *H.L. v. Matheson*, 450 U.S. 398, 413 (1981); *Carey*, 431 U.S. at 693; *Zbaraz v. Hartigan*, 763 F.2d 1532, 1537 (7th Cir. 1985), *aff'd per curiam by an equally divided court*, 108 S. Ct. 479 (1987), but must also provide a procedure whereby such involvement can be avoided by mature minors and those whose best interests require complete autonomy and anonymity in the decision. *Akron*, 462 U.S. 416, 427 n.10; *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476, 490-91 (1983) (affirming that requirement of bypass is "not in dispute"); *Bellotti II*, 443 U.S. at 643-44.[2] Particular legislative sensitivity is required, *Bellotti II*, 443 U.S. at 642, in recogni-

2 Any bypass provision, whether administrative or judicial, must, of course, be effective, expeditious and confidential. As plaintiffs have previously argued, subdivision 6 as applied was not effective, either in providing a means for mature or best interest minors to bypass notice, or in advancing state interests. *See generally*, B.P. 13-16, 23-25, 27-38.

tion of the grave consequences of unwanted motherhood for a teenager. *Id.* To date, a majority of this Court has never strayed from this exacting standard of review. *See e.g., Webster v. Reproductive Health Services*, 109 S. Ct. 3040, 3060 (1989) (O'Connor, J., concurring in judgment) (providing the fifth vote to uphold the Missouri statute and declining to re-examine this Court's precedent on grounds that the "requirements [of the law do not] conflict with any of the Court's past decisions concerning state regulation of abortion").

Although defendants agree that parental consent statutes require a judicial bypass, they argue that subdivision 2 survives constitutional scrutiny because it "merely requires that parents be informed," B.C-P. 38,[3] and is therefore distinguishable from the parental consent statutes which this Court has repeatedly held must have a constitutionally adequate bypass procedure. *Akron*, 462 U.S. 416 (1983) (parental consent); *Bellotti II*, 443 U.S. 622 (1979) (parental consent with bypass requiring notification to parents); *Danforth*, 428 U.S. 52 (1976) (parental consent).[4] This argument erroneously construes the prior opinions of this Court and fails to take into account the actual effects of mandatory parental notification on minors.[5]

3 Defendants also argue that notice is less burdensome in fact. This argument is discussed in Point I(B) below.

4 Minnesota's argument that the constitutional standard to be used to evaluate consent requirements differs from that to be used in evaluating notice requirements is inconsistent with defendants' position at trial that the standards are the same. As the district court observed, "[t]he parties agreed in response to a question from the court that the constitutional analysis applicable to notice requirements does not differ from that applicable to consent requirements." 36a. *See also* 81a.

5 Although defendants argue facts about the burden imposed by subdivision 2, the assessment of burdens was treated as a question of law at the trial level. 37a-38a. In Point I(B), *infra*, plaintiffs demonstrate that the burdens imposed by forced notice to both biological parents are effectively the same or greater than the burdens of most consent statutes. Nevertheless, if this Court finds that the difference between notice and consent is of constitutional significance, we argue that the case should be remanded to the district court for specific factual findings regarding the burdens of notification without bypass. *See* n.21, *infra*.

This Court has never considered any abstract distinction between notice and consent to be constitutionally significant. For example, in *Bellotti II*, Justice Powell, writing for the plurality, stated:

> We conclude, therefore, that under state regulation such as that undertaken by Massachusetts, every minor must have the opportunity—if she so desires—to go directly to a court without first *consulting or notifying* her parents. If she satisfies the court that she is mature and well enough informed to make intelligently the abortion decision on her own, the court must authorize her to act without parental *consultation or consent*.

443 U.S. at 647 (emphasis added).[6] This holding was reaffirmed by a majority of this Court in *Akron*, noting that an Ohio statute:

> makes no provision for a mature or emancipated minor completely to avoid hostile parental involvement by demonstrating to the satisfaction of the court that she is capable of exercising her constitutional right to choose an abortion. On the contrary, the statute requires that the minor's parents be notified once a petition has been filed, . . . a requirement that in the case of a mature minor seeking an abortion would be unconstitutional.

462 U.S. at 441 n.31 (citations omitted); *id.* at 427 n.10 (coining the term "parental involvement" to describe notice and consent requirements alike). Further, lower courts, including the district

6 The plurality opinion in *Bellotti II* represented the views of Chief Justice Burger and Justices Stewart, Powell and Rehnquist. Justices Stevens, Brennan, Marshall and Blackmun joined in an opinion which found the parental consent statute in that case unconstitutional because, "In every instance, the minor's decision to secure an abortion is subject to an absolute third-party veto," whether by a parent or a court. *Id.* at 654 (footnote omitted).

court and court of appeals below,[7] have consistently held that a bypass procedure is required whenever notification is required.[8]

7 The district court entered a restraining order enjoining subdivision 2 of Minn. Stat. § 144.343 on July 31, 1981, J.A. 1-2, one day before it was to have gone into effect. The subdivision was preliminarily enjoined on March 22, 1982, J.A. 6. The injunction was made permanent on November 6, 1986, 37a-38a, affirmed by a panel of the Eighth Circuit on August 27, 1987, 58a-62a, and by the Eighth Circuit *en banc* on August 8, 1988. 80a-81a. At each stage, subdivision 2 was held unconstitutional as a matter of settled law. *See* 37a-38a; 81a.

8 *See Indiana Planned Parenthood Affiliates Ass'n v. Pearson*, 716 F.2d 1127 (7th Cir. 1983); *Planned Parenthood Ass'n of Atlanta v. Harris*, 691 F. Supp. 1419 (N.D. Ga. 1988); *Zbaraz v. Hartigan*, 584 F. Supp. 1452 (N.D. Ill. 1984), *vacated in part and remanded*, 763 F.2d 1532 (7th Cir. 1985), *aff'd by an equally divided Court*, 108 S. Ct. 479 (1987) (per curiam); *Glick v. McKay*, 616 F. Supp. 322 (D. Nev. 1985); *Akron Center for Reproductive Health v. Rosen*, 633 F. Supp. 1123 (N.D. Ohio 1986), *aff'd sub nom. Akron Center for Reproductive Health v. Slaby*, 854 F.2d 852 (6th Cir. 1988), *prob. juris. noted sub nom. Ohio v. Akron Center for Reproductive Health*, 109 S. Ct. 3239 (1989); *Orr v. Knowles*, No. CV81-0-301 (D. Neb. Sept. 16, 1983). *See also Women's Community Health Center v. Cohen*, 477 F. Supp. 542, 547 (D. Me. 1977) (pre-*Akron* decision that notification laws must have a bypass); Op. Att'y Gen. No. 85-035 (Md. Dec. 31, 1985); Op. Att'y Gen. No. 84-239 (Tenn. August 7, 1984).

The Seventh Circuit's discussion of this point in *Pearson* is particularly helpful:

> In requiring that states provide bypass procedures in connection with both consent and notification statutes, the Court has made no suggestion that procedures insufficient for consent statutes would be sufficient for notification statutes. Rather than differentiating between consent and notification statutes, the Court in *City of Akron* stated that it is "parental involvement" that an emancipated or mature minor must have an opportunity to avoid. The apparent reason for the similar treatment of notification and consent requirements is that, as a practical matter, a notification requirement will have the same deterrent effect on a minor seeking an abortion as a consent statute has.
>
> . . . .
>
> Because parental involvement brought about by either consent or notification statutes may result in similar efforts by parents to block the abortion, we will apply the Supreme Court's analysis with respect to consent bypass procedures in our consideration of the

This Court's rejection of gossamer distinctions between "consent" and "notice" constitutes recognition that parental authority which can be used to benefit teenagers may also be used to obstruct their exercise of constitutional rights, simply by virtue of the economic, emotional and other coercive powers most parents inherently have over their children. As this Court noted in *Bellotti II*:

> [M]any parents hold strong views on the subject of abortion, and young pregnant minors, especially those living at home, are particularly vulnerable to their parents' efforts to obstruct . . . an abortion . . . .

443 U.S. at 647. *See also H.L. v. Matheson*, 450 U.S. 398, 420 & n.9 (1981) (Powell, J., concurring); *id.* at 428 n.3 (Marshall, J., dissenting); opinion of Eighth Circuit *en banc* at 81a. *Cf. Planned Parenthood of Rhode Island v. Bd. of Medical Review*, 598 F. Supp. 625, 635 (D.R.I. 1984) ("spousal notification requirement . . . opens the door to total frustration of a woman's personal and unilateral decision to have an abortion" because husbands "will exert physical or emotional pressure to coerce their wives to forego the abortion entirely").[9] The trial record in this case bears witness to these facts. *See* discussion Point I(B), *infra*.

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constitutional sufficiency of Indiana's notification bypass procedures.

716 F.2d at 1132 (citations omitted).

9 The Seventh Circuit has characterized the effects of parental notification as follows:

> Unemancipated minors are fundamentally different from adults because they are financially dependent upon their parents and have numerous legal incapacities. In addition, parents have considerable leeway to impose punishment upon their children for disobedience. Because of this, minors often have no choice but to comply with parental directives.
>
> Although notification requirements do not give parents the legal power to veto their daughter's abortion decision, as a practical matter they may . . . . It was a recognition of this vulnerability that led the plurality in *Bellotti II* to state that confidentiality was necessary in a waiver-of-consent proceeding.

Pearson, 716 F.2d at 1132 (citations omitted).

B. Minnesota's Two-Parent Notification Statute Is So Burdensome As To Be Unconstitutional Under Any Standard.

Employing a standard never before adopted in a privacy case, defendants contend that Minnesota's statute passes constitutional muster under a new form of rational basis test.[10] In so arguing, defendants rely on post-trial assertions and fail to cite any evidence to support their argument that Minn. Stat. § 144.343(2) would in fact result in increased notice, benefit minors or families, or actually impose "markedly less[ ]" of a burden[11] on minors than some hypothetical consent statute. Defendants' assertions cannot sustain the statute, however, because the overwhelming evidence in the record establishes that precisely the opposite is true.[12] As outlined below, the rec-

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10 Defendants contend that following this Court's decision in *Webster*, 109 S. Ct. 3040 (1989), "a state regulation pertinent [to the constitutional right to choose abortion] may survive constitutional challenge if it is reasonably designed to further a 'legitimate' state interest and does not unduly burden the abortion process." B.C-P. 23. But as Justice Blackmun stated, this Court in *Webster* made not "a single, even incremental, change in the law of abortion." *Webster*, 109 S. Ct. at 3067 (Blackmun, J., concurring in part and dissenting in part); *id.* at 3064 (Scalia, J., concurring in judgment) (Court "avoid[ed] almost any decision of national import"). *See also* Chief Justice Rehnquist speaking for the plurality in *Webster*, explicitly declining to "revisit" this Court's holding in *Roe v. Wade*, 410 U.S. 113 (1973), stating instead that "we leave it undisturbed." *Webster* at 3058; *id.* at 3060 (O'Connor, J., concurring in judgment) ("there is no necessity to accept the state's invitation to re-examine the constitutional validity of *Roe v. Wade*"). Since *Webster*, courts and Attorneys General have read the case as providing no majority of this Court for a change in *Roe* or its standard of review. *E.g.*, *In re T.W.*, No. 74,143, slip op. at 6 (Fla. Oct. 5, 1989) (per curiam); 1989 Op. Att'y Gen. No 16 (Wash. Aug. 25, 1989); 74 Op. Att'y Gen. No. 89-023 (Md. July 20, 1989).

11 The "balancing" approach to constitutional analysis which defendants hereby advance has been consistently rejected by members of this Court. *See Webster*, 109 S. Ct. at 3066, n.* (Scalia J., concurring in judgment); *Akron*, 462 U.S. 416, 420 n.1 (1983).

12 Even in their post-trial Proposed Findings of Fact, defendants failed to cite a single piece of evidence in support of their proposed finding

ord shows that minors will be driven to dangerous alternatives in seeking to avoid involving parents and that, if notice were successfully compelled, their lives, and those of their single parents, would be imperiled. Without a judicial or other bypass mechanism, many mature and best interest minors, including emancipated minors and victims of abuse, will thus have their privacy rights violated.

1. Some Minors Will Go To Any Length To Avoid Involving One Or Both Parents In Their Abortion Choice, Whether In The Context Of A Notice Or Consent Statute.

Most minors notify at least one parent about their pregnancy.[13] 31a; 41a. Many others discuss their pregnancy with another adult.[14] J.A. 380-81. Kathy M. Tr. 1234, P. Ex. 96 at 7. Martin Tr. 412. Those members of plaintiff class who cannot involve one or both biological parents, however, have compelling reasons. *See* B.P. 16-23. These reasons include: fear of

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that notice is less burdensome than consent. *See* Defendants' Proposed Findings Of Fact And Conclusions Of Law, p.36 No. 13. Defendants get around the record in this case by simply disagreeing with, or ignoring, the trial court's extensive findings. Unless defendants prove clear error by the district court, they are foreclosed from writing their own, alternative assessment of the factual record. *See Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985); *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 857-58 (1982); *United States v. Nat'l Ass'n of Real Estate Bds.*, 339 U.S. 485, 494-95 (1949).

13 Younger minors are more likely then older ones to notify their parents. 1 *Risking the Future: Adolescent Sexuality, Pregnancy and Childbearing* 192 (C. Hayes ed. 1987).

14 Out of the 258 minors involved in the court bypass hearings at which Minnesota State Court Judge Petersen had presided, 35 had discussed their abortion with one parent, 48 had discussed it with an adult relative, and "[i]n many of the remaining cases, the girl had sought out the advice and counsel of other adults before going to professional counselors. Those adults include teachers, employers, parents of friends, parents of the potential father, ministers, priests and neighbors." J.A. 380-81.

recurring abuse;[15] fear that one or both parents would obstruct the abortion;[16] serious illness or disability in the family;[17] fear of notifying an estranged parent with whom the minor has no emotional relationship or trust;[18] fear that notice would evoke

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15 Judge Gerald Martin testified that one minor who appeared before him was "frequently abused" by her father, and that her father had broken her mother's wrist a week or two before the hearing. J.A. 204. *See also* § B(2), *infra*.

16 In his order finding C.U. to be mature and capable of giving informed consent, Judge Martin wrote, "[p]etitioner stated that her father is dramatically opposed to abortion and she is concerned that he would force her to leave home if he knew of her condition." P. Ex. 55L. *See also* § B(2), *infra*.

17 Plaintiff Rose C., who told her mother, stated that her family doctor advised her not to tell her father about the pregnancy because he was recovering from a massive stroke and the stress would be harmful to him. P. Ex. 98 at 12-13. Mary J., whose mother was a recovering alcoholic, testified that she was afraid, based on her knowledge of her mother's addictive behavior, that notification of her pregnancy would cause her mother to resume drinking. Mary J. Tr. 634-35. Amy W. testified that her mother had suffered a nervous breakdown the previous winter and that she was afraid that notice of her pregnancy would have deleterious effects on her mother's health. P. Ex. 111 at 6-7. Susan B., 17 years old, testified she did not wish to notify her parents because there had recently been illnesses and deaths in her immediate family. P. Ex. 99 at 4-5. Judge Peter Hemstad found that W.C., who was one month short of 18, should be allowed to obtain her abortion without notifying her parents because, in part, her parents were divorcing and her father was paraplegic. P. Ex. 55S.

18 Emma G., who had discussed her pregnancy with her father, testified that her parents had divorced when she was one year old, and that her mother lived in Maryland. She also testified that she first met her mother when she was 14 years old. P. Ex. 104 at 10-11. Harriet T. testified that her parents had divorced when she was five years old and that her father lived in the East. P. Ex. at 8. She also testified that she had only seen her father twice in the previous four or five years. *Id.* at 10. Sally H. testified that her parents had been divorced for seven years and that her father lived in Colorado. She also stated, "I don't—I see him, but not enough for him to have anything to do with what I have to do with my future . . . . " P. Ex. 96 at 9. In his order declaring B.L. a mature minor, Judge Martin stated, "Petitioner related to the Court that her mother and father separated when she was about [10]

violence towards one parent by the other;[19] or fears based on the fact that the pregnancy was the result of incest.[20]

Although defendants assume that a blanket notice requirement without a bypass option would operate to force notice to both biological parents without cost to the minor, this assumption must fail in light of the trial record.[21] Social workers, clinic personnel, experts, all made clear that many minors would forego critical medical care, rather than involving their parents, if there were no bypass option. Ring Tr. 1661, Melton Tr. 1154, Welsh Tr. 122-23. This is because teenagers are so concerned with confidentiality, Melton Tr. 1147-48, David Tr. 2544-45, Peterson Tr. 1289, that the decisive factor in whether to seek

years old and that since that time she sees her father possibly once a year." P. Ex. 55F. In another court proceeding, Judge Martin found L.Q. mature and stated that "her father is currently a fugitive from the law and his whereabouts are unknown." P. Ex. 55I.

19 In his order declaring C.U. to be mature, Judge Martin stated, "Petitioner informed the Court that her father is a practicing alcoholic and has been very abusive towards her and her mother in the past . . . . She is concerned that if her father knew he would be physically abusive towards her and perhaps her mother." P. Ex. 55K. Judge Oleisky testified, "[W]e have heard . . . where the parent will say I am afraid of assault from my husband or if he were to know about this." J.A. 166.

20 P.C., a member of plaintiff class, was living with her father and stepmother when she was reportedly impregnated by her stepbrother. Welsh Tr. 230-31. It would not have been reasonable to expect P.C. to notify her natural mother, who lived away from her and had abused P.C. in the past. Welsh Tr. 231.

21 The district court made no specific findings on the effect of mandatory notice without a bypass option; because it, like the court of appeals, held that the unconstitutionality of subdivision 2 was settled as a question of law. 38a; 81a. However, many of the court's findings concerning subdivision 6 apply with even greater force to a system that eliminates a bypass. Should this Court find that the necessity of a bypass procedure for this notification statute rests on a factual evaluation of either the degree of burden or the statute's effectiveness, not already satisfied by the present record or trial court findings, this Court should remand to the district court for further findings of fact.

health care in connection with a pregnancy is often whether they will be assured privacy. Melton Tr. 1154.[22] Minors' desperation for privacy is illustrated as well by the fact that nearly one-half of all minors receiving abortions went through the arduous and traumatic bypass procedure, often accompanied by their mothers, in order to avoid notice to one or both parents. J.A. 123. *See generally* B.P. at 9 n.16, 23-24.

Some minors, who choose to neither notify nor carry to term, will run away,[23] commit suicide,[24] obtain illegal or self-induced

22 Torres, Forrest & Eisman, *Telling Parents: Clinic Policies and Adolescents' Use of Family Planning and Abortion Services*, 12 Fam. Plan. Persp. 284, 288 (1980) (twenty-three percent of teenagers would not seek an abortion at a clinic which required parental notification); Cartoof & Klerman, *Parental Consent for Abortion: Impact of the Massachusetts Law*, 76 Amer. J. Pub. Health 397, 399 (1986) (one in three minor abortion patients living in Massachusetts had abortions in states that did not require parental consent); Chamie, Eisman, Forrest, Orr & Torres, *Factors Affecting Adolescents' Use of Family Planning Clinics*, 14 Fam. Plan. Persp. 126, 133 (1982) (twenty-six percent of adolescents prefer clinics to doctors because they fear doctors will notify parents). Torres, *Does Your Mother Know...?*, 10 Fam. Plan. Persp. 280, 281 (1978) (thirty-six percent of teenagers would not attend family planning clinic if parents were notified); Zabin & Clark, *Why They Delay: A Study of Teenage Family Planning Clinic Patients*, 13 Fam. Plan. Persp. 205, 213 (1981) (three out of ten adolescents state that they delay attending family planning clinics because they are afraid their parents will be notified).

23 Elizabeth S., a member of the plaintiff class, testified that she would have left home rather than tell her parents of her pregnancy. When asked why she opposed telling her parents, she stated, "[My father] totally disagrees with abortion . . . . He thinks that if a person is old enough to have sex he is old enough. [sic] If she gets pregnant they're old enough to take care of the baby." P. Ex. 105 at 5.

24 One minor plaintiff testified that she considered committing suicide or running away rather than notifying her father, a prominent anti-abortion politician. She was convinced by clinic counselors to consider options other than suicide, and she chose to appear before a judge instead. J.A. 65.

abortions,[25] or travel long distances out of state[26] rather than inform their parents of their pregnancy. Thomas Webber, the executive director of Planned Parenthood of Minnesota, testified that one quarter of the minors who came to Planned Parenthood clinics stated that they could not notify their parents of the abortion. When asked how minors would cope with a notice requirement, he stated:

> Some [minors] said they would seek illegal abortion care, some said they would lie about their age, some said that they would leave home, some said I don't know what I would do but I can't talk to my parents . . . .

Webber Tr. 611.[27]

Required notification without a bypass option would, at a minimum, lead minors to delay obtaining critical care, subjecting them to the increased risks of childbirth and all the attend-

25 Dr. Hodgson testified that one of her 14-year-old patients had attempted to self-abort and had severely damaged her cervix in the attempt. J.A. 462. *See* Binkin, Gold & Cates, *Illegal Abortion Deaths in the United States: Why Are They Still Occurring?*, 14 Fam. Plan. Persp. 163, 165 (1982) (desire for secrecy was primary reason why teen self-aborted and consequently died).

26 Legal abortion in another state with no restrictive laws is an option available only to those few minors who have both the necessary economic resources and the geographic proximity to an out of state provider. Plaintiff Kathy M. was taken to Iowa for an abortion by her mother when their local judge, who was religiously opposed to abortion, denied their bypass petition. Kathy M. Tr. 1239-41. It is unclear whether she could have done this without her mother's help.

27 This trial testimony is substantiated by such studies as one which found that forced parental notification would cause nine percent of pregnant minors to self-abort or seek an illegal abortion. Torres, Forrest & Eisman, 12 Fam. Plan. Persp. at 288. This testimony is further substantiated by the history of young women's actions before they could obtain legal abortions. *See* J.A. 457 (a number of attempted suicide patients seen in a psychiatric ward were, or feared they were, pregnant); B.P. 11 n.21 (before abortions were legal and accessible to minors under conditions of confidentiality, a large proportion of teenage girls who attempted or succeeded in suicide thought they were, or actually were, pregnant).

ant problems of teenage motherhood. B.P. 11-13.[28] Delay results from denial, from minors' hopes of avoiding notification of their parents, or from the time required to contemplate their limited options for obtaining an abortion in confidence, such as traveling out of state. Even minors with serious health problems which necessitate an immediate abortion, but which are less than imminently life-threatening, would be compelled to delay or forego medical treatment when notification of both parents is not in the minor's best interests.[29]

28 Evidence offered at trial demonstrates that the percentage of minors getting second trimester abortions in Minnesota increased 26.6% (from 18.4% to 23.3% from 1978 to 1983. In contrast, these percentages increased only 12.2% for 18 to 19 year olds and only 14% for 20 to 24 year olds. 135a. Defendants erroneously claim that subdivision 6 caused no increase in the average gestational age of Minnesota minors seeking abortions, B.C-P. 19, but their argument proves nothing. Dr. Paul Gunderson, Director of the Minnesota Center for Health Statistics, testified that the "average" gestational age noted in defendants' Exhibit 35 is the "mean" gestational age, calculated by adding the gestational age for each minor who obtained an abortion and dividing it by the number of abortions. Exhibit A, *infra* at A-1. If, therefore, a number of minors obtained early abortions, they would mask the trend toward later abortions in other minors. Thus, in response to a hypothetical question, Dr. Gunderson conceded that, if Minnesota minors were otherwise generally participating in the national trend towards earlier abortions, an unchanged mean gestational age could be explained by the presence of minors who delayed their abortions until a later stage in their pregnancy. Exhibit A, *infra* at A-1-3.

29 Subdivision 4(e) of the statute provides an exception for minors whose health is so endangered that her doctor can certify she will die within three days. Specifically, subdivision 4(a) states that no notice is required if the attending physician certifies the abortion is necessary to prevent the minor's death and there is insufficient time to provide the required notice. By the terms of the statute, the procedure may be performed 72 hours after notice is mailed. But, unless the doctor can state the minor will die within those three days, it is presumed that there is sufficient time to notify the parents. This exception does not help minors whose health problems warrant immediate abortions but whose lives cannot be certified to be so imminently endangered.

For example, when plaintiff H.L. began to abort spontaneously at the Women's Health Center of Duluth she could not be treated by an abortion procedure without notice to both her parents, because spontaneous abortions are usually not life-endangering. She was therefore

Despite the lengths to which minors will go to avoid notice, defendants contend that Minnesota's law falls short of an absolute veto, and somehow reasonably accommodates the interests and rights of minors. B.C-P. 37-38. But the illusory distinction they draw between statutes requiring notice, as in Minnesota, and those requiring consent is of little consequence to minors.[30] It is parental involvement which minors in Minnesota sought to avoid at all cost, and the record makes clear that notice alone, without a bypass, would deprive minors of critical choices and drive them to acts of desperation. The simple fact is that privacy, violated as much by "notice" as by "consent," is what they seek.

2. Forced Notice Puts Some Minors And Parents At Risk Of Harm And Creates An Opportunity To Obstruct Access to Abortion.

No one disagrees that the ideal situation for a pregnant minor is one in which both her parents, living together and with her, discuss the situation with the minor, offer advice, and support the decisions which need to be made about the pregnancy. However, this ideal is unattainable and unavailable to many teenagers. In fact, only fifty percent of the members of plaintiff class of minors live with both biological parents. 29a. Moreover, blanket requirement of notice for *all* minors would present significant numbers of them with a choice between unwanted motherhood and physical or psychological abuse. Requiring two-parent notice will subject many parents to these evils as well.

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taken to the court, accompanied by her mother and a nurse, in order to obtain a court order. Welsh Tr. 165-66. If no bypass had been in place, she would have had to wait for treatment until both parents were located or until 72 hours had elapsed from the time notice was mailed. This assumes she and her mother would have agreed to notify the father.

30 For example, Massachusetts state court judge Paul Garrity testified that he had adjudicated over 200 bypass cases under the Massachusetts parental consent statute. Not one of these minors had initially told her parents and then been refused consent. J.A. 290-93.

The district court found and defendants do not dispute that intrafamilial violence is a widespread phenomenon in Minnesota and in the nation as a whole. 30a. Violence and the threat of violence are too frequently a part of the lives of many of the plaintiff class.[31] Some minors had experience with violence inflicted on older sisters who had become pregnant.[32] These minors are only too aware that parental knowledge of their pregnancy could precipitate further abuse.[33] J.A. 204; J.A. 226;

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31 Natalie C., a plaintiff minor, testified, "my step-dad, he's got a bad temper and I'm scared of him and I was just afraid he'd knock me around." J.A. 66. Sarah L., a minor's mother, testified that her ex-husband had held one of their daughters locked up in her bedroom during a visit and that she had to send money to her daughter's friend so that the friend could help her daughter escape. J.A. 276-77. *See also* B.P. 16-19.

32 Ida B., an older sister of a plaintiff minor, testified that she had become pregnant when she was a teenager. She testified that when her father learned of her pregnancy "he was outraged, he was physically violent . . . [t]o me and my mother . . . [t]o the point of being slapped and kicked [sic] and abusive to my mother in the same way." Ida B. Tr. 1440-41. Paula Wendt testified:

> [O]ne [minor] chose to tell neither parent and she said that three years ago her father found her older sister in a somewhat compromising situation with her boyfriend. She said her father became so enraged over this he took her sister to a bar on Hennepin Avenue in downtown Minneapolis and forced her to sit and watch the prostitutes the way they were picked up by men. She said that he told her sister that if she were going to act like a whore she should see the way they live.

J.A. 116. This minor was adamant in refusing to notify her parents. *Id.*

33 Indeed, defendants' own proffered "expert," Dr. Rue, testified that, in some cases, forced notification could "exacerbate the problem." Exhibit E, *infra* at A-25. When asked how this could happen, he stated:

> In cases where there is very severe dysfunctional communication, threats of violence, very poor family life, it is possible that notification could be harmful to both the adolescent—well, primarily to the adolescent.

Id. He also admitted under cross-examination that mandatory notice could conceivably result in a parental reaction ending up in the death of the minor. J.A. 367. Recently, an Idaho father was indicted for the

J.A. 269-70; *see also* J.A. 193-94; J.A. 161; J.A. 245; J.A. 324; J.A. 464. It is not surprising, therefore, that many of the minors who used the bypass procedure stated that they did so because they feared parental abuse. J.A. 161; J.A. 203-204; J.A. 226; J.A. 237; J.A. 245; J.A. 269-270; J.A. 460.[34]

The two-parent notice requirement will also jeopardize the physical safety of some parents and will interfere with the integrity of those families who choose not to include both biological parents in the minor's abortion choice. For example, mothers of minors testified they will be abused if their estranged husbands learn of their daughters' pregnancies. D.P., a minor's mother, testified that during their marriage, her ex-husband "would just hit [her] all over and throw [her] down or [do] the same thing to the children." J.A. 180. When asked what she feared if she were forced to notify her ex-husband, she replied, "His violence. His last marriage ended where she ended up in the hospital a couple of time and he also did physically abuse

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first degree murder of his 13-year-old daughter. The young woman, who had allegedly been impregnated by her father, was to have obtained an abortion the following morning. Ensunsa, *Adams charged with murder*, The Idaho Statesman, August 23, 1989, at 1C, col. 3. *See* Exhibit G, *infra* at A-33-34. Dr. Rue endorsed notification to rapists and incestuous abusers. J.A. 366.

34 Defendants attempt to minimize the number of minors who fear parental retaliation by mischaracterizing the statistics compiled by state court Judge Petersen, B.C-P. 9-10. First, they state that only four percent of minors who went to court fear physical abuse. B.C-P. 10 n.5. This number refers, however, to those minors who are categorized as fearing *recurring* abuse. A closer look at Judge Petersen's tables reveals that several of his categories fall under any definition of abuse. For example, at least twice that number state explicitly that they fear physical abuse, whether recurring or initial (i.e., 11 stated that they feared a reoccurrence of prior abuse and 10 stated they were fearful based on prior expressed threats). J.A. 382. Others discussed family problems that are often associated with incidents of abuse (i.e., alcoholism, marital problems, etc.). *Id.* Second, and perhaps more importantly, defendants do not take into account the extensive evidence demonstrating that abused minors frequently do not reveal abuse. Those who reveal this family secret are but the tip of the iceberg. *See* § B(3) *infra*; 30a (abuse underreported).

their three children and that just—it just frightens me." J.A. 181.[35]

Physical abuse is not the only consequence minors fear. Trial testimony demonstrated that some parents attempt to obstruct their daughters' access to abortion services,[36] or make an abortion as difficult to obtain as they possibly can.[37] Based on their knowledge of their parents, some minors used the judicial bypass because they feared that similar tactics could be used against them.[38] J.A. 64, 114-115, 232, 460; *see also* J.A. 280,

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35 Another plaintiff, Sarah L., the mother of a pregnant teenager, Kathy M., testified that her ex-husband had repeatedly subjected her to emotional abuse during their marriage. J.A. 277. She also stated, "[t]wice during the last six years of our marriage when he was in a drunken stupor he put a .45 Magnum [sic] to my head and was going to blow my head off." J.A. 279. When asked why she had not even considered notifying her ex-husband, she said, "[h]e would go totally insane . . . Kathy was terrified of him, horribly terrified of him." Sarah L. Tr. 1261-62. "We would not have notified him. She would have had the child. We would not have notified him, there would have been no way, no way." J.A. 280.

36 For example, Dr. Hodgson testified concerning an incident in which a mother removed her 15-year-old daughter from school and kept her locked in the house to prevent her from obtaining an abortion. J.A. 462.

37 The administrative assistant in the Guardian Ad Litem Office of Hennepin County testified that some parents refused to sign the acknowledgement of notice in order to make the procedure as difficult as possible for their daughters. J.A. 332. *See also* J.A. 64; J.A. 114-15; J.A. 161; B.P. 42 n.80.

38 Agnes I. testified that her mother, who was politically active in the anti-abortion movement, had told her that, if she ever became pregnant, she would either have to carry to term and put the child up for adoption or lose her parents' support. P. Ex. 112 at 9-10. Sally H. testified that her mother had told her she would be forced to leave home if she ever became pregnant. P. Ex. 96 at 9-10. Natalie C. testified, "my mom once said I would be kicked out if I got pregnant[,] if she ever found out I'd be kicked out." J.A. 66-67. Rose E. testified that she and her mother traveled to Duluth rather than notify her father. When asked why she did not tell her father about her pregnancy, she stated:

(*Footnote continued*)

318. Further, although parental obstruction may be most successful with younger minors, *see* B.P. 42 n.80, many older minors will be unable to withstand parental efforts at obstruction and will be forced into childbirth against their will.[39] Contrary to Justice Stevens' assumption, not all mature minors can simply ignore any parental disapproval by virtue of their intellectual and emotional capability to make important decisions. *See Matheson*, 450 U.S. at 425 n.2 (Stevens, J., concurring).[40]

> I was—would be intimidated by his reaction. I know that he's conservative and I know his views on issues like abortion. I think it would really disrupt the family unit, ourselves, and it probably would be carried to extremes. I might have even had to leave home.

P. Ex. 97 at 5. Beth F. testified that, although she discussed her pregnancy with her boyfriend's mother, she would not talk to her own mother because she was afraid of being forced to leave home. P. Ex. 108 at 9-10. Her mother had once locked her out of her home when she saw Beth kissing her boyfriend. *Id.* at 11. In his order declaring B.L. a mature minor, Judge Martin stated, "[p]etitioner informed the Court that her mother has forced her to leave the home in the past and feels that this may happen again if she is told." P. Ex. 55F.

39 In downplaying this type of testimony, defendants miscount the number of minors who told Judge Petersen that they feared obstruction by their parents. B.C-P. 10 n.7. While five percent explicitly stated that their parents would force them to keep the child, 21% stated that their parents would force them to leave home. J.A. 381. Such a threat would obviously have a chilling effect on a minor's exercise of her privacy rights.

40 Similarly, a district court in Rhode Island, in striking down a spousal notification requirement, observed:

> [W]hen a woman has chosen not to communicate with her husband concerning her abortion decision, it is often due to the fragile or strained nature of the marital relationship. The wife in such a marriage may fear or avoid consultation with her husband for a number of reasons including an imbalance of decision-making power within the marital relationship; fear of physical abuse; extreme dissention regarding religious or moral values; and a variety of other communication barriers. In this type of dysfunctional marriage, the parties agree that forced notification may result in the husband physically abusing his wife, or exerting psychological or economic coercion to prevent the abortion altogether.

Planned Parenthood of Rhode Island v. Bd. of Medical Review, 598 F. Supp. 625, 635-36 (D.R.I. 1984) (citations omitted). *See also Scheinberg v. Smith*, 482 F. Supp. 529, 537-38 (S.D. Fla. 1979), *rev'd on other grounds*, 659 F.2d 476 (5th Cir. 1981).

Maturity is, unfortunately, no shield against a clenched fist or a closed door.

Defendants seek to sidestep the weight of this evidence by arguing that some minors, on occasion, overestimate the severity of parental reaction to their pregnancies. B.C-P. 11.[41] Defendants ignore the fact that single parents and others often corroborated minors' testimony about family violence. *See* n.44. State court judges, court-appointed guardians, social workers,[42] doctors, and other medical and court personnel uniformly testified that they believed the minors and single parents with whom they had contact had accurately described their family situations.[43]

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41 Even if it were true that a small number of minors misapprehend the degree of violence they would face, fear itself is enough to convince these minors to go through the bypass procedure. If an effective bypass were not available, that same fear would cause them to take more drastic steps. *See* § B(1) *supra*.

42 Defendants' own witness, Mary Ring, was an Olmstead County social worker who worked in the child protection division and had done pregnancy counseling for 12 years. She testified, regarding her counseling of pregnant teenagers, it would "be a violation of [my] professional ethics to advise her parents." Ring Tr. 1661. She also testified that if teenagers even thought she would tell, it would be a "great barrier" preventing many minors from seeking her help. *Id.* She believed, based on her experience and knowledge of the families involved, that threats of violence are real. Ring Tr. 1663.

43 Judge Neil Riley testified, "Quite universally the [reason why mothers accompanied their daughters to court] was that the father would beat up the child and raise unshirted hell if he were to know about [the pregnancy]." Riley Tr. 2009. He also testified that he believed these mothers because "[they were] in the best position to know." *Id.* Judge Gerald Martin was asked whether he too believed petitioners who stated that they were afraid of abuse from their parents. He replied, "Oh, yes. For sixteen years I have seen a great deal of that and there is no reason for me not to believe that." J.A. 204. Two other state court judges testified that, based on their years of experience on the bench, they believed the minors and parents who told them of intrafamilial abuse. J.A. 161-62; J.A. 166; J.A. 292. When Dr. Lenore Walker was asked whether a minor's judgment that she cannot notify one or both parents was correct, she answered:

(*Footnote continued*)

Defendants argue, without having offered proof at trial, that if and when parents are ultimately notified pursuant to subdivision 2, parents will provide emotional support, provide medical information to the physician, and assist them in obtaining proper post-abortion care. B.C-P. 34-35. But the trial record belies these assumptions as well. The evidence demonstrates that parental knowledge does not always benefit minors.[44] Many parents are abusive or otherwise unsupportive, while others inhibit minors from providing accurate medical

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> In my professional opinion, yes, it is likely to be an accurate perception. In abusive, dysfunctional families particularly a hyper-reluctance to discuss any potential violence develop and that sensitivity is a very accurate and real sensitivity and I think her judgement, a minor child's judgment that this might—telling her parents might create a dangerous situation is very accurate.

J.A. 197. Dr. Walker also testified that the perception of potential violence made by a mother in a dysfunctional family is also accurate. J.A. 198. Susanne Smith, the supervisor of the guardian ad litem program in Hennepin County, testified that based on her 10 years of experience in juvenile court, she believed the minors who described physical abuse and parental opposition to abortion. J.A. 232. Heather Sweetland, assistant public defender in St. Louis County, was asked whether she believed minors who told her of physical abuse in the home. She replied:

> Yes, I do, in part because they are so reticent about telling me; they are embarrassed to tell me, but they feel they need to tell me so that they can get the judicial bypass or the order allowing them to have the procedure.
>
> The other reason I believe them is that I handle kids, you know, minors every day of the week in juvenile delinquency court and I like to think I can tell the difference between someone who is lying through their teeth and someone who is not . . . . I think these women are telling me the truth.

J.A. 245-46.

44 Some parents, upon notification, will actually harm them instead. *See* n.33, *supra*. Defendants attempt to refute this evidence by arguing that not all parents are abusive. Plaintiffs do not dispute that fact; plaintiffs argue, however, that the state should allow some minors and their single parents the opportunity to decide what is in their own individual best interests.

histories,[45] or fail to promote greater post-abortion care.[46] These facts depict an unfortunate tragedy of dysfunctional family life. Minnesota's statute fails to address this tragedy and undermines the state's asserted interest in protecting minors who are already victims.

3. The Statutory Attempt To Exempt Abused Minors From The Mandatory Notice Requirement Does Not Render It Constitutional.

Defendants argue that subdivision 2 is narrowly tailored to accommodate the rights of minors because subdivision 4(c) contains an exception for minors who are reported victims of abuse or neglect. B.C-P. at 33. The record makes clear that Minnesota's effort to exempt such minors from its statutory mandate has been wholly unsuccessful.

As the district court found, "members of dysfunctional families are characteristically secretive about such matters and

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45 Paula Wendt, the co-administrator of Meadowbrook Women's Clinic, testified that clinic staff members take medical histories from minors outside the presence of their parents because "[w]e feel we get more accurate medical history if there is nobody else there, particularly with minors because they will have some aspects of their medical history that their parents do not know about . . . ." J.A. 129. Dr. Jane Hodgson also testified to this effect, stating that she always insisted on seeing the minors alone "because [she] found that the histories were much more accurate, particularly in regards to confidential matters." J.A. 439.

46 Defendants' reliance on the fact that many minors do not return to the clinics for a post-procedure check-up ignores evidence that puts this fact into context. For instance, it is undisputed that many minors must travel long distances to reach a clinic. 15a. It is therefore very likely that they decided to obtain post-procedure care closer to home. Furthermore, many of these minors presumably notified their parents, since more than half of all minors do so. It is therefore logical to presume that at least some parents agreed not to have their daughters return to the clinic in which they obtained abortions. Finally, the same percentage of adults as minors do not return for post-abortion check ups. Wendt Tr. 175. No one, however, suggests that these adult women be forced to notify their husbands, or parents, to ensure that they return to a clinic for a check-up.

minors are particularly reluctant to reveal violence or abuse in their families." 30a. Dr. Lenore Walker, a renowned expert in the field of family violence, testified:

> [I]t is very rare for children who are either physically or sexually abused to tell anybody about the abuse in any event. With the addition of pregnancy it would make it even less likely; there may be some who would, but it would be a very small percentage who would tell . . . . I think it would be almost impossible for most of them to take advantage of [the exception] psychologically.

J.A. 196. Because it is so difficult for an abused minor to break this code of silence and because her circumstances often preclude notice to both parents, elimination of the bypass will obviate her abortion option altogether.

Even if a minor is emotionally able to report the abuse, reporting itself, under Minnesota law, initiates the following chain of events inevitably leading to parental notice: (1) the notified physician or physician's delegate must report the abuse to the local welfare or law enforcement agency within twenty-four hours, Minn. Stat. § 626.556(3)(a),(3)(e); (2) if the minor declares that she is or was being abused by a parent, the welfare agency must conduct an immediate assessment of the situation, Minn. Stat. § 626.556(10)(a); (3) unless the agency obtains a court order it *must* notify the parent "no later than the conclusion of the assessment or investigation" that the interview took place, Minn. Stat. § 626.556(10)(c);[47] and (4) once the parent learns that he is the subject of a child abuse investigation, he may obtain access to the agency's records, Minn. Stat. § 626.556(11).

The records prepared when a report of abuse is filed may contain a reference to the minor's pregnancy,[48] particularly if

47 Minn. Stat. § 626.556(10)(c) gives the *latest* date the agency must notify the parent. The agency has the discretion to inform the parent of the interview, or otherwise initiate contact with the parent, as soon as it wishes.

48 Susanne Smith, director of the guardian ad litem program in Hennepin County, who acted as guardian for 200 minors who went through the bypass, J.A. 231, testified:

(*Footnote continued*)

she was impregnated by her father.[49] In such situations, the young woman's parents learn of her pregnancy and her abortion decision, despite invocation of the abuse exception.[50] As the district court found, "notification to government authorities [as required by Minn. Stat. § 626.556] creates a substantial risk that the confidentiality of the minor's decision to terminate her pregnancy will be lost." 21a.

4. Subdivision 2 Fails To Provide A Way For Emancipated Minors To Avoid Notice To Both Parents.

Subdivision 2 provides that "no abortion operation shall be performed upon an unemancipated minor" in the absence of written notice to both of her parents. 1a. There is no definition of emancipation in the statute, however, and no other statute in Minnesota contains one. For this reason, throughout the five years in which the notice and bypass scheme operated, emanci-

> What I have heard from teenagers that I have specifically asked, as well as the clinics, when the [abuse] situations have occurred, is that the teens do not want this reported . . . . I think some teenagers are so fearful of their parents' reaction that they don't want this reported and would rather go to court than have it reported which would mean that their parents would find out that they were pregnant and planning to have an abortion.

J.A. 233.

49 Intrafamilial sexual abuse is, unfortunately, an all too common occurrence. According to a report by the Minnesota Department of Human Services, in 1986 there were 1665 reported cases of sexual abuse of young women between the ages of nine and 17. Exhibit D, *infra* at A-19-22. The corresponding numbers for the years 1985 and 1984 were, respectively, 1777 and 2099. *Id.* According to one study with a sample of 930 women, 16% reported at least one experience of intrafamilial abuse before the age of 18, and 12% had been sexually abused by a relative before the age of 14. Russell, *The Incidence and Prevalence of Intrafamilial and Extrafamilial Abuse of Female Children*, in Handbook on Sexual Abuse of Children 19, 25 (L. Walker ed. 1987). *See also* n.33, *supra*.

50 Although the statute mandates that the identity of the reporter be confidential, Minn. Stat. § 626.556(11), parents do, in fact, learn who reported the abuse. For instance, Paula Wendt testified, "I have gotten angry phone calls from parents who are furious because they find out I reported a problem in their family . . . ." J.A. 117-18.

pation became a factual issue to be resolved during the judicial bypass proceeding. B.P. 34. J.A. 230-31. In the absence of the judicial bypass option, minors who believe they are emancipated would have no defined or expeditious method for insuring their exemption from mandatory two-parent notice.

First, the standards for emancipation are themselves unclear. Minnesota courts have "had but few occasions to discuss and legally define an emancipated minor," *In re Fiihr*, 289 Minn. 322, 325, 184 N.W.2d 22, 25 (1971), and have noted "the inexactitude with which the term is used." *In re Sonnenberg*, 256 Minn. 571, 576, 99 N.W. 2d 444, 446 (1959). Moreover, emancipation "is to be determined largely on the peculiar facts and circumstances of each case," *Streitz v. Streitz*, 363 N.W.2d 135, 137 (Minn. Ct. App. 1985), and is "ordinarily a question for the jury." *In re Fiihr*, 184 N.W.2d at 25, quoting 39 Am. Jur. Parent and Child § 64. "[E]mancipation may be complete, partial, conditional, absolute or limited as to time or purpose." *In re Sonnenberg*, 256 Minn. at 576, 99 N.W.2d at 447-48 (footnote omitted).[51]

Second, there is no expeditious procedure in Minnesota for obtaining a judicial declaration of emancipation. Indeed, absent Minn. Stat. § 144.343(6), it appears that a minor would have to initiate an action under the Minnesota Uniform Declaratory Judgment Act, Minn. Stat. ch. 555 (1988), presumably against the minor's parents, *see Taubert v. Taubert*, 103 Minn. at 247, 114 N.W. at 764 (1908) (emancipation involves surrender of control by parent),[52] in order to obtain a court order of emancipation. Such an action would have to proceed

51 The effect of complete emancipation is to give the minor "his time and earnings and gives up the parents' custody and control, and in fact works in absolute destruction of the filial relation." *Lufkin v. Harvey*, 131 Minn. 238, 241, 154 N.W. 1097, 1098 (1915) (citation omitted). In order for complete emancipation to occur, a parent must surrender "the right to the services of his minor child, and also the right to the custody and control of his person." *Taubert v. Taubert*, 103 Minn. 247, 249, 114 N.W. 763, 764 (1908) (citations omitted).

52 *See also* Minn. R. Civ. P. 19.01 (all persons must be joined in whose absence complete relief cannot be accorded).

in accordance with the Minnesota Rules of Civil Procedure.[53] The time consumed by such a process would delay many minors until far beyond the time when it would be permissible to perform an abortion.

Finally, a minor would have no choice but to seek such a court order because, if she asserted she was emancipated, but was unable to produce a written instrument of emancipation,[54] any person who performed the abortion would risk prosecution. This is because Minn. Stat. § 144.343(5) requires written evidence of compliance to avoid liability. 2a-3a. No prudent physician or clinic providing abortions would go forward with an abortion simply based upon a minor's representation that she was emancipated.

In sum, a minor who believes she is emancipated would be forced either to notify her parents or, alternatively, to engage in a lengthy judicial proceeding against her parents, without counsel, and without a guarantee of expedition or confidentiality in order to obtain a declaration of emancipation. Elimination of the judicial bypass would thus destroy the purported exception for emancipated minors contained in subdivision 2.

II. MINNESOTA'S MANDATORY TWO-PARENT NOTICE REQUIREMENT CANNOT BE JUSTIFIED AS A MEANS OF PROTECTING A PARENTAL RIGHT TO KNOW.

A. Biological Parents Have No Constitutional "Right To Know" About Their Daughter's Abortion Decision.

Defendants, recognizing that the decisions of this Court have never endorsed a blanket requirement of two-parent notification, nevertheless seek to sustain subdivision 2 on the ground

53 The Rules allow 20 days after service of the Summons for service of an answer; the time to answer is automatically extended if a dismissal motion is made. Minn. R. Civ. P. 12.01.

54 "A minor may be emancipated by an instrument in writing, by verbal agreement, or by implication from the conduct of the parties." *Lufkin v. Harvey*, 154 N.W. at 1098 (citation omitted).

that Minnesota is protecting the "constitutionally based" right of Minnesota parents to be informed of their daughters' abortion choice.[55] *See, e.g.*, B.C-P. 24, 33. The right proffered by the state as a justification for the challenged law is, ironically, asserted in opposition to the arguments of parent-plaintiffs herein, the only parents who are party to this case.

Defendants do not cite a single decision of this or any other court recognizing such a right. They rely instead for support on *Meyer v. Nebraska*, 262 U.S. 390 (1923), *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), *Prince v. Massachusetts*, 321 U.S. 158 (1944), *Stanley v. Illinois*, 405 U.S. 645 (1972), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). These cases, however, fail to

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55 Rather than being "constitutionally based," defendants' "right to know" theory appears to be derived from the antiquated common law rule requiring parental consent to medical procedures performed on minors. Of course, such a common law doctrine is insufficient to justify infringement of a constitutional right and has, in any event, been modified by many states—including Minnesota—to reflect the modern view that many minors are mature enough to consent on their own, and that the health interests of the minor may outweigh the parental authority interests. Minn. Stat. § 144.343(1). For example, many states give mature minors the right to consent to medical treatment. Statutory "maturity" has been accorded minors who are married, active in the armed services, living independently, etc. These statutes are listed in Exhibit F to this Brief, *infra* at A-26.

The common law rule requiring parental consent was never itself based on a "right" of parents but on the now archaic judgment that adolescent minors are incompetent to consent on their own behalf. *See* Brief *amicus curiae* of American Psychological Association, *et al.*, in No. 88-1125. But even under common law, parental consent requirements, the consent of one parent was sufficient. *Bonner v. Moran*, 126 F.2d 121, 122 (D.C. Cir. 1941). Indeed, a custodial parent, as a consequence of sole custody, has sufficient authority to consent to medical treatment for her children. *See, e.g.*, Uniform Marriage and Divorce Act, § 408(a) and Comment (1974) (general rule that custodial parent "may determine the child's . . . health care" is "designed to promote family privacy and to prevent intrusions upon the prerogatives of the custodial parent at the request of the non-custodial parent").

establish that which defendants advocate.[56] Indeed, the right which lies at the core of these cases is a right against interference with "the private realm of family life which the state cannot enter." *Prince*, 321 U.S. at 166.[57] It is a right of the family as against the state, not a right of parents as against the rights of their children.[58]

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56 Cases more on point than those cited by defendant make clear that there is no such "right to know." *Doe v. Irwin*, 615 F.2d 1162 (6th Cir.), *cert. denied*, 449 U.S. 829 (1980) *accord Gillick v. West Norfolk and Wisbeck Area Health Authority*, 3 All E.R. 402 (H.L. 1985). In rejecting a constitutional right of parents to know their children have received contraceptives based on *Meyer*, *Pierce*, *Yoder*, and *Prince*, the Sixth Circuit explained why these cases are not controlling. "There is one fundamental difference between all the cited cases and the present one. In each of the Supreme Court cases the state was either requiring or prohibiting some activity [of parents]." 615 F.2d at 1168. Furthermore, the absence of parental involvement legislation does not, as defendants claim, constitute a veto over parental rights because:

> [t]here is no requirement that the children . . . avail themselves of the services offered by the Center and no prohibition against the [parents] participating in decisions of their minor children on issues of sexual activity and birth control. The [parents] remain free to exercise their traditional care, custody and control over their unemancipated children.

Id.

57 Characterizing this right, at least one court of appeals stated: "[w]e now hold that this constitutional interest in familial companionship and society logically *extends to protect children from unwarranted state interference with their relationships with their parents.*" *Smith v. City of Fontana*, 818 F.2d 1411, 1418 (9th Cir.) (emphasis added), *cert. denied*, 108 S. Ct. 311 (1987).

58 These cases did not involve a conflict between the authority of parents and the rights of children; rather, they were attempts by the state to interfere with inter-familial decisionmaking. The Court in *Yoder*, for example, specifically disavowed any balancing of parents' and children's interests:

> Our holding in no way determines the proper resolution of possible competing interests of parents, children, and the State in an appropriate state court proceeding in which the power of the State

Moreover, in *Yoder*[59] the Court stated in no uncertain terms that even the traditional interest of parents in guiding their child is limited by the child's interest in health and safety:

> To be sure, the power of the parent, even when linked to a free exercise claim, may be subject to limitation under *Prince if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens.*

406 U.S. at 233-34 (emphasis added). The Court upheld parental power only because it found that the accommodation of the Amish religious beliefs "will not impair the physical or mental health of the child,[60] or result in an inability to be self-

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is asserted on the theory that Amish parents are preventing their minor children from attending high school despite their expressed desires to the contrary.

406 U.S. at 231; *see also id.* at 237 (Stewart, J., concurring) ("This case in no way involves any questions regarding the right of the children of Amish parents to attend public high schools, or any other institutions of learning, if they wish to do so."). Not one of these cases suggests that a state is obliged to legislate to protect parental "rights" or that a state would be constrained by due process from depriving parents of their alleged rights by, for example, passing laws to safeguard confidentiality in health care such as Minn. Stat. § 144.343(1) and others listed in B.P. Exhibits C and D. Rather, these cases indicate that in instances where there is no demonstrated harm to the child the state may not interfere with parental authority. Yet, when there is a demonstrated harm to the child, even parental authority may be blocked by the state. *Prince*, 321 U.S. at 168-69.

59 In *Yoder*, the Court was faced with a conflict between the state's strong interest in educating minors through age 16 and the Free Exercise rights of the Amish community. The presence of the Free Exercise claim strengthened any independent parental interests in the upbringing of children and led to a decision in favor of parental authority and against the government. As the Court noted, "where nothing more than the general interest of the parent in the nurture and education of his children is involved, it is beyond dispute that the State acts 'reasonably' and constitutionally in requiring education to age 16 . . . ." 406 U.S. at 233.

60 The Court was quite clear in *Yoder* that there was no demonstrated harm to the child in the record: "This case, of course, is not one in

supporting or to discharge the duties and responsibilities of citizenship, or in any other way materially detract from the welfare of society." *Id.* at 234.[61]

Far from establishing a constitutional "right to know" in favor of estranged or non-custodial parents, these cases shed constitutional doubt on a statute which, like subdivision 2, invades "the private realm of family life," *see Prince*, 321 U.S. at 166, in a manner which seriously threatens the health and safety of minors. *See* discussion regarding harm to minors in Point I(B), *supra*. The statute interferes with the freedom of parents to structure sharing, responsibility and privacy with their adolescent daughters, *see, e.g.*, 117a-118a, and with the ability of single parents to control communication, association, and the flow of personal information to the minor's other parent regardless of whether divorce, separation, remarriage or previous abuse has occurred.[62] This sort of interference in the ability of a parent to control family relationships in accordance with the child's best interests is precisely what is prohibited under *Meyer*, *Pierce*, *Prince*, *Stanley* and *Yoder*. "Protecting [such intimate family] relationships from unwarranted state interference . . . safeguards the ability independently to define one's identity that is central to any concept of liberty." *Roberts v. United States Jaycees*, 468 U.S. 609, 619 (1984) (citations omitted). Contrary to defendant's arguments, a statute like

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which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred." *Id.* at 230 (footnote omitted).

61 This Court's decision in *Parham v. J.R.*, 442 U.S. 584 (1979), is in accord. While the statute upheld in that case permits parents to exercise control and authority over their children, the Court established stringent procedural safeguards to ensure that the parent acts in the minor's best interests. *Id.* at 606-07. The parent has the burden of persuading an impartial medical fact-finder of the need for the commitment and the decision of that fact-finder is subject to mandatory periodic review. *Id.* at 607.

62 The single parent plaintiffs in this case are mostly divorced and several cited fear of abuse as the reason for not wanting to re-involve an absent parent. *E.g.*, J.A. 181, 277-79.

Minnesota's which compels minors and their single parents to communicate private information to an estranged second parent may in fact violate, rather than protect, parents' constitutional rights.[63]

B. The "Right To Know" Upon Which Minnesota Relies Does Not Justify The Lines Drawn In The State's Statutory Scheme.

Minnesota not only asks this Court to create a constitutional right and to sustain subdivision 2 as a means of protecting that right, but it also asks this Court to ignore the conspicuous selectivity with which it invokes the right.

For example, minors in Minnesota are given specific statutory protection for confidential pregnancy tests, pregnancy counseling, and prenatal care, including tests and treatment that may be risky for the fetus, as well as for childbirth surgery, where necessary. Minn. Stat. § 144.343(1). Married minors and

63 For example, "[f]reedom of association . . . plainly presupposes a freedom not to associate." *Jaycees*, 468 U.S. at 623. Infringements on the right not to associate must be justified by a compelling state interest that cannot be effectuated by less restrictive means. *Id.* Recently, this Court quoted *Jaycees* approvingly:

> . . . the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme.

City of Dallas v. Stanglin, 109 S. Ct. 1591, 1594 (1989) (quoting *Jaycees*, 468 U.S. at 617-18). Of course, the association embodied in marriage, and the corresponding decision not to associate embodied in divorce, are accorded special constitutional protection as well. *Zablocki v. Redhail*, 434 U.S. 374, 383-87 (1978) ("reaffirming the fundamental character of the right to marry"); *Boddie v. Connecticut*, 401 U.S. 371, 376-77, 382 (1971) (indigent women must "be afforded an opportunity to go into court to obtain a divorce"). Subdivision 2 effectively compels minors and single parents to associate with divorced or estranged spouses with whom, as the facts of this case show, they have chosen to break off all relations. *See* 31a (large percentage of minors using bypass were accompanied by or had voluntarily notified one parent and went to court to avoid having to notify the other biological parent).

those with children can consent to all medical care for themselves and their children. Minn. Stat. § 144.342 (1988). Minnesota guarantees minors the right to make these important medical decisions without notification of parents despite the fact that for teenagers, pregnancy, childbirth and motherhood pose far greater risks, both physical and psychological, than abortion. *See* B.P. 11-13.[64] Under this statutory scheme, for example, a minor could in fact refuse to consent to medical treatment even if she were informed that the treatment was vital to the continued survival of her fetus. "At the heart of that situation, as with abortion, is a decision involving the life or death of the fetus. Yet under this statutory scheme, the minor girl is considered competent to make one decision but not the other." *In re T.W.*, No. 74,143, slip op. at 23 (Fla. Oct. 5, 1989) (Ehrlich, C.J., concurring specially).

The irrationality of Minnesota's asserted justification of its statute is further illustrated by the fact that the "right to know" theory would vitiate other valuable, though unrelated, legislative initiatives regarding confidentiality. *See generally* statutes listed in B.P. Exhibits C and D. Minnesota teenagers are currently guaranteed confidentiality in a wide variety of

64 Defendants imply that forced parental notification of a minor's pregnancy is not necessary because the parents will eventually learn of the impending birth. This assumption, however, is not necessarily true. For example, in Liberty, N.Y., a 17-year-old who left her baby in the woods after giving birth managed to keep her pregnancy hidden from her parents. According to the *Sullivan County Democrat*, a local newspaper:

> Apparently, the girl had hidden her pregnancy from everyone except her boyfriend, and had given birth to the child at about 6 a.m. on Thursday, July 13. Her mother and stepfather were reportedly home with their daughter at the time of birth, but were unaware of what was going on.
>
> According to reports, the girl waited until 2 p.m. when her parents had left the apartment, and then she wrapped the child in a sheet, put him in a box, and took the child, who she thought was stillborn, out into the woods and left him there.

Gillow, *Mother Released from Jail: Abandoned Baby on Way to Recovery*, Sullivan County Democrat, July 21, 1989 at 1A, 16A.

areas: communications with psychologists[65] or psychiatrists,[66] confessions to members of the clergy,[67] and communications with attorneys[68] are all instances in which minors have been given by statute the right to be free from unauthorized disclosure of their private deliberations and decisions. It is a weak interest indeed which defendants assert so selectively.

The only inference which can be drawn from this legislative picture is that the state had in mind a purpose other than protecting some alleged parental "right to know" when it enacted the statute. In fact, the district court found that one of the legislature's motives for enacting Minn. Stat. § 144.343(2)-(7) was the "desire to deter and dissuade minors from choosing to terminate their pregnancies." 25a. Contrary to defendants' assertion, *see* B.C-P. 4 n.2, substantial support for this finding can be found not only in the statements of witnesses testifying

65 Minn. Stat. § 595.02(1)(g) (1988) ("A registered nurse, psychologist or consulting psychologist shall not, without the consent of the professional's client, be allowed to disclose any information or opinion based thereon which the professional has acquired in attending the client in a professional capacity . . .").

66 Communications with psychiatrists are protected by the provision concerning licensed physicians, Minn. Stat. § 595.02(1)(d) (1988) ("A licensed physician . . . shall not, without the consent of the patient, be allowed to disclose any information or any opinion based thereon which the professional acquired in attending the patient in a professional capacity . . .").

67 Minn. Stat. § 595.02(1)(c) (1988) ("A member of the clergy or other minister of any religion shall not, without the consent of the party making the confession, be allowed to disclose a confession made to the member of the clergy or other minister in a professional character . . . ; nor shall a member of the clergy or other minister of any religion be examined as to any communication made to the member of the clergy or other minister by any person seeking religious or spiritual advice. . . ."). The statute makes no distinction based on the age of the person seeking advice.

68 Minn. Stat. § 595.02(1)(b) (1988) ("An attorney cannot, without the consent of the attorney's client, be examined as to any communication made by the client to the attorney or the attorney's advice given thereon in the course of professional duty . . .").

before the legislative committee,[69] but also in the statements of legislators who debated passage of this law.[70] This desire to deter abortions is, however, a patently improper legislative purpose. *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 759 (1986).

To sustain Minnesota's law based on a theory which represents, in truth, a thinly-veiled hostility to abortion rights for minors, would be to open the door to a host of disingenuous legislative enactments mandating parental involvement in minors' decision-making. The cost of keeping parents informed

69 Statements made to the Minnesota Senate Committee on Health, Welfare and Corrections by both proponents and opponents of the proposed legislation highlight that the measure was designed to deter abortions. A lobbyist for Minnesota Citizens Concerned for Life stated that her group supported the bill because "we are convinced that it will save at least some lives . . . . We believe, many parents, if given the opportunity, will help their daughters continue her [sic] pregnancy . . ." (statement of Maurice [sic] Rosenberg). *See* Exhibit C, *infra* at A-14, A-15. Another witness, who opposed the legislation, echoed the belief that the intended purpose of the act was "accomplish[ing] the desire of cutting down on the number of abortions that are preformed [sic] in this state." (statement of Robert McCory, Administrator of the Midwest Health Center for Women). *See* Exhibit C, *infra* at A-16.

70 One of the Act's most outspoken proponents in the Minnesota Senate, Senator Menning, stated on the Senate floor that it could "save lives," or deter abortions. *See* Exhibit B, *infra* at A-8. A sponsor of the Human Life Amendment, Senator Menning repeatedly referred to abortion as the "taking of life" and attempted to sway other state senators with graphic descriptions of the abortion procedure ("Those suction devices pull those babies limb from limb and they don't even kill them before time."). *See* Exhibit B, *infra* at A-12. In a discussion regarding the number of judicial bypass procedures the proposed statute would necessitate, Senator Menning asked, ". . . how many lives do you think it [the bypass procedure] could possibly save?" Senator Stern agreed that the purpose of this statute was to discourage abortions:

> [W]hat we're talking about here is a strong desire to prevent abortions. So I don't think we should continue to fool ourselves and the general public or the courts that that isn't our intent. I think a quick review of the tapes today makes legislative intent very obvious . . . .

See Exhibit B, *infra* at A-12-13.

would be unacceptably high and would swallow entirely the independent rights of minors. That cost—both the physical harm to minors from unwanted pregnancies and the loss of constitutional rights—must not be condoned by this Court.

CONCLUSION

Cross-Respondents respectfully request this Court to affirm the judgment of the Eighth Circuit Court of Appeals that Minn. Stat. § 144.343(2) is unconstitutional.

Respectfully submitted,

WILLIAM Z. PENTELOVITCH
REBECCA A. PALMER
Maslon, Edelman, Borman & Brand
1800 Midwest Plaza
Minneapolis, MN 55402
(612) 339-8015

LINDA OJALA
Kurzman, Grant & Ojala
2445 Park Avenue South
Minneapolis, MN 55404
(612) 871-9004

JANET BENSHOOF
(counsel of record)
RACHAEL N. PINE
LYNN M. PALTROW
KATHRYN KOLBERT
JOHN A. POWELL
ELLEN K. GOETZ
American Civil Liberties Union Foundation
132 West 43rd Street
New York, NY 10036
(212) 944-9800

SIMON HELLER
On the Brief

ROBERT S. HICKS
Minnesota Civil Liberties Union
1021 West Broadway
Minneapolis, MN 55411
(612) 522-2423

APPENDIX

Exhibit A

Excerpts of Trial Testimony of Dr. Paul Gunderson
March 12, 1986

CROSS-EXAMINATION

[2464] * * *

BY MS. BENSHOOF:

Q: Looking at Exhibit 35, you drew this up or your staff did?
A: That is right, uh-huh.
Q: Looking at the average gestational age which is on Exhibit 35, do you have any opinion today about the average gestational age reported there and its correlation, if any, to the parental notification law?
A: Do I have an opinion?
Q: Yes.
A: Yes.
Q: What is that opinion?
A: The opinion is that there appears not to be a correlation.
Q: Is that because in 1980, 1981, 1982, and 1983 the average gestational weeks are about the same?
A: Correct.
Q: Okay. Now average means taking all minors of gestational ages 8 weeks to 20 weeks, adding it together and dividing it by the number, isn't that correct?
A: Yes, or whatever the gestational age was that was reported by their physician, if it was less than 8 weeks.
Q: So when there is an average there are people at either **[2465]** end and it all averages out, is that correct?
A: Yes, yes.

The distribution spans a continuum as you have mentioned.

Q: So distribution changes do not always relate to average, is that correct? Let me rephrase the question, there can be a change in distribution with the averages staying the same, isn't that correct?

For example, people could go from 12 to 18 and other people could go from 14 to 18 and the average would be the same?

A: Yes, so long as both movements occurred simultaneously.
Q: Right.
A: Yes.
Q: You have testified that you are familiar with a national trend to earlier gestational ages, is that correct?
A: That is right.
Q: And you also testified that you are familiar with the national studies showing that when new facilities open, or when people have to travel less, there is less delays [sic], isn't that correct?
A: That is correct.
Q: Now are you familiar with the fact that in March 1981 an abortion clinic opened in Duluth, Minnesota, and in October 1981 an abortion clinic opened in Fargo, North Dakota?
[2466] A: Yes, we do know about those, uh-huh.
Q: Well, let me give you a hypothetical as an expert, okay?

Since you are testifying about this law, you know how this law operates, isn't that correct?

A: That is correct.
Q: Now let's presume for a hypothetical, and I think this is accurate, that not all minors are affected by this law.

Let's say that out of 100 minors 35 would tell both parents before the law and 35 would tell them after the law so there would be no effect of the law on some minors.

Let's also assume that there is a trend to lower gestational ages for those minors because of the national trend of increased knowledge and because of the opening of two facilities in 1981.

Let's also assume, and I think that in 1982 less than 50 percent of the minors were using the court system, more are now.

Let's assume in 1982 because of the two new facilities and because of the national trends, 35 minors out of 100 got their abortions one week earlier and these are the ones unaffected by the law because they would tell their parents anyway.

35 minors who had to go to court and who were anxious about making the decision got their abortions one week later than they would have without the law.

Now assuming that those two phenomena happened the [2467] average gestational weeks would still be the same, isn't that correct, one week of 35 cancels out one week of 35?

A: That is correct.

MR. GALUS: Excuse me, counsel, I would object to the factual premises of these hypotheticals unless those facts are in the record.

Plaintiffs have rested.

THE COURT: I think for the purposes of postulating means from averages, is what, as I understand, you are getting at?

MR. GALUS: If the question is limited to an explanation of what the possible difference between a mean and distribution are I withdraw my objection.

But if it is positive on any premise that those facts are part of the record—

THE COURT: There are no facts such as that in the record.

MS. BENSHOOF: Well, Your Honor—

THE COURT: Well, there is a fact that there is a new clinic in Fargo and a new clinic in Duluth.

MR. GALUS: My reference was to the assumption in the hypothetical, a certain group would have gotten it earlier and a certain group would have gotten it later.

MS. BENSHOOF: Assuming those two assumptions an average would cancel out then, wouldn't it?

[2468] THE WITNESS: That is right.

BY MS. BENSHOOF:

Q: But looking—
A: The average would remain the same.
Q: I am sorry, I am sorry. The answer would remain the same?
A: That is right.
Q: But that would not mean that for 35 of those 100 minors there was not a burden of delay, isn't that correct?
A: That is right.

Q: Now you also testified that you had two other bases for your opinion that there was no effect of the statute and one was comparing married minors with unmarried minors, is that correct?

A: The testimony that I believed in that regard was focused on substantiating the fact that the average gestation, the average gestational age of minors was fixed as was entered in Exhibit 35 and what I was trying to suggest was that I, in an effort to be sure that there weren't some unwanted or some unexplained major differences, used two tests in essence to test for the stability of the average gestational week as specified there on the first line for 1983, 1982, et cetera.

Q: But why would one compare married with unmarried minors?

A: The reason for doing that is sort of rooted in the premise that the married minor may have different patterns of **[2469]** behavior with respect to seeking an abortion as opposed to an unmarried minor.

Q: And do you have an opinion on that premise?

A: No, no, just simply aware of the fact that that has appeared here and there in terms of conversations among the reproductive epidemiologists at the CDC and in my conversations with them.

THE COURT: Were you comparing—was it minors you were comparing, married versus the emancipated?

THE WITNESS: Yes.

THE COURT: Or unemancipated?

THE WITNESS: That is right, minors only.

BY MS. BENSHOOF:

* * * *

[2470] * * *

Q: Are you aware of the studies, sociologic-demographic that show the different kinds of minors who are married versus unmarried and that married minors are most passive, delay reproductive seeking behavior and that sort of thing?

A: I am only aware of, frankly, of one study in that area and I am not sure how directly that one addressed the issue, and that is the Bloom (ph) study, et al, here at the University of Minnesota.

Q: Now this is a study by Bloom and Resnick?

A: That is right.

Q: Isn't the result of that study that minors who are married and have children are more passive, less future-oriented, and delay in seeking medical help?

A: If my memory serves me right, I think you are right. I don't have it in front of me, I confess, and I am working from memory on that one.

Q: So if I am right, as you think I am, then what we are comparing here are apples and oranges because if Minnesota married minors have these characteristics that would already lead them to delay their gestational ages at the time of **[2471]** abortion they might very well come out the same as other minors seeking abortion who are delayed because of the law, isn't that correct? Do you follow me?

A: Yes. I believe I am following you. That is one possible, yes, explanation, uh-huh.

Q: So if that is a possible explanation, that would be an explanation for your results, that is a different explanation than saying the parental notification law has no effect, is not that true?

A: Yes. Again that could be one logical extension of the explanation, yes.

Q: Okay. So let's go onto [sic] your third basis for your opinion and that was—I am not quite sure what it was, if you could explain it again; I think you were comparing resident minors to all other minors, is that correct?

A: That is correct.

THE COURT: Minnesota 17 and under versus all women, the result is the same is [sic] what I have.

Maybe you had better tell us, Dr. Gunderson, what your third one was.

THE WITNESS: I believe at this point we may be confusing the testimony relative to gestation with complications

because what you have just mentioned, Your Honor, was testimony with respect to complications, at least that is what I recall.

* * * *

[2472] * * *

Q: Okay. Could you explain what you mean by a comparison of resident women and all others?

A: Yeah, the all [sic] others in essence are those women who are not residents of Minnesota; who came into the state for purposes of securing an abortion and based on the analyses I have done from '80 through 1983, it certainly appeared as though the average weeks of gestation for both of those populations were relatively similar.

Q: Well, what does that mean?

A: Well, as I think I indicated at the outset of my testimony, the reason for doing this additional work in essence was to test the stability of the calculation for average gestation in weeks by expanding in theory the test.

[2473] Q: Well, is it your understanding that the law also applies to minors coming in from other states?

A: That is my understanding.

Q: What does your comparison have to do with the parental notification law, forgive me if I am not getting it.

A: The reason for doing that comparison was—was principally an interest in determining the stability of the calculation for average gestational weeks and what I was interested in doing was trying to determine whether as a scientist I could detect levels of instability which would be helpful in explaining in any way the nature of the phenomenon here. I could deduct none.

Q: So that you used the resident versus nonresident comparison only to check your other figures?

A: Uh-huh.

Q: That is not an independent basis for your opinion that the law had no effect.

A: No. The two reasons I gave were reasons because I wanted to check.

Exhibit B*

Excerpts from Transcripts of Senate Debate

May 6, 1981

[14] * * * *

CHAIR: Sen. B [sic]

BERGLAND [sic]: Mr. Chairman and Sen W [sic]. I was sitting last night looking in my crystal ball and I just had a hunch you might offer this amendment today and so we called out to Massachusetts, which has had this particular provision which you are introducing in this part of your amendment, in operation for about two weeks. Now two weeks isn't very long to find out what the kind of history is, but they are having 15-20 cases being referred to the courts per week at the present time. Of course, only two weeks for this new system to operate. None of the cases that have gone before the court under this provision have been denied. So I calculated that out and I figure, at least in their state, they will have somewhere over 1,000 cases per year going to their courts, unless that number increases as people become more aware of how the whole thing works. And I'm just wondering, your amendment calls for a guardian ad lidem [sic] to be appointed for these minors who are in court asking for the court to review their situation. Do you have any idea what the cost of appointing a guardian ad lidem [sic] for an individual is?

CHAIR: Sen. W [sic]

WALDORF: No, Mr. Chairman, I don't.

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* A copy of relevant portions of transcripts of tapes of Minnesota Senate Committee hearings, including the contents of this Exhibit, has been lodged with this Court by counsel for Cross-Respondents.

BERGLAND [sic]: I don't either. But, I am a little bit concerned that if this amendment should pass, which I expect it probably will, and if this should go into effect, which it might, that essentially what is going to happen is that Hennepin and Ramsey County Juvenile Courts are to [sic] ones that are going to end up hearing most of these cases since that is where most of the requests for abortions take place. In spite of the fact that the people who may be coming to Hennepin and Ramsey Counties for those services may not reside in Hennepin or Ramsey County. I'm not sure whether between our two counties, Sen. W [sic], we're going to be able to handle 1,000 or perhaps more than that cases, more cases in the juvenile court per year without increasing the cost to our court. And, I wonder if you've given that any consideration in the drafting of this amendment?

[15] CHAIR: Sen. Menning, is it relevant to the same point here?

MENNING: Yes, Mr. Chairman, will Sen. B [sic] yield?

BERGLAND [sic]: Yes.

MENNING: Sen. B, I think you said your calculations showed maybe possibly 1,000 cases?

BERGLAND [sic]: 1,040, based on two weeks.

MENNING: Sen. B [sic], out of that 1,040 that goes to court, how many lives do you think it could possibly save?

BERGLAND [sic]: Well, based on what's happening in Massachusetts, everyone [sic] of the cases so far has been referred to a doctor for an abortion.

MENNING: So what you're saying, Sen. B [sic], is there are no lives saved?

BERGLAND [sic]: Perhaps the lives of some of the minors who might seek an illegal abortion if they didn't have

that option available to them, but what I'm saying is I think . . . .

MENNING: I'm sorry I didn't think I understand that statement. Could you repeat that?

BERGLAND [sic]: I said only the lives of the minors who are using this option rather than seeking an illegal abortion.

CHAIR: Chair recognizes,

(Confusion)

Senator Menning, is this a continuation to your comments before?

MENNING: Mr. Chairman, I guess I'm a little surprised at Sen. B's [sic] comments that—insinuating that possibly this provision goes there's going to be some lives of some teenagers taken? Is that what you're saying?

BERGLAND [sic]: No. I'm not saying that. What I'm trying to say is that through this process, it does not seem apparent, at least at this time, that anyone is going to be denied an abortion, and yet we are going to make people go through this somewhat cumbersome and costly process. And I am a little bit concerned that the cost of that, at least, is not going to be shared by residents across the state, since it will be residents throughout the state that will be using this service.

MENNING: Sen. B [sic], you really—what you're really saying is that the issue is not serious enough with merit to a trial or going to court. Is that what you're saying?

[16] BERGLAND [sic]: Mr. Chairman, Sen. Marion [sic].

• • • •

This provision does not warrant a trial. What it does is it says that the juvenile courts shall review

the situation if the minor requests it. And based on what's been happening under this very same provision, which is in force in Massachusetts, there've been no cases denied by the court.

MARION [sic]: I think we have a serious enough matter here where it perhaps should go to the courts. Sen. B [sic], how is an abortion performed? I'm serious, folks. I think we're dealing with a very serious matter, I hear some groans and I guess I'm wondering . . .

CHAIR: Sen. B [sic]

BERGLAND [sic]: Sen Marion [sic], I have never performed an abortion. I wouldn't have the vaguest idea how you perform an abortion. I have never had an abortion so I'm not an expert on how you perform abortion.

MARION [sic]: Mr. Chairman, members . . .

STERN: Mr. Chairman, point of order.

CHAIR: Sen. [sic] Stern, state your point.

STERN: Mr. Chairman, just to state my point, I'm a little confused by this debate. I thought that we were talking about counseling, love, care and all those good things, and parental notification and all of a sudden I find myself in the middle of a debate revolving [sic] death, and all those other awful things and how do you perform abortions. And I really would like to get back to the debate, Mr. Chairman, and I would call upon you to keep us germaine [sic] while we're going through these amendments.

CHAIR: Your point is well taken, Sen. [sic] Stern.

MARION [sic]: I agree with Sen. [sic] Stern. He clarified exactly what I was thinking. He said, "Now we're

dealing with death." And that's exactly what we're dealing with.

* * *

[30] * * * *

MENNING: Thank you, Senator Stern. Senator Stern, what we're talking about here is the actual killing of life. Now that's what we're talking about. Senator Stern, I asked Senator Bergland [sic] a question. Do you know how an abortion is performed? And I'm giving that the amendment, Mr. Chairman.

STERN: Mr. Chairman, Senator Menning, I can imagine, but I really don't know.

DAVIES: Senator Menning, proceed with your comments.

STERN: Mr. Chairman, Senator Menning, No.

MENNING: All right, Mr. Chairman, Members, I hear a lot of people say, "let's keep to the point." That is exactly what I'm talking about. I'm talking about a 14, 15, 16, 17 year old young girl who's pregnant who, if that person has an abortion, a couple years later will say as a young lady said on radio the other night when I was debating the abortion issue, while she was crying, she said: "I killed my baby." That's what she said, she said, "I killed my baby." And now what you're saying Senator Stern is, don't pass this amendment; just let them make this decision without really thinking about it. Senator Stern, I think you know as well as I do, that most of these abortions now are performed through a suction device. Do you agree, Senator?

STERN: Mr. Chairman, Senator Menning—

DAVIES: Senator from Hennepin, Senator Stern.

STERN: Again, I'm confused. We're talking about this amendment that Senator Waldorf proposed that asks a girl to go to the courts, and you're asking me about abortion, suction devices and all those things?

MENNING: That's right.

STERN: I do not come prepared to argue on this particular amendment.

[31] DAVIES: Senator Stern, if you don't want to yield to the questions, you don't have to if you don't think they're relevant. Senator from Pipestone, Senator Menning.

MENNING: Members of the body, what I'm saying is this, we are dealing with a situation where a minor has to make a decision on whether or not to take the life of her baby. Mr. Chairman, members of the body, this body came in here Monday morning. You know they were all concerned about those dog fights down there. And what I'm saying is this. Those suction devices pull those babies limb from limb and they don't even kill them before time. And this young girl who has to make that decision is going to face that situation someday, and I would support the Waldorf Amendment.

* * *

[43] DAVIES: The Secretary will report the amendment.

SECRETARY: Mr. Stern moves to amend Senate File 287 as follows: Amend the title. Page 1, line 4, after the word "persons" insert "comma, with the intent to prevent abortions."

STERN: Mr. Chairman, members of the committee, what I'm really trying to do here is just a simply [sic] title change because after the debate, I think you'll agree, that what we're talking about here is a strong desire to prevent abortions. So I don't

think we should continue to fool ourselves and the general public or the courts that that isn't our intent. I think a quick review of the tapes today makes legislative intent very obvious, and I would appreciate your affirmative vote for this amendment.

Exhibit C*

Excerpts from Transcripts of Hearings Before Minnesota Senate Committee on Health, Welfare & Corrections

March 24, 1981

[3] * * * *

ROSENBERG: Madam Chairman, members of the committee, my name is Maurice [sic] Rosenberg. I am a chief volunteer lobbyist of Minnesota Citizens Concernced [sic] for Life. In 1973 the Supreme Court struck down the abortion laws in all 50 states and ruled that abortion was to legal [sic] for the entire term of pregnancy. In subsequent ruling [sic], the court has reaffirmed and expanded the right to destroy the unborn. But yesterday the court issued a ruling that at least would allow a restriction on the right of abortionists to perform his or her specialty on minor girls when their parents do not know they are seeking abortion. Today we are asking to approve a law similar to the one upheld yesterday. Why does MCCL support such legislation? First and foremost, we are convinced that it will save at least some lives. When young teens become pregnant they, understandably, are frightened and may make a panic decision to have an abortion because this looks like an easy solution to their problems. In many case, the parents of these teenagers would have been willing and able to offer help and support their daughters in a time of crisis but they do not have the opportunity when abortion clinics are allowed to end the lives of their daughter's child, their grandchild, before they even know that life exists. Under the proposed law, teenagers could still get abortions without their [4] parents consent or even over their objections, but at least their parents would have

* A copy of relevant portions of transcripts of tapes of Minnesota Senate Committee hearings, including the contents of this Exhibit, has been lodged with this Court by counsel for Cross-Respondents.

the important knowledge about their daughter's [sic] plight. We believe, many parents, if given the opportunity, will help their daughters continue her [sic] pregnancy and will make suitable arrangements for the welfare of the baby. Secondly, we are concerned for the health and welfare for [sic] the pregnant teen herself. A frightened girl is in no position to give an accurate medical history to an abortionist, but if her parents at least knew she was planning to undergo an abortion they could provide pertinent information that might be vital in preserving their daughters [sic] own health. Abortion can cause severe health problems in young. Even when they have no preexisting medical condition. For instance, a study conducted by a Florida obstetrician, Dr. Mathew [sic] Bolson, has shown that teens undergoing abortion can suffer both long and short term complications that can effect [sic] their health and reproductive capabilities for the rest of their lives. Many symptoms of such problems may be regarded by the young girl as just part of the abortion aftermath or she may hide these symptoms from her parents so they don't find out about the abortion. In the short term their health and very lives can be put in jeopardy and in the long run they can find that abortion complication [sic] can effect [sic] their ability to have children in the future when they truely [sic] want to have them and are prepared to raise them. Informing parents of their daughter's decision will not eliminate these dangerous aspects of abortion, but at least they will be in a position to help their child if such problems do develop. Opponents of this legislation stress the right of a woman of age to choose abortion and they deny that parents have any right sufficient to interfere with their daughters [sic] decision. What they are saying is that a teenage girl afraid and confused has the sole right to choose the destruction of her own child. We reject this logic and insist that we cannot, must not, attempt to solve the problem of pregnant teenagers by destroying the babier [sic] they carry. We urge you to approve this vital legis-

lation which will have benefits for three generations of Minnesotoans [sic]. Parents, their teenage daughters and their unborn children. Thank you for this opportunity to speak before you. Are there any questions?

* * * *

[15] * * *

MCCORY: My name is Robert McCory. I'm the administrator of the Midwest Health Center for Women in Minneapolis. Next week we are opening a clinic in Duluth. I've assisted since 19___ the provision of abortion care for some 30 thousand women in this state and I've learned some things from my experience in doing this, but I do not think that this piece of legislation you have before you will accomplish the desire of cutting down on the number of abortions that are preformed [sic] in this state. Doctor Sumerdorf has suggested that it will delay some procedures too far and cause problems when some parents discover their children are pregnant and try to force them to have abortions. Those of us in the provision of health care for our patients who seek abortion *encourage* parental involvement. We see the importance that parents do become involved in these decisions. At Midwest we're committed to giving parents information about what their children are doing. We conduct courses and programs on such topics as parents as sex education [sic]. We think its [sic] important to do this and we think its [sic] important for the patient to bring her parents to the clinic to be with her at the time she has the abortion which to us is more important than to send the parents a notice that your youngster is having an abortion. We ask our patients to bring somebody with them to the clinic. Often it is a parent, but it could be an older brother or sister. From 40-50% of our patients do call their parents but they generally tell only one parent and its [sic] generally the mother. While we do believe we should involve parents in these decisions we do know that there are a small number of cases, which Doctor

Sumerdorf just pointed out, in which the patients [sic] cannot advise her parents what she is preparing to do. In some instances they will tell them later. In many instances they know it would be damaging to their already shaky relationship to expose them to the fact that they've been sexually active. I can recall in years past of [sic] young women telling me how, their [sic] parents in one case, locked her in the attic of her house with blankets on the windows so the rest of the neighbors wouldn't see their shame. Or another young woman who was locked in the basement as a prisoner because her parents thought that the rest of the neighborhood found out she's pregnant and bring shame on the family [sic]. Both of these youngsters escaped and they did seek abortion care and this was at a time [16] that it was illegal and went out of the county. At our clinic we require young people to have parental consent or family consent of some kind if they're 15 or younger. There are very few patients 13, 12 or younger than that. 22 last year. If the woman is 15 or younger we ask her and we will not do the procedure unless she brings someone else from her family. It may be a parent and it usually is, but it also may be even a grandparent or an aunt or uncle. Providers of this kind of care are not willy nilly trying to capture patients to do abortions. We at our clinic have never done an abortion on a patient against her will. We should really call this the, if you are being cynical, the abortion business aid bill because at present we subsidize, that is we provide a time payment for 40% of the patients we see. We let them pay for their procedures on time. I know many of the patients I talk to I've told them "why don't you tell your parents?" In almost every instance when they tell their parents their parents come back with them to the clinic and see that they have proper medical care. We are finding that large numbers of young women often helping with their sisters and brothers who provide abortion care [sic]. We provide a fair number of free procedures, but 40% of them pay for their procedure on time. I think the cate-

gory that this is really aimed at is the 16 and 17 year old young women because that is the big people [sic] who are sort of on their own. Its [sic] this group we think its [sic] detrimental to notify both of their parents that an abortion is pending. We urge you to defeat this kind of legislation because we think it will produce really serious disaster [sic] among many of the families in this state. Thank you.

Exhibit D*

Excerpts from Child Maltreatment Report
1985-86

Published by the Minnesota Department of Human Services

[22] *Reported Sexual Abuse*

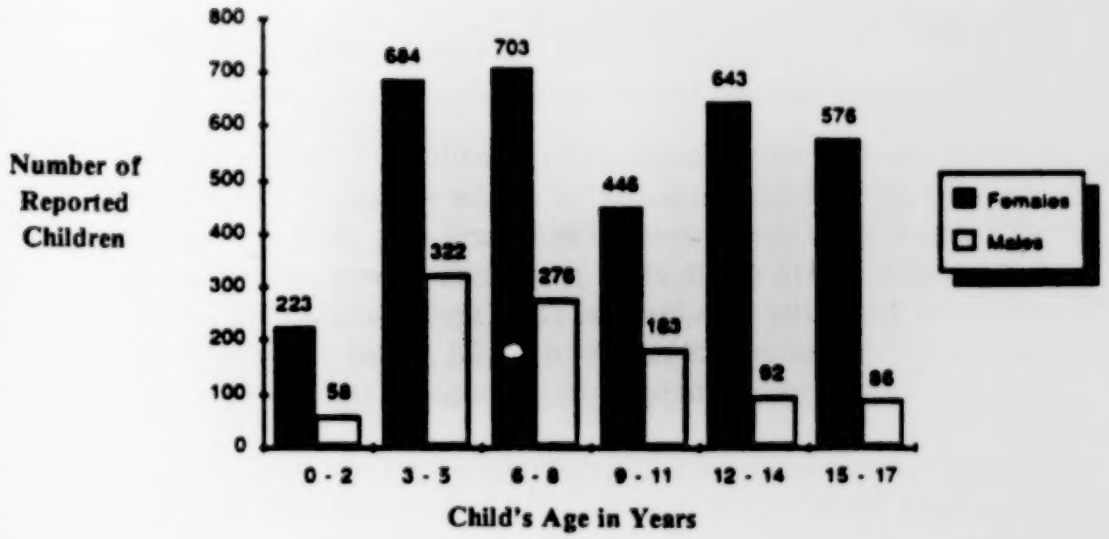
Females were two to seven times more likely to be reported as sexually abused than males. One of the reasons for this large difference is the department collects data only on those reports of sexual abuse in which child protection is required by law to respond, primarily intrafamilial child sexual abuse. The statistics below do not reflect reports of child sexual abuse made to law enforcement agencies where social services was not involved.

The substantiation rate for children on sexual abuse reports decreased from approximately 46% in 1984 to 44% in 1985, and increased back to 46% in 1986. In 1985 the substantiation rate for reports of sexual abuse was the same as physical abuse, while in 1986 it was again higher.

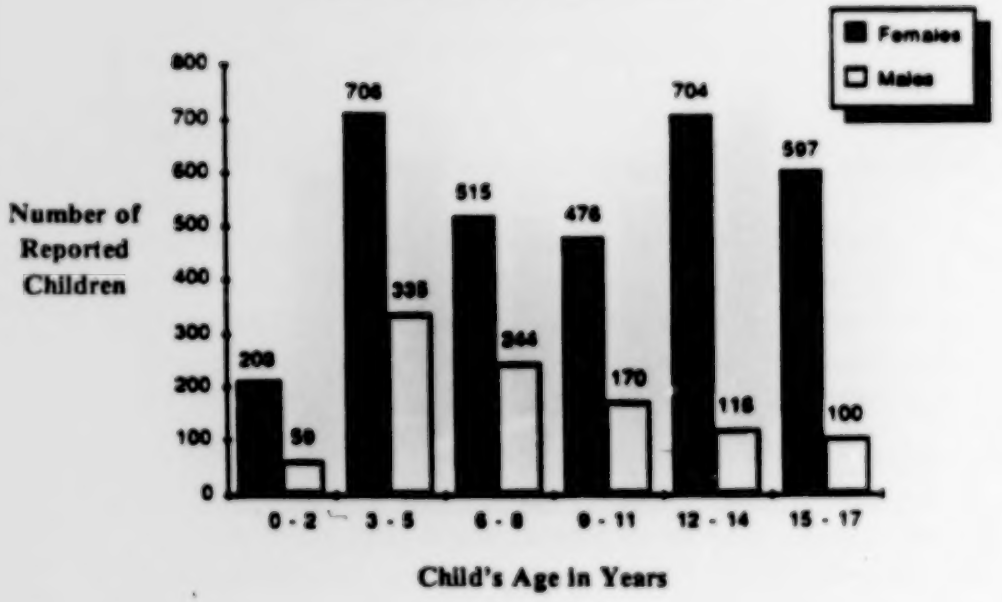
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* A copy of this report has been filed with this Court by counsel for Cross-Respondents.

Reported Sexual Abuse in 1986: Number of Children by Age and Gender



Reported Sexual Abuse in 1985: Number of Children by Age and Gender



Reported Sexual Abuse in 1984: Number of Children by Age and Gender

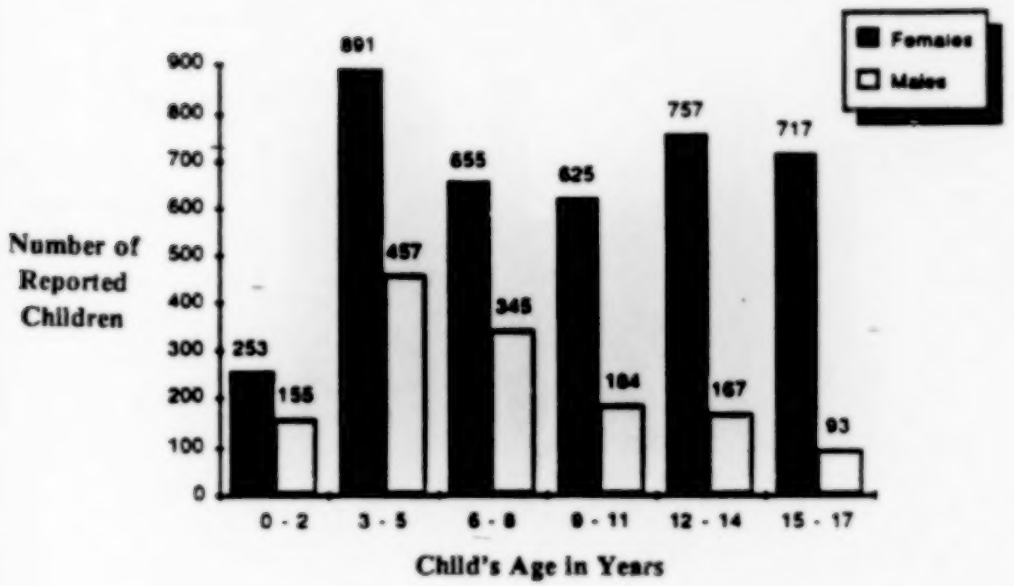


Exhibit E

Excerpts of Trial Testimony of Dr. Vincent Rue
March 12, 1986

CROSS-EXAMINATION

[2333] * * *

MS. BENSHOOF: If there were a criminal statute in California—

A: Uh-huh.

Q: —that required therapists such as yourself, when young women, and you see quite a few, come before you, are pregnant and their parents do not know about it, wouldn't you support a criminal law that would require you not to treat, see or counsel that minor until her parents are notified?

MR. GALUS: Object to that as asked and answered.

THE COURT: Objection overruled, you may answer.

THE WITNESS: I would not agree with such a statute that would impose criminal penalties on a counselor for not notifying parents of an intention for an abortion simply because the counselor is not providing the abortion.

Q: But you testified yesterday that the reason you are in favor [2334] of the statute is that it will lead to parental notice, parental knowledge of the pregnancy, that will lead to involvement, is that correct?

A: Yes.

Q: And if you as a counselor notified a parent, that would lead to knowledge, would it not?

A: Correct.

Q: So the beneficial result you would want from the Minnesota law would also occur from a California law, is that not correct?

A: No, I don't believe so because I will bet you in Minnesota most pregnant teenagers don't seek out a psychotherapist in decisionmaking [sic] process regarding abortion and I know that certainly is the case in California.

Q: So what you are suggesting here is if we—if the goal is to encourage parental notification, then what we should have

are sanctions against psychotherapists who don't involve parents?

A: Well, that would be true, I suppose, and workable to the extent of the goal, if the majority of teenagers went to counselors around the state, but I don't think that is the case.

Q: It would help a little bit, wouldn't it?

A: Well, no, I don't believe so, because—

Q: About how many patients do you see a year who don't involve parents?

[2335] MR. GALUS: Object to the answer being cut off.

THE COURT: Well, I think he should be permitted to answer.

Had you completed your answer or do you want to say more, or have we lost track?

THE WITNESS: I have lost track, but that is okay, proceed.

BY MS. BENSHOOF:

Q: About how many minors do you see a year who end up having abortions who don't tell their parents and you can't convince to tell them?

A: The minority.

Q: About how many?

A: I don't know, but it is a minority.

Q: Twenty-five?

A: I don't know.

Q: You said you saw 50 to 100, a minority, 25, 10?

A: If I saw 50, and 25 didn't, that would be 50 percent, that is not a minority.

Q: Let's say 15-10?

A: A minority.

Q: A minority. If there were a criminal statute it would certainly help that minority because their parents would be told by you and then their families would have the opportunity to get involved, isn't that correct?

[2336] A: For those minority of patients who are pregnant, who through the course of counseling insist that their parents not be involved, their parents would be notified subject to criminal prosecution of the psychotherapist.

Q: And the parents then would have the opportunity to be involved, isn't that correct?

A: They would.

Q: So for that portion of your patients they would be helped by such a law even though you would oppose such a law, isn't that correct?

A: I don't know that they would be helped. I don't know what that word means.

Parents would be notified. It is very possible in those exceptional situations that we could exacerbate the problem.

Q: You mean notification, forced notification would exacerbate the problem?

A: In some exceptional cases, yes.

Q: Well, tell me about this: How would such forced notification exacerbate the problem?

A: In cases where there is very severe dysfunctional communication, threats of violence, very poor family life, it is possible that notification could be harmful both to the adolescent—well, primarily to the adolescent.

Exhibit F

Statutory Definitions of Maturity

I. MARRIED MINORS (27 states):

ALA. CODE § 22-8-4 (1984) (minor who is or has been married may consent to any legally authorized medical, dental, health or mental health services), ALA. CODE § 22-8-5 (1984); ARIZ. REV. STAT. ANN. § 44-132 (1987) (minor who is or has been married may consent to hospital, medical and surgical care); ARK. CODE ADD. § 20-9-602(3) (1987) (married minor may consent to surgical or medical treatment or procedures not prohibited by law); CAL. CIV. CODE § 25.6 (West 1982) (minor who is or has been married may consent to hospital, medical and surgical care); COLO. REV. STAT. § 13-22-103 (1987) (married minor may give consent to hospital, medical, dental, emergency health and surgical care); DEL. CODE ANN. tit. 13, § 707(a)(2) (married minor may consent to any lawful diagnostic, therapeutic or post-mortem procedure, and to the furnishing of hospitalization and other reasonably necessary care in connection therewith); GA. CODE ANN. § 31-9-2(a)(3) (1985) (married minor may consent to any surgical or medical treatment or procedures not prohibited by law); ILL. REV. STAT. ch. 111, para. 4501 (1987) (married minor may consent to performance of medical or surgical procedures by a physician); IND. CODE § 16-8-12-2(2)(c) (Supp. 1987) (minor who is or has been married may consent to his or her own health care); KY. REV. STAT. ANN. § 214185(3) (Baldwin Supp. 1988) (minor who is or has been married may consent to hospital, medical, dental or surgical care for himself or herself); LA. REV. STAT. ANN. § 40: 1299.53(c) (West 1977) (married minor may consent to any medical or surgical treatment or procedures, including autopsy, not prohibited by law); MD. HEALTH-GEN. CODE ANN. § 20-102(a)(1) (1987) (married minor has same capacity as adult to consent to medical treatment); MASS. GEN. L. ch. 112, § 12F (1986) (minor who is married, widowed or divorced can consent to his or her own medical or dental care); MINN. STAT. § 144.342 (1988) (married minor may consent to medical, mental, dental and other

health services); MISS. CODE ANN. § 41-41-3(c) (Supp. 1988) (married minor may consent to medical or surgical procedures or treatments not prohibited by law); MO. REV. STAT. § 431.061 (1986) (married minor may consent to any medical or surgical treatment or procedures not prohibited by law); MONT. CODE ANN. § 41-1-402(1)(a) (1987) (minor who is or has been married may consent to medical or surgical care or services by hospital, clinic or physician); NEV. REV. STAT. ANN. § 129.030(1)(b) (Michie 1986) (minor who is or has been married may consent to examination and treatment, other than sterilization, provided by physician, hospital, board of health, or health officer, as long as he or she understands the nature and purpose of treatment, its probable outcome and voluntarily requests it); N.J. STAT. ANN. § 9:17A-1 (West 1976) (married minor may consent to medical or surgical care); N.M. STAT. ANN. § 24-10-1 (1986) (minor who is or has been married may consent to hospital, medical and surgical care); N.Y. PUB. HEALTH LAW § 2504(2) (McKinney 1985) (any person who is or has been married may consent to medical, dental, health and hospital services); OKLA. STAT. ANN. tit. 63, § § 2601(c) and 2602(A)(1) (West 1984) (1981) (married minor may consent to health services, except abortion or sterilization); PA. STAT. ANN. tit. 35, § 10101 (Purdon 1977) (minor who is or has been married may give consent to medical, dental, and health services); R.I. GEN. LAWS § 23-4.6-1 (1985) (any married person may consent to routine emergency medical or surgical care); S.C. CODE ANN. § 20-7-270 (Law. Co-op. 1985) (married minor may consent to any lawful diagnostic, therapeutic surgical or postmortem procedures); VA. CODE ANN. § 54.1-2969(E) (1988) (minor who is or has been married may consent to any surgical and medical treatment, except sterilization); WYO. STAT. ANN. § 14-1-101 (Michie 1989) (minor who is or has been married may consent to health care treatment to the same extent as an adult).

II. MINORS WHO ARE PARENTS (27 states):

ALA. CODE § 22-8-5 (1984) (any minor who has borne a child may consent to any legally authorized medical, dental, health or

mental health services for self and child); ALASKA STAT. § 09.65.100(3) (1983) (minor who is the parent of a child may consent to medical and dental services for self and child); ARK. CODE ANN. § 20-9-602(2) (1987) (any minor parent may consent for any medical or surgical treatment or procedure not prohibited by law for his child, but illegitimate father cannot consent for children solely on the basis of parenthood); COLO. REV. STAT. § 13-22-103(3) (1987) (minor parent may consent to hospital, medical, dental, emergency health and surgical care for his or her child); CONN. GEN. STAT. § 19a-285 (1987) (minor who has borne a child may consent to medical, dental, health and hospital services for his or her child); DEL. CODE ANN. tit. 13, § 707(a)(4) (1981) (minor parent may give consent for his or her child for any licensed medical, surgical, dental or osteopathic practitioner or hospital or clinic to perform diagnostic, therapeutic, or postmortem procedures and any hospitalization or other necessary care in connection therewith); FLA. STAT. § 743.065(2) (1987) (unwed minor mother may consent to medical or surgical care or services for her child by hospital, clinic or physician); GA. CODE ANN. § 31-9-2(a)(2) (1985) (minor parent may give consent to any surgical or medical treatment or procedure not prohibited by law for his or her minor child); IDAHO CODE § 39-4303 (1985) (consent for furnishing of hospital, medical, dental or surgical care, treatment or procedure to any person who is not then capable of giving such consent as provided in this act or who is a minor or incompetent person, may be given or refused by any competent parent, spouse or guardian); ILL. ANN. STAT. ch. 111, para. 4502 (Smith-Hurd 1987) (a parent who is a minor may consent to performance of medical, surgical or dental procedure upon his or her child); KAN. STAT. ANN. § 38-122 (1986) (minor parent may consent to the performance upon his or her child of medical, surgical or post mortem procedure by a physician); KY. REV. STAT. ANN. § 214.185(3) (Baldwin Supp. 1988) (minor who has been married or borne a child may consent to hospital, medical, dental or surgical care for the child or for himself or herself); LA. REV. STAT. ANN. § 40:1299.53(b) (West 1977) (minor parent may give consent for his or her child to any medical or surgical treatment or procedure, including

autopsy, not prohibited by law); MD. HEALTH-GEN. CODE ANN. § 20-102(a)(2) (1987) (minor parent has the same capacity as an adult to consent to medical treatment); MASS. GEN. L. ch. 112, § 12F (1986) (minor parent may give consent to medical or dental care for herself or himself and his or her child); MINN. STAT. § 144.342 (1988) (minor who has borne a child may consent to medical, dental, mental and other health services for self and child); MISS. CODE ANN. § 41-41-3(b) (Supp. 1988) (minor parent may consent for his or her child to any medical or surgical procedures or treatments not prohibited by law; however, father of illegitimate child cannot consent for child solely on basis of parenthood); MO. REV. STAT. § 431.061(1)(3) (1986) (minor parent may consent to any medical or surgical procedures or treatment not prohibited by law for himself or herself and for his or her child); MONT. CODE ANN. § 41-1-402(a) (1987) (minor who has had a child may consent to medical or surgical care or treatment by a hospital, clinic or physician); NEV. REV. STAT. ANN. § 129.030 (Michie 1986) (minor who has borne a child may consent for herself and for child to any examination and treatment, except sterilization, by a hospital, clinic, or physician, provided she understands the nature and purpose of the treatment and its probable outcome, and voluntarily requests it); N.J. STAT. ANN. § 9:17A-1 (West 1976) (married or pregnant minor may consent for self and children for medical and surgical care or procedures); N.Y. PUB. HEALTH LAW § 2504 (McKinney 1985) (any person who has borne a child may consent to medical, dental, health and hospital services for herself and for child); OKLA. STAT. ANN. tit. 63, § 2602(1) (West 1984) (a minor who has a dependent child may give consent for self and child to health services); PA. STAT. ANN. tit. 35, § 10102 (Purdon 1977) (minor who has been pregnant, borne a child or married may consent to medical, dental, and health services for self and child); R.I. GEN. LAWS § 23-4.6-1 (1985) (minor parent may consent to routine emergency medical or surgical care for his or her child); S.C. CODE ANN. § 20-7-300 (Law. Co-op. 1985) (minor who has been married or borne a child may consent to health services for the child); UTAH CODE ANN.

§ 78-14-5(4)(a) (1987) (minor parent may consent to any health care not prohibited by law for his or her minor child).

III. INDEPENDENT MINORS (11 states):

ALASKA STAT. § 09.65.100(1) (1988) (minor who is living apart from parents and managing own financial affairs may consent to medical and dental services); CAL. CIV. CODE § 34.6 (West 1982) (minor 15 years of age or older and living apart from parents or guardian and managing own financial affairs, regardless of income source, may consent to hospital care or any X-ray examination, anesthetic, or medical, dental or surgical diagnosis or treatment); COLO. REV. STAT. § 13-22-103(1) (1987) (minor 15 years of age or older who is married or living apart from his or her parents and managing own financial affairs, regardless of source of income, may consent to hospital, medical, dental, emergency health and surgical care); IND. CODE § 16-8-12-2(2)(B) (Supp. 1987) (minor at least 14 years of age who is not dependent on a parent for support, is living apart from parents and is managing own affairs may give consent to health care); MASS. GEN. L. ch. 112, § 12F (1986) (minor who is living apart from parents and managing own financial affairs may consent to medical or dental care); MINN. STAT. § 144.341 (1988) (minor who is living apart from parents and managing personal financial affairs, regardless of source or extent of income, may consent to medical, dental, mental or other health services); MONT. CODE ANN. § 41-1-402(b) (1987) (minor who has been separated from his or her parents and is supporting himself or herself may consent to medical or surgical care or services by a hospital, clinic or physician); NEV. REV. STAT. ANN. § 129.030 (Michie 1986) (minor who has been living apart from his or her parents for at least 4 months may consent to any examination or treatment, except sterilization, provided by physician, hospital, board of health, or health officer, as long as he or she understands the nature and purpose of the treatment and voluntarily requests it); OKLA. STAT. ANN. tit. 63, § 2602(A)(2) (West 1981) (minor who is separated from his or her parents and is not supported by them may consent to health services); TEX. FAM.

CODE ANN. § 35.03(a)(2) (Vernon Supp. 1989) (minor who is 16, is living apart from his or her parents with or without their consent, and managing personal financial affairs, regardless of source of income, may consent to hospital, medical, surgical and dental care); WYO. STAT. § 14-1-101 (1989) (minor who is living apart from parents and managing own affairs, regardless of income source, may consent to health care treatment).

IV. MINORS IN ARMED FORCES (five states):

CAL. CIV. CODE § 25.7 (West 1982) (any minor on active duty with any of the armed services may consent to hospital, medical or surgical care); IND. CODE § 16-8-12-2(2)(D) (Supp. 1987) (a minor who is in the military service may consent to his or her own health care); MASS. GEN. L. ch. 112, § 12F (1986) (minor who is a member of the armed forces may consent to medical or dental care); TEX. FAM. CODE ANN. § 35.03 (Vernon Supp. 1989) (a minor on active duty in armed forces may consent to hospital, medical, surgical or dental care); WYO. STAT. § 14-1-101(b)(ii) (1989) (minor in active military service may consent to health care treatment to the same extent as an adult).

V. MINORS WHO HAVE GRADUATED FROM HIGH SCHOOL (three states):

ALA. CODE § 22-8-4 (1984) (minor who has graduated from high school may consent to any legally authorized medical, dental, health or mental health services); MONT. CODE ANN. § 41-1-402(a) (1987) (minor who has graduated from high school may consent to medical or surgical treatment or care); PA. STAT. ANN. tit. 35, § 10101 (Purdon 1977) (minor who has graduated from high school may consent to medical, dental and health services).

VI. MATURE MINORS (three states):

ARK. STAT. ANN. § 20-9-602(7) (1987) (unemancipated minor of sufficient intelligence to understand and appreciate the consequences of the proposed surgical or medical treatment

or procedures may consent); MISS. CODE ANN. § 41-41-3(h) (Supp. 1988) (any unemancipated minor of sufficient intelligence to understand and appreciate the consequences of the proposed surgical or medical treatment or procedures may consent for himself or herself); N.H. REV. STAT. ANN. § 318-B:12a (1984) ("nothing contained herein shall be construed to mean that any minor of sound mind is legally incapable of consenting to medical treatment provided that such minor is of sufficient maturity to understand the nature of such treatment and the consequences thereof").

Exhibit G

Article from The Idaho Statesman, August 23, 1989, and Murder Indictment of Rocky Allen Adams

ADAMS CHARGED WITH MURDER

By David Ensunsa
The Idaho Statesman

PAYETTE—A charge of first-degree murder has been filed against a Fruitland man accused of impregnating and killing his teenage daughter.

Payette County Prosecutor Bruce Birch said his office filed the charge Monday against Rocky Adams, 37, who remained hospitalized in Boise Tuesday night from an apparent suicide attempt.

Adams will appear in court for arraignment when he is able to, Birch said Tuesday.

Adams is accused of with [sic] firing a slug from a .30-caliber rifle into the head of his 13-year-old daughter, Spring, on Aug. 14, at their Fruitland home. He then apparently turned the gun on himself and suffered a bullet wound to the head.

Adams, who was comatose for several days, has been steadily improving at St. Alphonsus Regional Medical Center. Tuesday night, he was listed in fair condition.

Birch said his office is continuing to investigate the shooting. Sheriff Bob Barowsky said his investigation is essentially complete.

"We had to make sure we had all our statements before the charge was filed," Barowsky said. "Once the charges have been filed, we are pretty well finished."

The sheriff declined to comment further on the case, saying he did not want to "try the case in the newspaper."

Officials were still refusing Tuesday to release some findings from Spring Adams' autopsy. After the shooting, family members told The Statesman that Rocky Adams had been consumed with guilt because he had sexually abused and impregnated his daughter.

But officials have declined to say whether the girl was pregnant, adding that such a revelation, if true, could hinder the prosecution.

On Tuesday, Payette County Coroner Robert Bigelow said he did not know whether Adams was pregnant. He said he has had the autopsy report read to him but he hadn't actually seen the report.

"Personally, I don't have knowledge if she was pregnant. I'm not interested in that, because that's not the cause of death," Bigelow said.

A clerk at the Payette County court office said she had no written report of an autopsy on the girl.

The girl, who would have been a sixth-grader this year, had been scheduled to receive an abortion Aug. 15 in Portland, relatives said.

(EXHIBIT CONTINUED ON FOLLOWING PAGE.)

IN THE DISTRICT COURT OF THE
THIRD JUDICIAL DISTRICT OF
THE STATE OF IDAHO,
IN AND FOR THE COUNTY OF PAYETTE

Case No. CRM: 839

STATE OF IDAHO,

Plaintiff,

vs.

ROCKY ALLEN ADAMS,

Defendant.

CRIMINAL INFORMATION

Pursuant to Idaho Criminal Rule 7, the Prosecuting Attorney of Payette County, Idaho, alleges by this information that:

ROCKY ALLEN ADAMS

has perpetrated a crime against the State of Idaho, to-wit:

MURDER IN THE FIRST DEGREE,
I.C. 18-4001, 18-4002, 18-4003, (FELONY)

committed as follows:

That the Defendant, ROCKY ALLEN ADAMS, on or about the 14th day of August, 1989, in the County of Payette, State of Idaho, did wilfully, unlawfully, deliberately and with premeditation, and with malice aforethought, kill and murder Spring Adams, a human being, by shooting her in the head with a firearm from which she died, which is in violation of I. C. 18-4001, 18-4002, 18-4003, MURDER IN THE FIRST DEGREE, (FELONY).

CRIMINAL INFORMATION—1

DATED this 14 day of September, 1989.

Bruce H. Birch
Prosecuting Attorney

No. 88-1125

Supreme Court, U.S.
FILED
OCT 13 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JANE HODGSON, M.D.; ARTHUR HOROWITZ, M.D.; NADINE T., JANET M., ELLEN Z., HEATHER P., MARY J., SHARON L., KATHY M., and JUDY M., individually and on behalf of all other persons similarly situated; DIANE P., SARAH L., and JACKIE H.; MEADOWBROOK WOMEN'S CLINIC, P.A.; PLANNED PARENTHOOD OF MINNESOTA, a nonprofit Minnesota corporation; MIDWEST HEALTH CENTER FOR WOMEN, P.A., a nonprofit Minnesota corporation; WOMEN'S HEALTH CENTER OF DULUTH, P.A., a nonprofit Minnesota corporation,

Petitioners,

vs.

THE STATE OF MINNESOTA; RUDY PERPICH, as Governor of the State of Minnesota; HUBERT H. HUMPHREY, III, as Attorney General of the State of Minnesota,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENTS

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota
JOHN R. TUNHEIM
Chief Deputy
Attorney General
CATHARINE F. HAUKEDAHL
Solicitor General

KENNETH E. RASCHKE, JR.
Assistant Attorney General
JOHN B. GALUS
Special Assistant
Attorney General
Counsel of Record
525 Park Street, Suite 500
St. Paul, Minnesota 55103
Telephone: (612) 297-2040
Counsel for Respondents

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QUESTIONS PRESENTED

1. May a state constitutionally require a physician to attempt with reasonable diligence to notify the parents of an unemancipated minor under the age of eighteen at least forty-eight hours before performing an abortion upon their daughter, if the notice requirement may be avoided by a court bypass system which, both on its face and in actual practice, meets the standards set forth by this Court for more burdensome parental consent statutes?

2. If the requirement that both parents be notified absent a judicial determination renders the Minnesota statute unconstitutional, is that requirement severable from the remainder of the statute as was clearly intended by the legislature?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

NO. 88-1125

JANE HODGSON, M.D.; ARTHUR HOROWITZ, M.D.; NADINE T., JANET M., ELLEN Z., HEATHER P., MARY J., SHARON L., KATHY M., and JUDY M., individually and on behalf of all other persons similarly situated; DIANE P., SARAH L., and JACKIE H.; MEADOWBROOK WOMEN'S CLINIC, P.A.; PLANNED PARENTHOOD OF MINNESOTA, a nonprofit Minnesota corporation; MIDWEST HEALTH CENTER FOR WOMEN, P.A., a nonprofit Minnesota corporation; WOMEN'S HEALTH CENTER OF DULUTH, P.A., a nonprofit Minnesota corporation,

Petitioners,

vs.

THE STATE OF MINNESOTA; RUDY PERPICH, as Governor of the State of Minnesota; HUBERT H. HUMPHREY, III, as Attorney General of the State of Minnesota,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENTS

STATUTORY PROVISIONS INVOLVED

STATE LAWS

Minnesota Statutes § 144.341 (1988)
Minnesota Statutes § 144.342 (1988)
Minnesota Statutes § 144.343 (1988)
Minnesota Statutes § 645.451 (1988)

(The text of Minn. Stat. § 144.343 is reprinted in the Appendix to the certiorari petition of Hodgson *et al.* at 1a-4a. The text of the remaining statutes is reprinted in the Appendix to this brief at A-2.)

STATEMENT OF THE CASE

I. The Statute

In 1981 the Minnesota legislature enacted the Act of May 19, 1981, ch. 228, Minn. Laws 1011, which is codified as subdivisions 2 through 7 of Minn. Stat. § 144.343 (1988). 1a-4a.[1] Subdivision 2 of the statute generally provides that physicians or their agents must attempt with reasonable diligence to notify the parents of an unemancipated minor at least 48 hours before performing an abortion.[2] Subdivision 4 provides

[1] Page references with the suffix "a" refer to the appendix to the certiorari petition of Hodgson, et al.

[2] The age of majority in Minnesota is 18. *See* Minn. Stat. § 645.451, subd. 2 (1988). While there is no general statutory definition of the term "emancipation" in Minnesota, Minn. Stat. § 144.341 (1988) provides that any minor who is living apart from her parents, with or without parental consent and regardless of the duration of such separate residence and who is managing personal financial affairs, regardless of the source or extent of the minor's income, may give effective consent to any personal medical or other health services. Minn. Stat. § 144.342 (1988) provides that any minor who has been married or has borne a child may likewise give effective consent to any personal medical or other health services.

that 48 hour prior parental notice is not required when the parents have consented to the abortion, when prompt action is needed to preserve the life of the pregnant minor or when the minor reports that she is a victim of sexual abuse, neglect or physical abuse as defined in Minn. Stat. § 626.556 (1988).

Subdivision 6 provides that if subdivision 2 is ever enjoined by judicial order, then the same parental notification requirement shall be effective together with an optional procedure whereby an unemancipated minor may obtain a court order permitting an abortion without notice to her parents upon a showing that she is mature and capable of giving informed consent to an abortion or, if she is not mature, that an abortion without notice to her parents would nevertheless be in her best interests.

Any minor who files a petition pursuant to subdivision 6 is permitted to participate in the proceeding on her own behalf, and the court is empowered to appoint a guardian *ad litem*. There is an express statutory right to a court-appointed counsel upon request and a waiver of all filing fees. The statute further expressly provides that all proceedings shall be confidential and shall be given precedence over other pending matters so that the court may reach a decision promptly so as to serve the best interests of the pregnant child. An expedited, confidential appeal is also made available under subdivision 6 to any minor for whom the court denies an order.

II. Procedural History

Plaintiffs' [3] chronology of events at pp. 2-6 of their brief is substantially accurate and adequate save for its description of the rulings of the district court.

[3] The parties will be referred to in this brief by their posture in the district court where petitioners were plaintiffs and respondents were defendants.

In an order issued January 23, 1985, the district court granted partial summary judgment for defendants, dismissed all of plaintiffs' claims that the Minnesota statute, with the judicial bypass procedure of subdivision 6 in effect, was facially invalid or violated equal protection standards, and ordered all such claims dismissed. 146a-157a. In granting summary judgment, the district court acknowledged that this case was controlled as a matter of law by this Court's decisions in *Bellotti v. Baird*, 443 U.S. 622 (1979) (*Bellotti II*); *H. L. v. Matheson*, 450 U.S. 398 (1981); and *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983). The district court held that:

> The requirement of parental consent is more of a burden on a minor's right to choose an abortion than a requirement of parental notification. Thus, any parental notification/judicial bypass procedure which meets the Supreme Court's constitutional test established for parental consent/judicial bypass procedures is constitutional. . . . The Supreme Court, however, in *Bellotti II* suggests that a state may require a pregnant minor to obtain both parents' consent to an abortion as long as it provides an alternative procedure whereby authorization for the abortion can be obtained. *Bellotti II, supra*, 443 U.S. at 648-49. Accordingly, this court sees no constitutional infirmity with a two parent notification requirement.

151a.

Thus it is clear, and defendants reasonably believed, that trial in this matter was not to be held to explore through alleged "evidence" the correctness of the legal principles recognized by this Court in *Ashcroft* and *Bellotti II*. Nor did it appear that the supposed "burden" imposed by the underlying requirement of advance notice to both parents was to be tried

as an issue of fact insofar as it relates to the functioning of the Minnesota law.

What was reserved by the district court for trial was the question of whether the Minnesota judicial bypass system functioned in accordance with the *Bellotti II* standards.

> [T]he court is of the opinion that there are genuine issues of material fact in dispute on this claim and that defendants have failed to show that plaintiffs are not entitled to recover under any discernible circumstances. Specifically, plaintiffs have identified disputed issues of material fact relating to confidentiality, delays and inconvenience, and lack of access to the courts in rural counties. This list of material facts in dispute is not all inclusive. The court, at this moment, cannot accept defendants' contention that plaintiffs have presented only immaterial and anecdotal factual issues.

153a.

Upon these factual issues which *were* framed for trial, defendants were entitled to, and did, prevail.[4] The district court specifically concluded as follows:

> [Accordingly, the court concludes that the] judicial bypass procedure created by Minn. Stat. § 144.343(6), as presently executed by Minnesota courts and the other offices that participate in the bypass proceedings, complies with the procedural requirements set forth in *Bellotti II* and approved in *Ashcroft*. Therefore, the court must reject plaintiffs' challenge to Minnesota's notification/bypass requirement as a whole.

---

[4] *See* Findings of Fact, Conclusions of Law and Order of the district court dated November 6, 1986, Findings No. 30-42, 17a-20a; Conclusions of Law, 44a-45a.

45a. (Bracketed material omitted from appendix.) Unaccountably, however, the district court, notwithstanding its conclusions of law upon summary judgment, invalidated the entire statute because it felt that the State had an obligation to prove that the forty-eight hour waiting period and the two-parent notice requirements were not unduly burdensome despite the availability of judicial dispensation. The district court concluded that the forty-eight hour waiting period could be severed but that the two-parent notification requirement could not.

III. Facts

A. Implementation And Operation Of the Minnesota Judicial Bypass System.

On July 31, 1981, the district court temporarily restrained enforcement of the parental notification requirement standing alone but denied plaintiffs' motion for an order temporarily restraining enforcement of the parental notification requirement operating in conjunction with the court bypass option. J.A. 31.[5] Thereafter on March 22, 1982, the district court issued a preliminary injunction to the same effect. By virtue of these two rulings, the judicial bypass procedure of subdivision 6 went into effect on August 1, 1981.[6]

---

[5] Page references with the prefix "J.A." refer to the parties' Joint Appendix.

[6] On August 13, 1981, the Minnesota Supreme Court issued an order directing that judicial bypass petitions under subdivision 6 of the parental notification statute be filed and considered by the various county courts throughout the state or, in the cases of Hennepin and Ramsey Counties, in the juvenile division of the district court of each of those two counties. By the same order, the Minnesota Supreme Court directed that all appeals should be on the record to a judge of the district court, including the district courts of Hennepin and Ramsey Counties. D. Exh. 62, J.A. 482. In a subsequent order effective July 1, 1984, the Minnesota Supreme Court provided that, in a unified judicial district, an order denying a judicial bypass petition shall be appealable on the record to two district court judges, and if there be a division between those judges, the order denying the petition shall stand. D. Exh. 62A,

As set forth in the appendix to the district court's final order, from August 1, 1981 to March 1, 1986, 3,573 petitions were brought by pregnant minors pursuant to the judicial bypass procedure of subdivision 6.[7]

On a state-wide basis, a total of six petitions were withdrawn before a hearing. There is no evidence that any of the withdrawals was other than the minor's voluntary choice or that the court involved was not prepared to conduct an expedited, confidential hearing according to the terms of the statute.

A total of nine petitions were denied. There is no evidence to suggest that the denials were other than the result of the petitioner's failure to demonstrate either (1) that she was mature or (2) that an abortion without parental notification would be in her best interests. Indeed, the evidence indicates that the denials were justified.[8] The district court found that

---

[7] The appendix to the district court's final order was omitted from the printing of the district court's final order as it appears in Petitioners' Appendix, at 10a *et seq.*, and is accordingly reprinted as an appendix to this brief at A-1. The appendix to the district court's final order is also reported at *Hodgson v. State*, 648 F. Supp. 756, 781 (D. Minn. 1986).

[8] Four of the denied petitions occurred in the City of Minneapolis (Hennepin County). Of these four petitions, one was denied after the minor told the court that her mother was forcing her to have an abortion; another was denied after the minor stated she did not want the abortion but preferred to get married; and a third was denied when the minor indicated that she was not sure whether or not she wanted an abortion. The fourth petition was initially denied when the minor was unable to express herself

"[w]ith the exception of a single hearing shortly after enactment of § 144.343," judges in Minnesota have applied the standards set forth in subdivision 6 by deciding petitions based upon whether the pregnant minor succeeded in showing either (1) that she is mature or (2) that even if she is not mature, an abortion without parental notification would be in her best interests. Findings 29-32, 17a-18a. Based upon the experience of these thousands of proceedings, the district court further found that judicial bypass hearings in Minnesota were systematically expeditious and that anonymity was carefully safeguarded and breached at all only in a small number of isolated cases. Findings 33-42, 18a-20a.[9]

---

orally and the judge was thus unable to make a determination as to her maturity or best interest but was later granted upon rehearing a short while later. J.A. 150-53, 240-41, Widseth T. 27-30. Another denial occurred in St. Paul (Ramsey County) when a pregnant minor came to court accompanied by "a 30ish married man who was insisting that she have an abortion." T. 269. The court denied the petition after learning that the minor did not want an abortion and was fearful of her male companion. T. 269, T. 1286. References preceded by "T." refer to portions of the record not printed in the joint appendix. The witness' name also appears where the testimony of that witness is separately paginated.

[9] All judicial bypass proceedings were conducted in chambers or in closed courtrooms. J.A. 150, 156, 168-69, Albrecht T. 15. Court personnel, public defenders and guardians were mindful of the requirement of confidentiality. J.A. 327, 337, T. 273-74. The records of the proceedings were filed and maintained under seal. J.A. 335, Oleisky T. 41, T. 1742. In several cases petitioning minors have happened to have been acquainted with the judge, public defender or guardian *ad litem*. J.A. 206. In addition, one public defender had occasion to represent the stepdaughter of a probation officer and the niece of a judge. J.A. 246-47. However, on those occasions there is no evidence that the court personnel involved breached the confidentiality of the minor involved by communicating the fact of her petition to her parents or to any other third party. J.A. 206-11. Similarly, the public defender who represented the stepdaughter of a probation officer and the niece of a judge was able to make arrangements with the court to have the hearings held in different parts of the courthouse to avoid either of those two minors inadvertently encountering their relatives, and it appears that the confidentiality of these two particular judicial bypass proceedings was also preserved. J.A. 246-47.

[10] Of the 258 minors appearing before a particular Minnesota juvenile court judge in judicial bypass proceedings for the period August 1, 1981 to November 30, 1982, 5% claimed that their parents would force them to keep the child and 4% expressed the fear of the recurrence of physical abuse. P. Exh. 21, J.A. 381.

B. The Requirement Of Parental Notification Operating In Tandem With The Judicial Bypass Option Has Served Important Public Purposes.

1. Many Minors Will Not Voluntarily Initiate Needed Communication With Their Parents About Their Sexual Activity, Pregnancy And Abortion Decision, Even In The Absence Of Any Well-Founded Fear Of Abuse Or Harm.

The record is clear that in many cases minors will not voluntarily consult with their parents concerning their pregnancies or abortion decisions, even in the absence of any well-founded fear of abuse or other harm. While the statute was in effect, only a small minority of Minnesota teenagers sought to avoid notifying their parents on the basis of an apprehension that they would suffer physical abuse or that their parents would somehow prevent the abortion.[10] Moreover, the claims of even this small minority should be discounted to some extent in light of the testimony of a number of witnesses, including Dr. Hodgson, that adolescents often misapprehend their parents' likely reactions in response to their decision to obtain an abortion. J.A. 178-79, 336, 358-60, 473.

Rather than being usually motivated by any well-founded fear of abuse or harm, it appears that a common, if not the

most common, reason for the minor's desire to avoid parental notification is a general fear of damaging her relationship with her parents. P. Exh. 21, J.A. 381-82. This is so even in good, functional families. As plaintiff Meadowbrook's co-director, Paula Wendt, testified, based upon her substantial experience in counseling abortion patients, minors seeking to avoid parental notification commonly explain that desire on the basis of "not want[ing] to ruin a good relationship." J.A. 114. Katherine Welsh, executive director of plaintiff Women's Health Center, testified that minors do not always voluntarily involve supportive parents. T. 428. She explained that she "[has] always found" that her minor abortion patients "hate to destroy the good girl image" and "that is usually why they don't want to tell their father," T. 176, even when the father is loving and supportive. T. 427. Dr. Hodgson herself similarly testified that minors commonly seek to avoid notification as "a matter of love for their parents, and they don't want to spoil the relationship they have with their parents." J.A. 460. Dr. Hodgson also agreed with defendants' experts that notwithstanding the apprehensions of minors, parents are generally supportive in helping a minor deal with an unwanted pregnancy. J.A. 355-56, 473, P. Exh. 92 (Hodgson Depo. July 12) at 187.[11]

In summary, the record appears to be undisputed that, in the absence of a parental notification requirement, many pregnant minors will refrain from notifying their parents of their pregnancy or abortion decision, even in good, functional families where there is no well-founded fear of abuse or harm and even where the unnotified parents could and would be

[11] The trial testimony of Dr. Hodgson by deposition on July 11 and 12, 1985 was admitted as P. Exh. 92.

supportive in providing much-needed assistance to their daughters who commonly face a host of problems.[12]

2. There Was A Substantial Increase In Parental Notification During The Period In Which The Statute Was In Effect.

The frequency of parental notification increased substantially while the statute was in effect. Plaintiff Meadowbrook's co-director Paula Wendt has counseled thousands of minor abortion patients since 1971 and Meadowbrook is by far the largest provider of abortions to minors in the State of Minnesota. She testified that before the statute was enacted approximately 25% of all pregnant minors told one or both parents of their intended abortions. J.A. 113-14, 125-26. Both Ms. Wendt and Dr. Hodgson testified that while the law was in effect only about one-half of their minor patients chose the court bypass option. J.A. 123-24, 460. Since very few minors have been excused under the emancipation or abuse/neglect exemption, it follows that while the law was in effect the

[12] As a number of plaintiffs' experts concede, an unplanned pregnancy is an extremely traumatic event for a minor and subjects her to extreme psychological stress. J.A. 141, 304, 472. "Furthermore, most teenage girls do not focus on the decision whether or not to bear a child or how childbearing will affect their futures until forced to do so by an unintended pregnancy." Brief for Petitioners at 7. Moreover, teenagers who undertake a secret abortion without parental involvement are commonly faced with logistical and practical problems. As plaintiffs themselves have observed, many teenagers fail to recognize early signs of pregnancy and have little experience with the health care system and few financial resources, and Minnesota is a large state with extreme weather conditions in which teenagers might have to hitchhike long distances in order to accomplish a secret abortion. Brief for Petitioners at 10, n.20. These, of course, are all problems for which supportive parents might readily offer logistical, financial and emotional support.

percentage of those notifying both parents roughly doubled from 25% to 50%. Ms. Wendt's testimony concerning the actual *numbers* of court bypass patients indicates an even more dramatic increase in parental notification. From August, 1981 to December, 1985, Meadowbrook had a total of 2,895 minor abortion patients and of that total, 1,160 exercised the court bypass option. J.A. 123. Reducing these figures to a percentage discloses that while the law was in effect the percentage of minors notifying both parents more than doubled, increasing from 25% to roughly 60%.

The head counselor of the Planned Parenthood Clinic, Laura Hunter, testified that, in her opinion, the statute increased parent-child communication concerning pregnancy and abortion in some cases. T. 836-37. Hunter likewise testified that in her experience only 30-33% of pregnant minors had voluntarily told both their parents before being told of the statutory requirement, but approximately 50% of all minors went on to tell both of their parents in order to comply with the statute. T. 789-90.

In light of the foregoing testimony from plaintiffs' own witnesses, the district court's finding that there is no evidence that the Minnesota statute in actual operation has achieved its intended effect of increasing parental notification is clearly erroneous.[13]

[13] Plaintiffs attempt to bolster the erroneous finding by the district court by arguing that the court had interpreted "ambiguous" testimony and also by reference to statements by Thomas Webber, executive director of Minnesota Planned Parenthood, to the effect that over half of Planned Parenthood patients already had full parental involvement prior to the statute's enactment. However, the trial court gave no suggestion that it was "interpreting" conflicting or ambiguous testimony. It plainly although erroneously thought that none of the witnesses had testified to an increase in notification. Furthermore, the sole ambiguity contained in the Wendt testimony is whether the 25% notice level before the law became effective referred to one or two parent notice. *See* J.A. 113, 126. Defendants have given plaintiffs the benefit of any possible doubt in pointing out that notice to both parents more than doubled. If Wendt's actual statement (J.A. 113) that 25 percent told one or both were taken as true, then the increase is even more dramatic. The statements of Webber relied upon by plaintiffs were not admitted into evidence as bearing upon the issue of increase in notification. The statements were made as part of an offer of proof following sustained objections to testimony concerning what Webber and others told the legislature during legislative considerations of the bill. *See generally* T. 605-13. While it appears that the offer of proof was later received, it was not subject to cross-examination nor was it offered to establish an actual pre-statute notification level. Furthermore, even the Webber testimony concedes that approximately 21% of minors who would not otherwise notify their parents, would be willing to do so pursuant to a statutory notice requirement. T. 610. Finally, the statement of Webber, the executive, is directly contradicted by Laura Hunter, head counselor at Planned Parenthood's St. Paul clinic, who indicated that only between 30 and 33% of Planned Parenthood patients voluntarily informed their parents prior to being informed of the statutory requirement. T. 789.

C. The Minnesota Notification Statute Operating In Tandem With The Judicial Bypass Option Did Not Seriously Harm Any Minnesota Teenagers.

1. Not A Single Minor Was Shown To Have Suffered Any Physical Abuse Or Parental Obstruction Of Her Abortion As A Result Of The Statutory Notification Requirement.

Much of plaintiffs' evidence concerning the alleged "burdensomeness" of the parental notification requirement relates to the incidence of "dysfunctional" families and intrafamily violence in the United States generally. The State does not dispute that there exist dysfunctional families in which there is violence or abuse or that there are minors in Minnesota who are victims of violence or who fear violence. Nevertheless, al-

though parents of several thousand minors were notified of their daughters' decision to have an abortion pursuant to the statutory requirement from August 1, 1981 to March 1, 1986,[14] the record fails to reveal a single instance in which any such minor has suffered any violence as a consequence of the notification.

As noted above, a small minority of Minnesota minors have also sought to avoid notifying their parents of the abortion on the basis of an apprehension that their parents would somehow prevent the abortion from occurring. *See* P. Exh. 21, J.A. 381-82. Once again, however, of the several thousand pregnant minors who elected to notify both parents pursuant to the statutory requirement since August 1, 1981, the record fails to reveal a single instance of parental prevention of an abortion.

Notwithstanding her vast experience in providing abortions to minors in Minnesota during the entire four and one-half years when the statute was in effect, Dr. Hodgson herself testified that she was unaware of a single instance in which any minor sought an illegal abortion or attempted a self-induced abortion as a result of the statute. J.A. 475. Dr. Hodgson further testified that in her opinion the law has not had

[14] During this period 3,573 bypass petitions were filed in Minnesota courts. See Appendix to district court order reprinted in the appendix to this brief. Both Dr. Hodgson, J.A. 460, and Paula Wendt, the co-director of Meadowbrook Women's Clinic, J.A. 123, testified that only one-half of their minor patients chose the court bypass option. The actual figures offered by Wendt disclosed that only forty percent of Meadowbrook minors have chosen the court option. J.A. 123. Since relatively few minors have been excused under the emancipation or abuse/neglect exceptions, it is reasonable to conclude that the number of minors that have notified their parents is at least equal to the number that sought court dispensation. *See also* Opinion of the Circuit Court, at 83a n.9.

the effect of causing parents to become violent or to prevent their daughter from having an abortion. *Id.*

2. The Judicial Bypass Procedure Operated Expeditiously.

The district court expressly found that the judicial bypass hearings were generally determined on an expedited basis. 18a-19a. These findings are amply confirmed by the record. As a general matter, minors, if they so desired, could obtain a court hearing within one to three or four days. Finding 43, 20a, J.A. 325-27, T. 142, T. 278, T. 398-99, T. 1986-87. In the vast majority of cases, minors who elected the court bypass option had the abortion on the same day as their hearing. Wendt T. 149-50, T. 174.

In addition, departures from the regular hearing schedule were readily granted when warranted by any exigent circumstances such as minors who would otherwise have faced the increased medical risks and costs of a second trimester abortion or those who had traveled long distances and wished to avoid an overnight stay away from home. J.A. 169-70, 200, 211-13, 283, 286, 326. Minnesota courts also showed themselves to be available to accommodate any emergency hearings if the need should arise. J.A. 239, 283, Albrecht T. 11, T. 527.[15]

Of the 3,573 judicial bypass petitions heard between August 1, 1981 and March 1, 1986, the voluminous trial record fails to reveal a single instance where the proceedings were not completed with sufficient expedition to provide an effective opportunity for an abortion to be obtained.

[15] In one instance, the court in Duluth, Minnesota, conducted a hearing during the Thanksgiving holiday and on another occasion the same court made itself available on a Saturday. T. 370-73. There have been virtually no requests for weekend or nighttime hearings despite the willingness of Minnesota courts to accommodate such requests. T. 277-78.

3. The Minnesota Statute, With The Court Bypass Option In Place, Did Not Involve Medically Significant Delays.

It is undisputed that all other things being equal, it is medically preferable to have an abortion at an earlier gestational age than at a later gestational age. A delay of less than one week is generally not medically significant. Finding 53, 23a. Plaintiff Meadowbrook's co-director Paula Wendt and its co-owner Dr. Horowitz, an experienced abortion practitioner, each testified that there is no significant increased risk of medical complications from week to week within the first trimester and that delays of up to one and one-half weeks within the first trimester do not generally increase the risk of medical complications. J.A. 146-48, 370-73. Because minors, if they so desire, can obtain a court hearing within one to three or four days, it does not appear that any delays associated with the court bypass option would involve any statistically significant medical risks.

At page 14 of their brief, plaintiffs incorrectly assert that the district court found that judicial bypass minors were delayed "one week or more before their abortions," and that such delays were "unavoidable" under the terms of the statute. The district court made no such findings. To the contrary, the district court found that minors "typically" had their hearings within "two or three days" of their first contact with the court. Finding 34, 18a, Finding 43, 20a. With respect to any longer delays, the court simply observed that "[t]his delay may combine with other factors to result in a delay of a week or more." The defendants are unaware of what hypothetical circumstances the district court had in mind in making this observation. As noted above, the vast majority of court bypass

minors had their abortions performed on the same day as their bypass hearing. *See, e.g.*, Wendt T. 149-50.[16]

4. The Record Fails To Reveal That Minnesota Teenagers Suffered Medical Harm As A Consequence Of The Statute.

In any event, the record fails to establish a single instance in which any delay associated with completing the judicial bypass option has resulted in medical complication to any teenager. Moreover, Minnesota public health data disclose no statistically significant increase in medical complications among pregnant minors during the time the statute was in effect. Plaintiffs, in fact, conceded at trial that no medical complications

[16] Plaintiffs cite the experiences of only two class members. Plaintiffs claim that Heather P. and Sharon L. "had to wait two weeks and one and one-half weeks respectively for abortions because of delays attributed to the court bypass system." Brief of Petitioners at 14 n.30. These assertions are not borne out by the record. Heather P. did *not* testify that the court bypass procedure delayed her for two weeks. Rather, she merely testified that it was "probably" about two weeks between her mother's first call to the clinic and the subsequent court hearing and abortion. When asked to explain why this two week period elapsed, she indicated that she really didn't know and thought that perhaps it had something to do with her mother's work schedule. Heather P. T. 41. In fact, she had her abortion the very same day as the court hearing without any medical complication. *Id.* 47. Sharon L. merely testified that a week or a week and a half elapsed between the time she contacted the clinic and the day she went to court. She offered no testimony as to when the court appointment was requested nor did she testify that an earlier appointment was asked for. T. 725. Moreover, Sharon L. was only eight weeks pregnant at the time and thus was able to get a safe first trimester abortion without medical complication. T. 713.

had resulted from any delays allegedly caused by the law. J.A. 348.[17]

5. The Record Fails To Demonstrate That Minors Were Made To Undergo Second Trimester Abortions As A Result Of The Time Necessary To Complete The Judicial Bypass Procedure.

Plaintiffs falsely assert that the statute dramatically increased the proportion of minors obtaining second trimester abortions in Minnesota. Brief for Petitioners at 13-14. The district court made no such finding, and the record refutes this claim. Plaintiffs base the claim upon a misleading comparison

[17] Plaintiffs refer to the testimony of Katherine Welsh that two or three court minors vomited before or after their hearing. Brief for Petitioners at 9 n.16. Welsh acknowledged, however, that vomiting is a common symptom of pregnancy and she could not say whether the vomiting episodes were in fact caused by the court bypass process. T. 376-77. Plaintiffs refer to the testimony of Dr. Hodgson that she has had occasion to prescribe sedatives for court bypass minors. Brief for Petitioners at 9 n.16. Welsh testified, however, that although she has observed Dr. Hodgson prescribing valium for court bypass minors, her clinic also frequently prescribes valium for non-court minors. T. 382. Plaintiffs refer to the testimony of Welsh that on one occasion she thought that one minor was about to spontaneously abort during the court process. Brief for Petitioners at 9 n.16. Once again, however, there is no evidence in the record to indicate that the court bypass process caused this to occur or that its occurrence during the court process was other than mere coincidence. In addition, there is nothing in the record to indicate that this particular minor could not and did not receive timely medical attention. Plaintiffs have also argued in this litigation that laminaria, although medically indicated in some cases, cannot be used on patients who must go to court in Duluth and need to get their abortions done on the same day. Dr. Hodgson testified, however, that in the vast majority of laminaria cases, the minor has to be sent home overnight before completion of the abortion without regard to the judicial bypass. Hodgson Depo. July 12, 91-92.

of 1978 and 1983 data in a chart prepared by plaintiffs from abortion data maintained by the Minnesota Health Department. P. Exh. 122, J.A. 477. In direct contradiction to the assertion made by plaintiffs, the chart reveals that a substantial increase in the proportion of minors' second trimester abortions occurred *before* the statute took effect and that the proportion of such second trimester abortions actually *decreased* when the notice/bypass law was first enforced. Specifically, the data show that in 1980, the year immediately before the statute went into effect, 21.9% of the Minnesota resident minors who obtained abortions received second trimester abortions. In 1982, the first full calendar year after the statute went into effect, the proportion of second trimester abortions *declined* to 20.6%. The chart also shows that between 1979 and 1980—the years immediately prior to the statute—the proportion of second trimester abortions increased 3.2 percentage points (or 17.1%) from 18.7% to 21.9%. Thus, if there was a trend toward a greater percentage of later, second trimester abortions, it pre-dated the statute and was more pronounced before the statute was implemented than afterwards. The trend, therefore, cannot be attributed to the operation of the statute. In any case, Minnesota Health Department data reveal that average gestational age for minors undergoing abortions in Minnesota did not increase at all for the period 1980 through 1983.[18]

Plaintiffs are also incorrect in asserting that the district court found that a one-week delay was "unavoidable" under the judicial bypass procedure or that the judicial bypass procedure pushed some minors into the second trimester. Brief for Peti-

[18] The average gestational weeks for minors (patients 17 and under) was 10.73 weeks in 1980, 10.41 weeks in 1981, 10.36 weeks in 1982, and 10.73 weeks in 1983. D. Exh. 35, J.A. 481.

tioners at 14. To the contrary, the district court merely observed that even delays of less than one week "*may* push the minor into the second trimester." Finding 43, 20a, Finding 53, 23a. This observation by the district court involves no more than the obviously true proposition that a delay, however short, may possibly put any given minor into the second trimester if she were to seek to exercise the judicial bypass option on the very eve of the second trimester of her pregnancy.

In connection with their assertion that the judicial bypass procedure put some unspecified number of minors into the second trimester, plaintiffs cite only four cases involving some degree of unusual delay. These isolated cases do not support the proposition that court bypass delays commonly pushed minors into the second trimester. Kathy M. obtained a first trimester abortion, J.A. 274-75, and Bonnie L. and the unidentified Meadowbrook patient described in the hearsay testimony of Meadowbrook co-director Paula Wendt were already in their second trimester *before* seeking a bypass. J.A. 93, 137-38. Moreover, in these four cases at least part of the delay was attributable to the minor's preference or occurred to suit plaintiff Meadowbrook Clinic's schedule.[19]

[19] For example, Cynthia J. contacted the court on January 27 or 28 and made an appointment for February 9 *without* asking for an earlier appointment. J.A. 90-91. After her petition was granted on February 9, she did not make an appointment to have her abortion performed until February 16, by which time she was approximately 15 weeks pregnant. J.A. 83-84, 92. Similarly, although Paula Wendt testified that the hearing of one of her minor patients did not occur until eleven days after visiting Meadowbrook, there was no testimony that this 11-day delay was caused by the court's inability or unwillingness to schedule a more prompt hearing. J.A. 138. For example, an assistant with the Hennepin County juvenile court testified that minors sometimes select hearing dates to suit their own convenience and recounted how one minor asked for a court date more than three weeks from the date of her request. J.A. 327.

Moreover, each of these four particular minors was able to get her petition heard and decided with sufficient expedition to provide an effective opportunity for an abortion to be obtained, and the record fails to contain any evidence that any of these four minors or any others suffered any medical harm as a result of any delay associated with completing the judicial bypass procedures. Furthermore, these four instances of delay appear to be atypical.

6. There Has Been No Showing That Minnesota's Parental Notification Requirement Operating In Tandem With The Judicial Bypass Option Forced Any Teenagers Into Unwanted Motherhood.

The assertions in plaintiffs' statement of the case that the Minnesota statute forced Minnesota minors into involuntary motherhood or "stunted" anyone's life is without support in the record. The voluminous trial record fails to reveal a single instance in which any minor was prevented from obtaining an abortion and thus caused to carry to term by virture of the operation of the Minnesota statute.

Nor is there any finding or convincing evidence that supports plaintiffs' suggestion that the notification law caused an increase in births among teenagers in the City of Minneapolis. Brief for Petitioners at 12. In the period 1980 through 1984 the birth rate in Minneapolis in the age group 15-17 increased more than the birth rate for the age group 18-19. P. Exh. 116. These data fail, however, to demonstrate any sort of causal connection between these rising birth rates and the operation of the Minnesota statute or that the statute has caused pregnant minors not to seek abortions.

The birth rate is simply the number of live births per thousand population, P. Exh. 116, and does not contain any implication as to the number of abortions. By contrast, the Minneapolis data show a more comparable decline in the abortion rate and in the pregnancy rate for the period immediately before and after the enactment of the statute, both in the age group 15-17 and in the age group 18-19 which is not affected by the statute.

Moreover, there is no reason to believe that the Minneapolis data concerning birth and abortion rates is representative of Minnesota at large. Pregnancy, birth and abortion rates are substantially influenced by cultural, religious and socioeconomic factors which are substantially different in Minneapolis than the remainder of Minnesota. J.A. 344-45.

Finally, a number of witnesses testified that it would be speculative to attribute changes in such complex social phenomena as abortion and birth rates to the statute. J.A. 343-44, 369-70. Dr. Butzer, a child psychiatrist, who appeared as an expert on behalf of plaintiffs, testified that more widespread use of contraceptives, increasingly negative attitudes about abortions among teenagers, and heightened awareness of the dangers of sexually transmitted diseases have all been observed in Minnesota in the past several years and that these attitude changes among the teenage population are equally plausible explanations for any observed decline in the abortion rate. J.A. 301-04.

7. The Judicial Bypass Option Was Available To All Pregnant Teenagers Since The Enactment Of The Statute.

Plaintiffs' assertion that the judicial bypass was not an option "for many teenagers" (Brief for Petitioners at 23-24) is likewise unsupported by the record.

In support of their assertion, plaintiffs refer to the testimony of some state court judges to the effect that judicial bypass petitioners tended to be "white, middle to upper-middle-class kids." Though not explicitly stated, plaintiffs' implication appears to be that poorer, non-white teenagers were unable to secure a judicial bypass. As noted above, however, pregnancy, birth and abortion rates are substantially influenced by cultural, religious and socioeconomic factors. J.A. 344-45. Moreover, the minority population of the State of Minnesota is relatively low, and there was no evidence that the demographic profile of court bypass minors differed from that of minor abortion patients generally. Accordingly, there is no basis to suppose that the judicial bypass option was not generally available to Minnesota teenagers irrespective of race or socioeconomic status.

Plaintiffs have also exaggerated the record in stating that minors uniformly testified that they found the court procedure anxiety-provoking. The record does reflect that minors have experienced varying degrees of apprehension in attending judicial bypass hearings. There is abundant evidence, however, that the judicial bypass hearings have not been overwhelming experiences for minors generally. For example, in Hennepin County, which has had by far the most experience in applying the statute, the tone of the hearing is non-threatening, J.A. 341-42; a friendly atmosphere is created by the court personnel, J.A. 334-35; petitioners are more composed than others appearing in juvenile court, J.A. 170; and only a small minority are visibly upset at all, Albrecht T. 12. The experience of Ramsey County, the second most common venue for judicial bypass proceedings, has been similar. The juvenile court of Ramsey County has made every effort to make petitioners feel comfortable. J.A. 187-88. Ramsey County

petitioners typically have a "normal" demeanor, they are generally not visibly distraught and crying is very unusual. J.A. 286-87.[20]

Nor is there any substantial support in the record for plaintiffs' claim that inaccessibility or lack of resources placed the judicial bypass out of the reach of any minors. Abortion providers are readily available in only five Minnesota counties, 14a, whereas the court bypass system is available to minors throughout the state. If minors have the resources to utilize these abortion providers, there is no reason to believe, absent specific evidence to the contrary, that they would not have the resources to avail themselves of a judicial bypass hearing.

8. Plaintiff Abortion Providers Prevent Their Minor Patients From Taking Full Advantage Of The Available Statutory Exceptions.

Plaintiff Meadowbrook has been the leading provider of abortions to minors in Minnesota, having performed 2,895 such abortions in the period between August, 1981 and December, 1985. J.A. 123-24. It appears, however, that Meadowbrook has systematically deprived its patients of otherwise available statutory exemptions from the requirement of parental notification by misinforming them as to the nature of both the abuse and the emancipation exceptions.

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[20] In support of their assertion that minors "uniformly" find the court procedure anxiety-provoking, plaintiffs quote from the testimony of two minors, Clara Z. and Rose C. to the effect that the proceedings made them feel as if they had done something wrong. Brief for Petitioners at 24 n.53. It must be borne in mind, however, that of the state-wide total of 3,573 judicial bypass petitions, the entire record contains the testimony of only six minors who described the proceedings as accusatory in any sense. *See* P. Exh. 95 at 10; P. Exh. 97 at 7; P. Exh. 98 at 23; P. Exh. 108 at 18; P. Exh. 111 at 8; J.A. 221.

Although Meadowbrook informs inquiring minors that there is no need for parental notification or a court order in cases of sexual abuse, it routinely refrains from advising minors that the statutory abuse exception also applies in cases of physical abuse or neglect, even though it is specifically aware that such cases also fall within the statutory exception. Wendt T. 163-66; P. Exh. 70A, J.A. 429. Moreover, even where a minor reports that she is the victim of sexual or physical abuse or neglect, Meadowbrook requires such minors to obtain a judicial bypass order unless she has also *previously* reported the abuse to a child protection agency and that agency has already made "a determination" of the abuse allegation, even though the statute does not prescribe such preconditions. J.A. 149-50, Wendt T. 184. Furthermore, it appears that in Duluth, as well, exempt minors have been unnecessarily sent to court. *See* testimony of Judge Martin, Petitioner's Brief at 19, n.42; J.A. 204.

It likewise appears that Meadowbrook does not permit its minor patients to take full advantage of the emancipation provisions contained in Minn. Stat. §§ 144.341 and 144.342 which provide that notwithstanding any other provision of law, any minor who is living separate and apart from parents, regardless of the duration of such separate residence, and any minor who is married or has a child and who is managing financial affairs, may give effective consent to medical services without the consent of any other person. Although Meadowbrook considers a minor emancipated if she lives away from home and is self-supporting, Meadowbrook unilaterally imposes a "stricter" standard by requiring that the minor "have lived away from home for at least six months and bring . . . copies

of her rent receipts, utility bills and paycheck stubs." Wendt T. 50.[21]

9. The Record Fails To Confirm That The Parental Notification Requirement Of The Minnesota Statute Was "Especially Disastrous" In Single Parent And Abusive Family Situations.

One of plaintiffs' experts, Dr. Walker, alluded to studies that revealed that the incidence of violence in abusive, dysfunctional families is more frequent in pregnancy, immediately following childbirth and during adolescence. J.A. 193. Notwithstanding such studies, however, there is no evidence in the record that any such violence in fact occurred as the result of the Minnesota statute. Although more than 3,500 minors have notified both of their parents since the statute has been in effect, the record fails to reveal a single instance in which such notification has provoked any violence or physical abuse on the part of the involuntarily notified parent in any single parent or abusive family situations.[22]

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[21] By way of contrast, the Midwest Health Center Clinic, which does far fewer abortions, correctly recognizes that the statutory exception extends to cases of physical abuse as well and that there is no requirement that the abuse either has been previously reported to or its existence determined by any child protection agency. P. Exh. 73, J.A. 436-37. Unlike Meadowbrook, the Midwest Health Center Clinic likewise recognizes and advises its patients that the emancipation exception applies to minors who are married or have borne a child. *Id.*, J.A. 435.

[22] In arguing that minors from broken or dysfunctional homes met with delays in complying with the statute, plaintiffs refer to a situation where a minor allegedly suffered a two-week delay because the notified father refused to acknowledge paternity. Brief for Petitioners at 15. The statute, however, imposes no requirement of written authorization or acknowledgement of paternity.

SUMMARY OF ARGUMENT

In Case No. 88-1309, defendants argue that a parental notification requirement represents a reasonable balance between recognition of the strong and proper interests of the state and parents in relation to the ultimate rights of minors to make the abortion decision and, therefore, that there is no constitutional imperative for such a requirement to be accompanied by a judicial bypass alternative. Even if it be decided, however, that a parental notification requirement standing alone is not permissible, the Minnesota statute should be found to be constitutional when operating in tandem with a court bypass system which, both on its face and in actual practice, meets the standards set forth by the Court for more stringent parental consent statutes.

Nor have plaintiffs presented new facts which should lead this Court to overrule already established constitutional standards regarding the legitimate scope of parental involvement in the abortion decisions of minors. Contrary to the inaccurate, misleading and exaggerated statements in plaintiffs' brief, the operation of the Minnesota parental notification requirement with the court bypass alternative available has not resulted in "disasters" and has not been shown to have seriously harmed pregnant minors seeking abortions in Minnesota. Plaintiffs concede that there was not a single medical complication caused by operation of the statute, and no Minnesota teenager was shown to have been forced into unwanted motherhood as a result of the statute.

If, for some reason, the statute as written cannot pass constitutional muster even with the judicial bypass option in place, the portions found by the district court to create an unnecessary burden, should be severed. That action has been

expressly called for by the Minnesota Legislature and can be accomplished without otherwise interfering with the operation of the statutory scheme.

ARGUMENT

I. THE DECISION OF THE EIGHTH CIRCUIT UPHOLDING THE MINNESOTA NOTICE/BYPASS STATUTE IS CONSISTENT WITH STANDARDS ALREADY ESTABLISHED BY THIS COURT AS A MATTER OF LAW.

The constitutional privacy right declared in *Roe v. Wade*, 410 U.S. 113 (1973), has never been considered absolute or unqualified. *Id.* at 154; *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 60-61 (1976). Thus in its most recent decision concerning abortion, a majority of the members of the Court appear to conclude that a regulation of abortion is permissible if it is reasonably designed to further a "legiti-mate" state interest and does not unduly burden the abortion process. *Webster v. Reproductive Health Services*, 57 U.S.L.W. 5023, 5031 (U.S. July 3, 1989) (plurality opinion of Rehnquist, C.J., White, J., and Kennedy, J.); *id.* at 5033 (O'Connor, J., concurring); *id.* at 5034 (Scalia, J., concurring).

While much remains uncertain concerning the permissible scope of state statutes touching upon abortion, this Court has clearly established that parents and society at large both have strong, legitimate and long standing interests in promotion of parental involvement in important matters involving their minor children, including abortion. The Eighth Circuit's decision upholding Minnesota's notice/bypass statute is consistent with the Court's clearly established standards, and should therefore be affirmed.[23]

[23] Defendants do not argue that *Roe v. Wade* should be overturned.

In numerous cases this Court has recognized the "cardinal" principle that parental involvement in the care and nurture of children is vital to the very structure of our society. *See, e.g., Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925); *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972). This cardinal principle is equally applicable to issues involving health care for a child,[24] including abortion. *See Bellotti v. Baird*, 443 U.S. 622 (1979) (*Bellotti II*); *H. L. v. Matheson*, 450 U.S. 398 (1981); *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983).

Despite the strength of these cardinal principles, however, this Court has determined that in light of what was viewed as the "unique" and "nonpostponable" nature of the abortion decision, a state may not go so far as grant a parent "an absolute and possibly arbitrary veto over the [abortion decision of a minor.]" *See Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976). In Case No. 88-1309, defendants have argued that the requirement of mere parental notification gives no one a veto power, either explicitly or implicitly, and that, in contrast to *Danforth*, it is constitutionally permissible to strike a balance between the "rights" of minors ultimately to obtain abortions and the strong interests of the state and parents in the care, nurture and raising of minors by requiring that those persons to whom our society, legal system and constitution have committed the care and upbringing of children have a reasonable opportunity to *know* critical, stressful and potentially hazardous situations facing their child. Even if it be held, however, that a state may not require even parental notice without some form of situational avoidance procedure, it is clear that the Minnesota statute is constitutional when operating in tandem with a court bypass system which, both

[24] *See, e.g., Parham v. J.R.*, 442 U.S. 584 (1979) (hearing not required prior to parents admitting children to mental health facilities).

on its face and in actual practice, meets the standards set forth by the Court for more stringent parental consent statutes.

While *Bellotti II* found invalid a Massachusetts law requiring parental *consent* for minors' abortions and providing for a form of court bypass procedure, Justice Powell, in announcing the judgment of the Court with the concurrence of three other Justices, went on "to provide some guidance as to how a state constitutionally may provide for adult involvement . . . in the abortion decisions of minors."[25]

> . . . We therefore conclude that if the State decides to require a pregnant minor to obtain one or both parents' consent to an abortion, it also must provide an alternative procedure whereby authorization for the abortion can be obtained.
>
> A pregnant minor is entitled in such a proceeding to show either: (1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests. The proceeding in which this showing is made must assure that a resolution of the issue, and any appeals that may follow, will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained. In sum, the procedure must ensure that the provision requiring parental consent does not in fact amount to the "absolute, and possibly arbitrary, veto" that was found impermissible in *Danforth*.

Id. at 643-44 (footnotes omitted).

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[25] *Bellotti II*, 443 U.S. at 651-52, n.32.

The concurring opinion of then-Associate Justice Rehnquist underscores the intent of the plurality to establish, as a matter of law, criteria upon which states and lower courts could rely in enacting and identifying constitutionally valid statutes calling for parental involvement in minors' abortions. *Id.* at 651-52.

The applicability of the *Bellotti II* plurality standard as a matter of law in judging parental consent statutes was subsequently confirmed in *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983). In that case, Justice Powell noted that "the relevant legal standards with respect to parental-consent requirements are not in dispute." *Id.* at 490. *See also id.* at 505 (O'Connor, J., concurring in part and dissenting in part).

Furthermore, in the only case to consider a statute merely requiring parental notice the Court upheld a Utah statute requiring parental notice, but withheld judgment upon whether that requirement could be applied to a girl who was mature or emancipated. *H. L. v. Matheson*, 450 U.S. 398 (1981). It is clear, however, that a majority of the Court supported the concept of parental notification, at least if a court bypass option is available. *Id.* at 413-20 (Powell, J., with Stewart, J., concurring). *Id.* at 420-25 (Stevens, J., concurring).

These cases clearly demonstrate the constitutional principle that a state may require parental involvement, even parental consent, if it also provides an expeditious, anonymous procedure whereby a minor can demonstrate either sufficient maturity or "best interest" to permit avoiding that involvement. Nothing in the Court's holdings in these cases has contained the slightest hint that their validity is dependent in any way upon state-by-state factual proof that parents in the state are really concerned with welfare of their children, or that their

involvement in the life crises and decisions of their children really serves a proper and compelling purpose. To the contrary, these cardinal and fundamental principles are taken as established beyond dispute.

As pointed out above, the district court found, after a complete trial that the Minnesota statute with the bypass system in place conformed, both on its face and as applied, with these standards. 146a-57a, 17a-20a. The court concluded that Minnesota judges, hearing over 3,500 petitions, applied the appropriate legal standards, and the proceedings were, on the whole, properly expeditious and anonymous. 44a-45a.

In upholding the Minnesota law, the Eighth Circuit Court of Appeals has merely applied the legal standard established by this Court to the relevant facts found by the trial court. Therefore, this case does not present an appropriate occasion for the Court to rekindle uncertainty in the states and lower courts concerning the reliability of the Court's holding on such an issue.

II. THIS CASE PRESENTS NO NEW "FACTS" WHICH SHOULD LEAD THIS COURT TO OVERRULE ALREADY ESTABLISHED CONSTITUTIONAL STANDARDS REGARDING THE PERMISSIBLE SCOPE OF PARENTAL INVOLVEMENT IN THE ABORTION DECISIONS OF MINORS.

Plaintiffs assert that considering the effect of the statute "in actual operation" should lead this Court to overturn it despite the fact that it conforms in all respects with the principles articulated in *Bellotti II*, *Matheson* and *Ashcroft*. The record of the statute in operation, however, provides no new basis to retreat from those principles.

In pursuit of their "as applied" argument, plaintiffs cite two sorts of cases. One line, exemplified by *Carey v. Population Services Int'l*, 431 U.S. 678 (1977) and *First National Bank v. Bellotti*, 435 U.S. 765 (1978), really do not address examination of a statute as applied at all. Rather, they indicate that in the case of facial examination of certain government restrictions, the government may be required to demonstrate a proper nexus between a public purpose sought to be served and the mechanism of regulation. From these cases, plaintiffs leap to the conclusion that the Minnesota law should be struck down because (they claim) the State did not prove at trial that the law actually achieved its goals in an unspecified quantity of cases. This argument is spurious.

The authority of a state to enact a statute requiring parental involvement and even consent has been confirmed by this Court, as a matter of legal and constitutional principle. *Compare First National Bank v. Bellotti, supra*, 435 U.S. at 790, where this Court suggests that a statute may be justified as well by arguments which are either inherently persuasive or supported by precedents of the Court. This Court has already confirmed that statutes requiring parental consent or notice are properly related to a sufficient state purpose. It is unreasonable in this context to assert after trial that the statute should be held invalid because the State did not factually reestablish the basis for this Court's prior opinions in the matter of parental involvement in minors' abortions. Indeed, to adopt plaintiffs' argument would utterly destroy the concept of *stare decisis*. No litigant could safely rely on established precedent but would have to reprove the factual and policy bases for each case relied upon.

Furthermore, the support for the Minnesota statute is both

inherently persuasive (*i.e.* parents, whom even plaintiffs concede are generally helpful and supportive, cannot be of any use to a child in trouble if they have no knowledge of the trouble) and supported by the record. *See* pp. 6-12 *supra*.

The second line of cases cited by plaintiffs are more in keeping with traditional "as applied" analysis. That is, they permit inquiry into whether a law, valid on its face, is either being administered in a way, or is achieving a result, previously identified as unacceptable. *See, e.g., Bowen v. Kendrick*, 108 S. Ct. 2562, 2580 (1988); *Buckley v. Valeo*, 424 U.S. 1, 97 (1976). With respect to this "as applied" analysis, it is clear that the statute was in fact administered in accordance with the standards previously established by this Court and that no harm or alleged burdens were shown to have occurred in Minnesota which had not been previously considered by the Court.

In the very first paragraph of their argument, plaintiffs make the incredible assertion that "[t]he disastrous impact of this law on the health and lives of the plaintiff classes is undisputed." Brief of Petitioners at 27. Not only has this point been consistently and vehemently disputed throughout the history of this litigation, it is clear that despite the length of the trial and the size of the record, plaintiffs failed to demonstrate any "disastrous" consequences to any real minors of the plaintiff class. Indeed, when pressed on the matter of adverse health results of the statute's operation, counsel for plaintiffs expressly conceded that there were no adverse medical complications to any member of the plaintiff class as a result of any delays associated with compliance with the statute. J.A. 347. In fact, while plaintiffs through their clinics had access to virtually all of the abortion patients in Minnesota for over four years of operation of the statute, they were able to pro-

duce no examples of the "disasters" they insist are inherent in the statute. No named class representatives suffered significant adverse health problems as a result of the law. No class representatives were shown to have been physically abused as a result of the statute. No minors were shown to have been forced into unwanted motherhood because of the statute.[26]

Nor has any substantial body of hitherto unknown facts been brought to light in this action which should cause this Court to retreat from the constitutional doctrine established by *Bellotti II*, *Ashcroft* and *Matheson* that a state may require parental involvement, even parental consent, if it also provides an expeditious, anonymous procedure whereby a minor can demonstrate either sufficient maturity or "best interest" to avoid that parental involvement. To the contrary, plaintiffs' evidence does little more than reiterate matters of fact and opinion already considered by this Court in prior decisions setting forth the standards for parental involvement in minor children's abortions.

As was recognized by the Eighth Circuit, the cases of *Bellotti II*, *Matheson* and *Ashcroft* were not decided in an in-

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[26] Even if it were to be proven that, as a consequence of the Minnesota law, some minors elected to give birth rather than undergo an abortion, that would not in any sense establish that anyone was *forced* into unwanted motherhood unless one accepts the unstated and plainly absurd assumptions that every decision to give birth is coerced and motherhood is, by definition, unwanted.

However, as Justice Powell recognized in *Bellotti II*:

> [A]n abortion may not be the best choice for the minor. The circumstances in which this issue arises will vary widely. In a given case, alternatives to abortion, such as marriage to the father of the child, arranging for its adoption, or assuming the responsibilities of motherhood with the assured support of family, may be feasible and relevant to the minor's best interests.

443 U.S. at 642-43.

tellectual or sociological vacuum. 85a. This Court has long been aware of, and has given full consideration to, the claims that some minors may be considered sufficiently mature to make abortion decisions independently,[27] that there may be some parents who wish to obstruct the abortion decision,[28] that some parents may be abusive, and that not all parents would necessarily provide helpful communication and support.[29]

The Court has also considered the "burdens" that a judicial bypass procedure inevitably creates for pregnant minors and has found those burdens to be outweighed by the state's important interests in protecting the well-being of minors. Indeed, in *Ashcroft* the Court held constitutional a judicial bypass statute which conformed to the requirements of *Bellotti II* in the face of uncontradicted testimony that the procedure "might well engender delays of 13 days or more, forcing many minors to pass into a later stage of pregnancy," and despite apparently uncontradicted expert testimony that compliance with the judicial bypass procedure under the Missouri statute would increase the total cost of the abortion procedure for minors choosing the judicial bypass alternative.[30]

Similarly, the Court in *Bellotti II* reviewed uncontradicted expert testimony that any judicial bypass proceeding, even if conducted in the most benign manner, could possibly be inconvenient to a teenager. The plurality was also fully mindful that even a judicial bypass procedure conforming to the stan-

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[27] *See Bellotti II*, 443 U.S. at 628, 653.

[28] *Id.* at 647; *Matheson*, 450 U.S. at 438-39 (Marshall, J., dissenting).

[29] *Matheson*, 450 U.S. at 424 (Stevens, J., concurring) and 438 n.24 (Marshall, J., dissenting).

[30] Reply Brief of Petitioners at 7-8, *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. at 476 (1983).

dards laid down in *Bellotti II* would necessarily involve some procedural difficulties and some delay in the performance of an abortion with increased health risks to the minor.[31] Nonetheless the general rule has been established that a state may require both notice and consent of parents prior to a minor's abortion at least so long as "mature" and "best interest" minors are not subject to absolute veto by their parents.[32]

The record reflects virtually no facts which would call for invalidation of the Minnesota statute, after some five years of operation. Rather, plaintiffs fall back upon the same alleged "burdens" which were already considered in prior cases. Moreover, for all their research and investigation, plaintiffs have failed to identify a single Minnesota minor who was prevented from having an abortion or who suffered any medical harm or parental abuse as a result of either notifying her parents or going to court.

Far from presenting a record which demonstrates that the principles embodied in *Bellotti II* and *Ashcroft* fail in practice, the instant case demonstrates that a statutory notice/bypass system patterned after the *Bellotti II*/*Ashcroft* standards can increase the potential for parental involvement and provide effectively for a judicial alternative without causing constitutionally significant hardships for the minors involved.

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[31] Brief of Intervenor-Appellee *Planned Parenthood League* at 47-52, *Bellotti v. Baird*, 443 U.S. 622 (1979).

[32] *Bellotti v. Baird*, 443 U.S. 622 (1979); *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983); *H. L. v. Matheson*, 450 U.S. 398 (1981).

III. THE REQUIREMENT THAT BOTH PARENTS BE NOTIFIED AND THE LENGTH OF THE WAITING PERIOD DO NOT RENDER THE MINNESOTA LAW INVALID WHEN BOTH REQUIREMENTS CAN BE AVOIDED BY RESORT TO THE COURT BYPASS OPTION.

Plaintiffs argue that the 48 hour length of the waiting period and the requirement that both parents be notified render the Minnesota statute unconstitutional, even when both of these requirements can be avoided by resort to the court bypass option. This argument is likewise without merit.

Minors who elect to have their parents notified by written notice must wait until 48 hours after actual or constructive delivery of written notice. Constructive delivery of mail notice occurs at noon on the regular mail delivery date following mailing. Thus the effective length of the statutory parental notice may in some instances be 72 hours.

With respect to the actual operation of the 48-hour waiting period, the district court found that:

> This statutorily imposed delay frequently is compounded by scheduling factors such as clinic hours, transportation requirements, weather, a minor's school and work commitments, and sometimes a single parent's family and work commitments. In many cases, the effective length of delay may reach a week or more.

Finding 52, 22a-23a.

The court's finding regarding possible delays of a week or more appears to be based upon facts relating to the relative inaccessibility of abortion services in Minnesota. Findings 22-25, 14a-15a. As recognized by the court of appeals, however, it is not apparent from the record how these logistical difficulties would cause the 48-hour notice requirement to result in delays of a week or more. Typically, when a pregnant minor telephones an abortion clinic to arrange an abortion, the operation, in the absence of unusual medical circumstances, is not scheduled to occur sooner than 48 or 72 hours hence. J.A. 146-48, 370-71. Opinion of the Circuit Court, 97a. Accordingly, in such typical cases it does not appear from the record that the fulfillment of the 48 hour parental notice requirement delays the abortion operation at all.[33] In any event, the record fails to establish a single instance in which any delay associated with the length of the parental notification requirement has resulted in medical complication.

The district court further acknowledged that "[s]ome period of mandatory delay between the time of actual or constructive notification of the minor's parent and the abortion itself would reasonably effectuate the State's interest in protecting pregnant minors" and that "[a] waiting period may allow parents to aid, counsel, advise, and assist minors in determining whether to undergo an abortion or to provide the physician with information which may be relevant to the medical judgments involved." Finding 73, 32a. The district court also found, however, that:

> The interest effectuated by the State's 48 hour waiting period could be effectuated as completely by a shorter waiting period. Therefore, to the extent the waiting

[33] For example, the telephone training manual of Meadowbrook Clinic indicates that if a pregnant minor calls on a Monday and reveals that she wishes to comply with the statute by mailed parent notification, the notification is mailed on that same day and the abortion may be scheduled as soon as Thursday. *See* P. Exh. 70A, at p.4, J.A. 433.

> period exceeds that necessary to allow parents to consult with minors contemplating abortion, it fails to further the State's interest in protecting pregnant minors.

Finding 74, 32a. The district court does not otherwise explain the basis of this finding, and defendants are unaware of any evidence in the record to support it.

The two-parent aspect of the notice requirement is likewise not unduly burdensome. Plaintiffs' primary argument that the requirement of notifying both parents renders the statute invalid in situations in which a one-parent notification might be upheld appears to have no firmer basis than plaintiffs' objection to parental notification generally, *i.e.*, that there may exist some parents who may act in an inappropriate fashion.[34]

Plaintiffs do point to a finding by the district court that minors who would voluntarily notify one parent "may be" dissuaded from doing so by the two-parent notice/court bypass alternative, and therefore, this statute somehow undercuts the goal of securing parental involvement. Neither the trial court nor plaintiffs, however, suggest any basis for this plainly irrational statement. Certainly the record of the numbers of minors who have gone to the judicial bypass alternative after having notified one parent does not support the statement.[35] Nor does it make any logical sense whatever. If a minor would, absent any legal mandate, notify one parent voluntarily, it can

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[34] *See* Brief of Cross-Petitioners in Case No. 88-1309 at 16-17.

[35] The district court found that 20-25% of minors seeking court orders to avoid notification had voluntarily notified one parent. 22a. This is about the same proportion that plaintiffs' witnesses indicate would notify a parent absent a statutory requirement to do so. J.A. 113-14, 125-26. See also the testimony of Planned Parenthood Counselor Laura Hunter who indicated that often a girl who had notified one parent would proceed to notify the other upon being informed of the statutory requirement. J.A. 247-48.

only be because she perceives that it is in her interest to do so. Even if we assume that she perceives it undesirable to further notify the second parent, however, no reason is suggested why avoiding notice to that parent would change in any way her perception of the desirability of notice to the first.

Given the Minnesota law with the judicial bypass in operation, if she obtains a court determination that parental notice is not required, she is free to tell one, both or neither of her parents as her own wishes dictate. This is the same position she would be in absent any statute on the subject. Thus, there is simply no evidence or rationale to support the conclusion that the Minnesota law in any fashion creates a deterrent to a minor's voluntarily notifying any parent she may in fact wish to involve.

In any event, even if the requirement that *both* parents be notified or the *length* of the notice period could, in some instances, be seen to impose an unnecessary "burden," this would provide no basis for striking down the notification requirement operating in conjunction with the court bypass option. If it is to be the case that an *ex parte* judicial bypass alternative is a constitutionally required element to a parental notification requirement, this can only be because the underlying notice requirement, standing alone, is occasionally unduly burdensome upon the abortion decision. It is indeed only that assumption which could support the necessity of a bypass option in the first place.

In *Bellotti II* this Court addressed a Massachusetts statute which required the consent of *both* parents for a minor's abortion subject to a court bypass mechanism. Justice Powell's opinion recognizes this fact and finds it permissible if a proper bypass system is available. 443 U.S. at 648-49. Furthermore,

in *Matheson* the Court declined to find unconstitutional a statute which required notice to both parents but provided no specific court bypass option. In neither of these cases did the Court suggest that the state is constitutionally limited to a one-parent requirement.

It is true that neither *Bellotti* nor *Matheson* dealt with a statute containing a specified waiting period. Ironically, the lack of such a waiting period caused the dissenters in *Matheson* to criticize the statute as not well suited to further parental consultation. *See Matheson*, 450 U.S. at 446 (Marshall, J., dissenting).

The type of statute discussed in *Bellotti* contained no set waiting period, because it was a *consent* statute. Therefore, absent the court bypass, the wait could be very brief if consent was forthcoming, or indefinite if it was not. The court bypass requirement was thus imposed to act as a check against the passive arbitrary parental veto of the nonpostponable abortion decision by indefinite withholding of consent.

Like *Bellotti II*, a Minnesota minor could avoid any waiting period at all by obtaining parental consent. Also, as with the *Bellotti* statute, a "mature" or "best interest" Minnesota minor could avoid the 48-hour notice requirement by the court bypass mechanism. Unlike the *Bellotti* statute, however, a Minnesota minor was never subjected to indefinite delay caused by parental inaction. She could, in any event, proceed with an abortion after 48 hours from parental notice.

Therefore, inasmuch as the Court has indicated that a state may require consent of both parents with the attendant possibility of indefinite delay, so long as a court bypass option is available, it is anomolous to suggest that the requirement of mere notice to both parents with a delay of 48 hours is more burdensome and may not be redeemed by the same bypass option.

IV. IF THE REQUIREMENT THAT BOTH PARENTS BE NOTIFIED ABSENT A JUDICIAL DETERMINATION RENDERS THE MINNESOTA STATUTE UNCONSTITUTIONAL, THE DISTRICT COURT ERRED IN HOLDING THAT REQUIREMENT NOT SEVERABLE FROM THE REMAINDER OF THE STATUTE CONTRARY TO THE EXPRESS INTENT OF THE LEGISLATURE.

In its decision to enjoin the Minnesota notice/bypass system in its entirety, the district court severed the 48-hour notice feature of the statute, but held the two-parent notice requirement non-severable. The determination of severability of unconstitutional provisions or applications from otherwise valid statutes is essentially a function of divining and giving effect to legislative intent where that can be done without rendering the statutory scheme unworkable or so altering it as to be materially different from that enacted. When dealing with state legislation:

> [The] standard is similar to that which we would apply in determining the severability of a federal statute: " 'Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.' "

Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 506 n.15 (1985) (citations omitted).

In the case of the Minnesota statute here at issue, the clear intent of the Minnesota legislature is expressly stated:

> If any provision, word, phrase or clause of this section or the application thereof to any person or circumstance shall be held invalid, such invalidity shall not affect the

> provisions, words, phrases, clauses or application of this section which can be given effect without the invalid provision, word, phrase, clause, or application, and to this end the provisions, words, phrases, and clauses of this section are declared to be severable.

Minn. Stat. § 144.343, subd. 7 (1988).

It therefore is clear that if the requirement of notification to both parents renders the statute invalid, the legislative intent is that at least one parent should be notified. For the trial court to *wholly* frustrate the legislature upon the assertion that severance of the two-parent language leaves the statute without definition or unenforceable simply ignores the legislative direction.

Plainly, the two-parent definition of "parent" is not inseparably intertwined in the entire fabric of the statute. All operative provisions of Minn. Stat. § 144.343, subds. 2-7, as they relate to the notice or the notice/bypass procedure with a two-parent definition, would operate likewise under a one-parent definition. Indeed, as the statute is presently written, it specifically contemplates one-parent notice where the other parent is dead or cannot be located.

Thus, the entire legislative system for parental notice or notice with judicial bypass could plainly be functional and would address, though not as fully, the same legislative purpose of promoting parental involvement by severing the definition of "parent" insofar as it is said to mean both parents.

Furthermore, the definition of parent in section 144.343, subd. 3, can be readily modified by excision to achieve this

result in sensible and cogent fashion.[36] Alternatively, if the two parent language were too intertwined to suffer removal from the definition, section 144.343 could be carried into effect without any special definition of the word "parent" simply by relying upon the common and approved usage of the term which includes either the mother or father by birth or adoption. Thus, if the "both parents" definition is the unconstitutional feature of the act, the definition may be severed in its entirety to permit effectuation of the legislative intent to the extent constitutionally permissible.

CONCLUSION

In Case No. 88-1309, defendants have urged this Court to reverse the court of appeals' holding that the State of Minnesota may not require advance notice to parents of abortions upon unemancipated, unabused minors. If, however, even this narrow recognition of the compelling interests of the state and parents in the care of children is constitutionally impermissible, it is clear that the Minnesota notice provision coupled with the court bypass option is, in all respects, both on its face and in actual practice, valid in light of the constitutional standards which have been set by the Court for statutes requiring parental consent to minors' abortions. The court of appeals should, therefore, be affirmed upon its decision not to enjoin the statute in its entirety.

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[36] For purposes of this section, "parent" means (BOTH PARENTS OF THE PREGNANT WOMAN IF THEY ARE BOTH LIVING,) one parent of the pregnant woman (IF ONLY ONE IS LIVING OR IF THE SECOND ONE CANNOT BE LOCATED THROUGH REASONABLY DILIGENT EFFORT) or the guardian or conservator if the pregnant woman has one. (Parenthetical material excised.)

Finally, even if the Court were to rule the notice/bypass system invalid due to perceived occasional difficulties arising from either the 48-hour or two-parent features of the notice element of the law, those features can be severed so as to permit the proper legislative purpose to be fulfilled at least in part.

Respectfully submitted,

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota
JOHN R. TUNHEIM
Chief Deputy
Attorney General
CATHARINE F. HAUKEDAHL
Solicitor General
KENNETH E. RASCHKE, JR.
Assistant Attorney General
JOHN B. GALUS
Special Assistant
Attorney General
Counsel of Record
Suite 500
525 Park Street
St. Paul, Minnesota 55103
Telephone: (612) 296-2654
Counsel for Cross-Petitioners

APPENDIX

APPENDIX TO DISTRICT COURT'S FINAL ORDER NOVEMBER 6, 1986

APPENDIX
Petitions
Abortion Notification Statute
Minnesota Statutes § 144.343, Subd. 6,
1981 Supplement
August 1, 1981 to March 1, 1986

Judicial District	No. of Counties	No. of Petitions Filed	No. of Petitions Granted	No. of Petitions Withdrawn	No. of Petitions Denied	No. of Petitions Appealed	No. of Petitions Affirmed	No. of Petitions Reversed
1.	7	78	77	1				
2.	1	793	793					
3.	11	52	51		1			
4.	1	2,314	2,311		3			
5.	15	4	1	1	2	1	1	
6.	4	279	278		1			
7.	10	7	5	2				
8.	13	2	2					
9.	17	6	6					
10.	8	38	34	2	2			
	87	3,573	3,558	6	9	1	1	

Minnesota Statutes (1988)

144.341 [LIVING APART FROM PARENTS AND MANAGING FINANCIAL AFFAIRS, CONSENT FOR SELF.]*

Notwithstanding any other provision of law, any minor who is living separate and apart from parents or legal guardian, whether with or without the consent of a parent or guardian and regardless of the duration of such separate residence, and who is managing personal financial affairs, regardless of the source or extent of the minor's income, may give effective consent to personal medical, dental, mental and other health services, and the consent of no other person is required.

144.342 [MARRIAGE OR GIVING BIRTH, CONSENT FOR HEALTH SERVICE FOR SELF OR CHILD.]

Any minor who has been married or has borne a child may give effective consent to personal medical, mental, dental and other health services, or to services for the minor's child, and the consent of no other person is required.

645.451 [DEFINITIONS, CONTINUED.]

Subdivision 1. The terms defined in the following subdivisions shall have the meanings given them for the purpose of any statute or law of this state now in force, for the purposes of any statute or law hereinafter enacted unless a different meaning is specifically attached to the terms or the context clearly requires different meaning.

Subd. 2. "Minor" means an individual under the age of 18.

Subd. 3. "Adult" means an individual 18 years of age or older.

Subd. 4. "Minority" means with respect to an individual the period of time during which the individual is a minor.

Subd. 5. "Majority" means with respect to an individual the period of time after the individual reaches the age of 18.

Subd. 6. "Legal age" or "full age" means 18 years of age or older.

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* Brackets denote Minnesota Revisor of Statutes headnotes.

(31) (30)

Nos. 88-1125 and 88-1309

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JANE HODGSON, M.D., *et al.*, *Petitioners*,

—v.—

THE STATE OF MINNESOTA, *et al.*, *Respondents.*

THE STATE OF MINNESOTA, *et al.*, *Cross-Petitioners*,

—v.—

JANE HODGSON, M.D., *et al.*, *Cross-Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

WILLIAM Z. PENTELOVITCH
REBECCA A. PALMER
Maslon, Edelman, Borman & Brand
1800 Midwest Plaza
Minneapolis, Minnesota 55402
(612) 339-8015

LINDA OJALA
Kurzman, Grant & Ojala
2445 Park Avenue South
Minneapolis, Minnesota 55404
(612) 871-9004

JANET BENSHOOF
(*Counsel of Record*)
RACHAEL N. PINE
LYNN M. PALTROW
KATHRYN KOLBERT
JOHN A. POWELL
ELLEN K. GOETZ
American Civil Liberties Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800

SIMON HELLER
On The Brief

ROBERT S. HICKS
Minnesota Civil Liberties Union
1021 West Broadway
Minneapolis, Minnesota 55411
(612) 522-2423

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ARGUMENT

I. THE DISTRICT COURT'S FACTUAL INQUIRY WAS CONSTITUTIONALLY MANDATED AND ITS FINDINGS WERE SUPPORTED BY THE EVIDENCE.

A. Contrary To The Assertions Of Both Defendants And The Solicitor General, It Was Proper For The Trial Court To Make Factual Determinations.

In an effort to deflect the attention of this Court from the district court's factual findings, defendants argue that the "validity" of laws like Minnesota's is not "dependent in any way upon state-by-state factual proof" that the state's interests have been served. Brief of Respondents in No. 88-1125 at 31-32.[1] The Solicitor General, on behalf of *amicus* tne United States, goes further, arguing that any time state legislation is grounded on assumptions which are "subjective, value-laden, and contestable . . . it is almost meaningless to inquire as to their truth or falsity." S.G. 26.[2] In so arguing, both defendants and the Solicitor ignore settled principles of law.

Factfinding is vital to the function of the lower federal courts, for a full factual record is essential to the adjudication of constitutional claims. *See, e.g., City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 721-22 (1989); *Bowen v. Kendrick*, 108 S. Ct. 2562, 2582 (1988) (O'Connor, J., concurring); *see also* B.P. 30 n.60. Even when applying the most deferential standards of review, this Court has held that a district court must base its decisions on findings of actual fact. *See, e.g., Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 444 n.19 (1978) ("presumption of validity . . . cannot justify a court in closing its eyes to uncontroverted evidence of rec-

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1 In conformity with the citation format used in plaintiffs' prior briefs, citations to Brief for Cross-Respondents in No. 88-1309 are in the form "B.C-R." Citations to defendants' Brief of Respondents are in the form "B.R." Citations to Briefs of *amici* United States and AAPS are in the forms "S.G." and "AAPS" respectively.

2 The Solicitor goes on to argue that such a factual inquiry "is ultimately an assault on the right of the people . . . to govern themselves." S.G. 26-27.

ord."); *Kassel v. Consolidated Freightways*, 450 U.S. 662, 675-76 (1981) (court cannot ignore evidence regarding the safety of double trailers and defer to the state).[3] *See generally* B.P. 29-31.

These factfinding functions do not change simply because legislative assumptions have been "subjective, value-laden, [or] contestable." S.G. 26.[4] In this case, for example, the legislative judgment at issue is that Minnesota's interest in protecting immature minors will be served by a two-parent notice requirement.[5] Although this judgment may have been "contestable" at the time of enactment, it is not today. The argument that the

3 Such factual determinations are consistent with the proper role of a district court and required to ascertain, for example, whether the state's asserted interests were served by the statute. *Cf. Carey v. Population Servs. Int'l*, 431 U.S. 678, 703 (1977) (White, J., concurring) (concurring principally because the State did not prove that the statute "measurably contributes to the deterrent purposes which the State advances as justification for the restriction.").

4 If this were not true, legislative value judgments such as those about racial or gender inequality would also be unassailable in the courts. Indeed, in *Brown v. Bd. of Education*, 347 U.S. 483 (1954), the state argued that the district court's finding of fact regarding the effect of racial segregation on black children, *see id.* at 483 n.1, was " 'legally insignificant' and immaterial," Henderson, *Legality and Empathy*, 85 Mich. L. Rev. 1574, 1595-96 (1987) (quoting from Kamisar, *The School Desegregation Cases in Retrospect* in Argument 33 (L. Friedman ed. 1969)), because it " 'deals entirely with legislative policy, and does not tread on constitutional right.' " Kluger, *Simple Justice* 572 (1975) (quoting from Transcript of Argument). The Solicitor makes a similar argument today. The argument in *Brown* failed because this Court recognized then, as it has since, that "fixed notions concerning the roles and abilities of [blacks and whites as well as] males and females," *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982), cannot shield a statute from an assessment of the factual record as to the legitimacy of a state's chosen means and objectives. *See generally id.* at 727-31. Accepting the reasoning advanced by defendants and the Solicitor would turn back the clock on a century of legal realism and would leave irrational or even reprehensible legislative value judgments unchallengeable and unreviewed, regardless of "their truth or falsity."

5 Both defendants and the Solicitor imply that plaintiffs seek to impugn legislative value judgments such as those articulated by this Court in *Bellotti v. Baird*, 443 U.S. 622 (1979) (*Bellotti II*). Plaintiffs do not challenge general values, such as the advisability of good parent-child communication on matters of importance; instead, they challenge whether those values have been served by the statute at issue.

district court erred in inquiring into this fact disregards the undisputed duty of federal courts to perform a "searching analysis" of the relationship between legislative means and ends, *Hogan*, 458 U.S. at 728, as well as to determine the actual impact of a law in operation.[6] *See generally* B.P. 29-31.

The Solicitor seeks to discredit the district court's findings by arguing that "constitutional law does not rest on . . . opinions of experts" who "merely camouflage[ ] personal value judgments as impartial truths." S.G. 27. But this attack on the admissibility or reliability of expert testimony is misplaced. This Court has consistently relied on the opinions and research of experts in reaching conclusions of law.[7] Moreover, the dis-

6 Indeed, the Solicitor's argument that the district court erred in considering this evidence, S.G. 26-27, is worthy of Lewis Carroll:

> " 'Herald, read the accusation!' said the King.
>
> On this the White Rabbit blew three blasts on the trumpet and he unrolled the parchment-scroll, and read as follows:—
>
> 'The Queen of Hearts, she made some tarts,
> All on a summer day
> The Knave of Hearts, he stole those tarts
> And took them quite away!'
>
> 'Consider your verdict,' the King said to the jury.
>
> 'Not yet, not yet!' the White Rabbit hastily interrupted. 'There's a great deal to come before that!' "

Carroll, Lewis, *Alice in Wonderland* 97 (Brimax Books Ltd. 1988).

7 Expert testimony is admissible "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue." Fed. R. Evid. § 702. A district court may consider expert testimony even in constitutional cases. Experts may not only give opinions regarding a matter within their expertise, *Rhodes v. Chapman*, 452 U.S. 337, 348 n.13 (1981) (expert opinions "may be helpful and relevant with respect to some questions") (citing *Bell v. Wolfish*, 441 U.S. 520, 543-44 n.27 (1979)), but may also introduce studies and statistics that the court may use in reaching a decision. *See, e.g., United States v. Leon*, 468 U.S. 897, 907 n.6 (1984) (research on the effects of the exclusionary rule); *Craig v. Boren*, 429 U.S. 190, 199-204 (1976) (statistical evidence undermined, rather than supported, State's contention that liquor statute with gender-based age differential served interest in highway safety); *Brown*, 347 U.S. at 494 n.11 (noting studies concerning the psychological effect of racial segregation upon

trict court did not rely primarily on the opinions of experts without personal knowledge. Instead, the court heard and incorporated the evidence provided by a plethora of witnesses who were directly affected by the statute—minors, parents, clinic personnel, state court judges, and court officers. *See* B.P. 29 n.58. Although some of these witnesses were "experts" by training and experience, their testimony was not of the sort which this Court has, on occasion, called into question.[8]

Finally, defendants attempt to annul the district court's findings of fact by arguing that this Court's prior facial cases preclude anything but the most limited judicial review of a parental notice or consent law which has been, in their view, immunized from review by the addition of a facially adequate judicial bypass option. This argument supposes that plaintiffs seek to go beyond the holdings of these cases. To the contrary, however, plaintiffs only ask this Court to apply the holdings in *Bellotti II*, *H.L. v. Matheson*, 450 U.S. 398 (1981), and *Planned Parenthood Ass'n of Kansas City v. Ashcroft*, 462 U.S. 476 (1983),[9] to the facts of this case. B.P. 29-38.

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which this Court relied); *Muller v. Oregon*, 208 U.S. 412, 419 n.† (1908) (noting the reports of experts such as statisticians, commissioners, inspectors, etc.).

8 *See, e.g., Stanford v. Kentucky*, 109 S. Ct. 2969, 2979 (1989). In *Stanford* this Court found that socioscientific evidence regarding the general psychological and developmental characteristics of adolescents was not material to an Eighth Amendment analysis, which requires the Court only to "*identify* the 'evolving standards of decency;' to determine not what they *should* be, but what they *are*." *Id.* (emphasis in original). Where, as here, a court assesses the constitutionality of a law in operation, witnesses with personal knowledge of the impact of the statute may appropriately be relied upon by a district court. While experts on matters such as family violence (*e.g.*, Dr. Lenore Walker) did testify, such testimony was supplementary in nature and served to "assist the trier of fact to understand the evidence" as to the overall impact of Minnesota's law. *See* Fed. R. Evid. § 702.

9 Defendants' suggestion that plaintiffs are seeking the overturn of *Bellotti II* is particularly puzzling in light of defendants' argument that a requirement of notification to both biological parents *without any bypass* is constitutional, despite the requirement established by the plurality in *Bellotti II* that a parental involvement statute "must" allow mature minors and best interests minors to avoid parental involvement, including *notification* to parents that bypass is sought. *See City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 427 n.10 (1983).

In sum, at least since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), the federal judiciary has acknowledged its role in reviewing legislation to protect the constitutional rights of the minority. *See generally West Virginia Bd. of Education v. Barnette*, 319 U.S. 624, 638 (1943). Where a majority favors a particular means of achieving a legislative objective that proves to be unconstitutional in practice, this Court may not evade its duty to uphold the Constitution even as against majority will. *See generally*, *Texas v. Johnson*, 109 S. Ct. 2533, 2548 (1989) (Kennedy, J., concurring) ("[J]udicial power is often difficult in its exercise. We cannot here ask another branch to share responsibility . . . [f]or we are presented with a clear and simple statute to be judged against a clear command of the Constitution. The outcome can be laid at no door but ours.").

B. Defendants' Assessment Of The Evidence Contradicts The District Court's Findings Of Fact, Which Are Supported By The Factual Record And Are Not Clearly Erroneous.

Page for page, line for line, defendants' brief rejects the district court's basic factual finding that the Minnesota statute's two-parent notification requirement, even with a bypass, Minn. Stat. § 144.343(6) ("subdivision 6"), failed to "further[ ] in any meaningful way" any of the purposes which *Bellotti II* found to be significant.[10] 29a. Indeed, the trial court found that

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10 Defendants seek to escape the overwhelming weight of evidence in support of this finding by selectively referring to isolated portions of the over 2600 pages of trial testimony and over 120 exhibits. But the conclusions they seek to draw from this minutia conflict with the finding of the district court. As this Court recently stated:

> If the district court's account of the evidence is plausible in light of the record *viewed in its entirety*, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

Anderson v. Bessemer City, 470 U.S. 564, 573-74 (1985) (citations omitted) (emphasis added); *see also Amadeo v. Zant*, 108 S. Ct. 1771, 1777-78 (1988). Where, as in this case, the trial court's findings of fact were based heavily on weighing the credibility of witness testimony, *see* 29a, 40a-41a, "Rule 52(a)

those interests—protecting the minor and fostering family communication—were actually *undermined* by subdivision 6.[11] 29a. An argument that relies on a factual version entirely incongruent with that of the trial court cannot succeed. We call attention below to the most egregious misstatements of fact made by defendants in their responding brief with reference to: (1) increased delay; (2) increased teenage motherhood; and (3) increased parental involvement.

1. Defendants properly recognize "that all other things being equal, it is medically preferable to have an abortion at an earlier gestational age than at a later gestational age." B.R. 16. In particular, as the district court found, "[s]econd trimester procedures entail significantly greater costs, inconvenience, and risk." 23a. But, as the statistics regarding second trimester abortions given in the Brief of *amicus* AAPS in support of defendants demonstrate, during each year in which the statute was in operation, minors, when compared to adult women, suffered an increased risk of second trimester abortion.[12] Thus,

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demands even greater deference to the trial court's findings." *Anderson*, 470 U.S. at 575.

Moreover, contrary to the Solicitor's argument that the district court's finding is one of fact and law subject to *de novo* review, S.G. 25 n.14, "Rule 52(a) 'does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous.' " *Anderson*, 470 U.S. at 574 (quoting *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982)). That the district court applied established legal standards to the evidence "does not alter the standard of review." *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986).

11 Defendants did not challenge the factual findings of the district court in the Court of Appeals below. 92a ("The state in response does not attack the findings of the district court . . ."). Nor did the Court of Appeals find any of the district court's factual findings to be clearly erroneous; rather, the Court of Appeals found itself foreclosed from *considering* the legal consequences of the district court's factual findings. 92a ("We are satisfied that the issue here then is not the district court's factual findings . . ."); *see also* 85a.

12 During the years in which subdivision 6 was in effect, minors were 100% more likely to have a second trimester abortion than adults, which is greater than in any of the years prior to the implementation of the statute,

when the statistics provided by the AAPS Brief are analyzed correctly (as in Exhibit B), defendants' threefold contention that minors suffered no medical harm from the statute, B.R. 17-18, that the statute involved no medically significant delays, B.R. 16-17, and, in particular, that the bypass procedure did not contribute to an increase in second trimester abortions, B.R. 18-21, collapses.

2. When government acts "to deter a woman from making a[n abortion] decision," *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 759 (1986), it has, in effect, compelled women to carry their pregnancies to term.[13] During the period for which subdivision 6 was in effect, the *only* age group for which the percentage of pregnancies ending in abortion decreased was the 10-17 year old group. *See* Exhibit A *infra* at A-1-3. For every other group of women for which statistics were collected, the percentage of pregnancies ending in abortion either remained steady or increased during

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and greater than the year (1987) since the statute was enjoined for which statistics are available. *See* Exhibit B *infra* at A-4-5. *Amicus* AAPS ignores this most basic implication of the data they present to this Court, making much of the fact that fluctuations in second trimester abortion rates for minors (10-17 years of age) and adult women occurred in tandem. AAPS 22-23. But this fact is not particularly significant, since small year-to-year fluctuations in second trimester abortion rates are attributable to random changes in physicians' assessments of gestational age.

13 Government-compelled childbirth is precisely the invasion of rights that lay at the core of this Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973):

> The detriment that the State would impose upon the pregnant woman by denying this choice [to obtain an abortion] is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it.

Id. at 153. Many of the concerns voiced by the Court in *Roe* are heightened in the case of minors facing unwanted motherhood. *Bellotti II*, 443 U.S. at 642.

the same time period.[14] Taken together with the disproportionate increase in birth rate for Minneapolis teenagers, *see* B.P. 12 (discussing trial testimony of Dr. Ehlinger and P. Ex. 116),[15] and the district court's explicit finding that "[s]ome mature minors and some minors in whose best interests it is to proceed without notifying their parents are so daunted by the judicial proceeding that they . . . carry to term," 20a, the reduction in percentage of pregnancies ending in abortion strongly supports plaintiffs' assertion that subdivision 6 achieved only the illegitimate objective of deterring abortion, *see* 25a, B.P. 35 n.68., and therefore forced teenagers to carry to term against their will.

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14 The AAPS Brief provides statistics for four age cohorts: 10-17; 18-19; 20-24; and 25-54 years old. A comparison of 1980 (the year before the statute went into effect) and 1985 (the last full year when the statute was in effect) reveals that for minors the percentage of pregnancies ending in abortion declined from 53.9% to 50.3%. The decline continued in 1986 (the statute was in effect until November 6, 1986), but ended in 1987, the first full year after the statute was enjoined. *See* Exhibit A *infra* at A-1.

15 *Amicus* AAPS impugns the significance of this fact with two arguments: First, they argue that the influx of Asian-Pacifics accounts for the dramatic increase in birth rate for teenagers in Minneapolis. AAPS 28 ("Dr. Paul Gunderson testified to the virtual non-existence of abortion to the Asian-Pacific population."). Abortion is far from "non-existent" among Asian-Pacifics. In fact, abortion is quite common in Asia. *See* Jones, Forrest, Goldman, Henshaw, Lincoln, Rosoff, Westoff & Wulf, *Teenage Pregnancy in Industrialized Countries* 253, 255 (1986) (Japan has much higher abortion rate than United States). The AAPS brief suggests that it is "implausible that the notice law would selectively impact Asian-Pacifics more than other races in Minnesota." AAPS 28. However, it is not at all implausible that an Asian teenager, part of a culture which strongly values family ties and family honor, would be disgraced by being compelled to reveal her pregnancy to her parents or a court. In fact, the much higher percentage of total births to Asian-Pacific teenagers in Minneapolis, as compared with the percentage of births to Asian-Pacific teenagers in the United States as a whole, suggests that subdivision 6 did cause an increase in births among these teenagers. *See* AAPS 41a-42a.

Second, AAPS claims that there is no evidence that more minors carried unwanted pregnancies to term because the number of births to [illegible]rs for the entire state fell while subdivision 6 was in effect. AAPS 15. [illegible]ntention ignores the fact that the fall in the total number of births pri[illegible] reflects a decrease in the number of births to *married* minors. *See* Exhibit [illegible] *infra* at A-6 (number of births to minors out of wedlock remained su[illegible]ntially the same from 1981-88).

3. Defendants claim that subdivision 6 caused a "substantial increase in parental notification," B.R. 11, and that the district court's finding to the contrary is clearly erroneous.[16] But the district court found that:

> [S]everal witnesses who testified at trial were involved in providing abortions to minors both before and after the enactment of Minn. Stat. § 144.343(2)-(7). These witnesses could have testified as to a change in the level of parental participation occurring at about the time of the statute's effective date. Although these and other witnesses testified that a sizable proportion of minors seeking an abortion in Minnesota voluntarily notify at least one parent of their intention, *none testified that this proportion changed at or around the effective date of the Minnesota parental notification law.*

41a (emphasis added). Defendants cite testimony which they claim compares notification rates before and after 1981, when subdivision 6 went into effect. But the district court did not so interpret this testimony; indeed, no witness was asked to compare the level of notification before and after the enforcement date of the statute. The differences in notification rates referred to by defendants occurred in widely-spaced portions of lengthy testimony, and the district court could reasonably have concluded that these lay estimates did not form a proper basis for a conclusion contrary to the overwhelming weight of the evidence. Defendants' attempt to piece together testimony from several witnesses and divergent portions of testimony[17] does not

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16 As the Court of Appeals noted, "the state did not offer any evidence concerning the effects of this notification." 83a n.9. Moreover, the Court of Appeals did not hold that the district court's finding was clearly erroneous, but merely "observe[d]" that "the percentage of parents notified of their daughters' intended abortion has increased." *Id.* As we have stated in our first brief, this observation is incorrect. *See* B.P. 21 n.46.

17 Defendants rely, for example, on Laura Hunter's testimony in support of their argument that notice increased after the statute went into effect. The following colloquy provides a sufficient basis for the court's conclusion that Hunter's testimony is insufficient support for this assertion:

undercut—and certainly does not render clearly erroneous—the district court's unequivocal finding that the statute did not effect a change in the level of parental notification.[18]

THE COURT: My question is do you have an opinion as to whether or not the statute resulted in some folks, minors talking to their parents who would not have talked to them absent the statute?

THE WITNESS: I wasn't working in the field before the statute existed.

Hunter Tr. 836. The defendants have pointed to isolated and ambiguous statements which they allege indicate an increase in communication. While the statute may have encouraged notification by some minors, it also discouraged notification by others. 31a. This offset is recognized by Hunter in answer to a general question regarding the statute's effects:

> Q. In your years of experience, in your opinion have you seen any effect that the statute requiring either notification of parents or going to court has accomplished in terms of achieving either better, in the family, communications or better quality in the decisionmaking process of the minor women?
>
> A. I would say to families where it has contributed to a better quality in her decisionmaking process, *that existed in those families where the communication was good to begin with* it was the family could share problems and stresses of daily life together to being [sic] with . . . . But in all the other cases where the families were either not that great a bunch dealing with adolescents or where there was [sic] some problems in the family, I don't think it did anything. It could have made it worse.

Hunter Tr. 834-35 (emphasis added). In light of this testimony, it is not surprising that the district court could not conclude that Hunter believed that the state's interest in increasing notification had been furthered by the law.

Defendants' citation to pages 789-90 of the transcript is not conclusive. There, Hunter states that "[p]robably 30% or so, a third" of minors indicate that they have told both their parents about their abortion by the time of the initial telephone counseling. Hunter Tr. 788-89. She then testifies that about 50% of minors use the bypass. Hunter Tr. 790. The change from 30% notification rate at the time of telephone counseling to an implied 50% by the time of the abortion is not a comparison between the pre-enforcement and post-enforcement rates as defendants assert. B.R. 13 n.13. Rather, it likely reflects the increasing, though voluntary, inclination of minors to consult with parents as the date of the procedure draws near.

18 Furthermore, even if the statute may have resulted in benefits for a few teenagers (e.g., a fall in pregnancy rates for teenagers—an argument raised only by *amicus* AAPS and never advanced by the state—or some increase in parental notification) such benefits for a few cannot be bought at the price of the harm this statute has imposed on the vast majority of teenagers seeking abortions in Minnesota. As Justice Stevens wrote in *Carey*:

> Although the State may properly perform a teaching function, it seems to me that an attempt to persuade by inflicting harm on the listener is an unacceptable means of conveying a message that is otherwise legitimate . . . . Assuming that the State could impose a uniform sanction upon young persons who risk self-inflicted harm . . . by engaging in sexual activity, surely that sanction could not take the form of deliberately . . . infecting the promiscuous child.

431 U.S. at 715-16 (Stevens, J., concurring in part and concurring in the judgment). Where, as here, a method of achieving a state purpose directly and deliberately harms those the state seeks to protect, the law amounts to "indiscriminate[ ] and . . . random" imposition of harm violative of the due process clause. *Id.* at 716.

II. THE SOLICITOR GENERAL'S SUGGESTION THAT THIS COURT OVERRULE *ROE V. WADE* IS INAPPROPRIATE.

The Solicitor General, in defiance of principles of *stare decisis*,[19] urges this Court to sustain Minnesota's law on the ground that this Court's precedents in the area of privacy rights were "wrongly decided." S.G. 12. The Solicitor's argument that *Roe v. Wade* should be overturned in this case is not shared by the defendants, who specifically state that they do not seek the overturn of *Roe*. B.R. 28 n.23. Because no party has requested re-examination of *Roe*, this Court should decline to address that question in this case. *See Thornburgh*, 476 U.S. at 828 (O'Connor, J., dissenting); *Akron*, 462 U.S. at 452 (O'Connor, J., dissenting).

In fact, this case can be decided without addressing the issue of abortion. A criminal statute requiring that both biological parents be notified about a medical decision of a very private

19 This Court has consistently held that, even in constitutional cases, "any departure from *stare decisis* demands special justification." *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984). Even an "overriding conviction" of prior error is not sufficient to justify overruling a case. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 Colum. L. Rev. 723, 758 (1988). *See* Brief of Senators Bob Packwood, *et al.*, as *Amici Curiae* in Support of Appellees, *Turnock v. Ragsdale*, No. 88-790, at 9 n.20.

nature is a severe intrusion by the state into family life. By forcing two unrelated adults to communicate with each other against their will about sensitive and private information, the Minnesota statute implicates rights beyond the minor's abortion choice. When, for example, a new unitary family has been created—of mother, stepfather, and daughter—and all three agree on medical treatment for the daughter, forcing the mother to communicate with the biological father, who may never have lived with or seen the daughter, and who may have impregnated the mother by rape,[20] violates the informational privacy rights and associational rights of both the minor and her mother. *See Whalen v. Roe*, 429 U.S. 589, 599-600 (1977), *quoted in United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 109 S. Ct. 1468, 1476 (1989); *see also* J.A. 50; B.C-R. 32 n.63 (discussing burden on associational rights of single parents).[21]

Further, the Solicitor's sweeping assault on this Court's analysis in *Roe* would, if adopted, unravel not only privacy rights but also this Court's time-honored method of constitutional interpretation. As this Court has long held, the principle of "liberty" encompasses more than "mere[ ] freedom from bodily restraint . . . ." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *see also Griswold v. Connecticut*, 381 U.S. 479, 484-86 (1965). In the decades following *Meyer*, this Court has continued to affirm that "liberty" includes the right to be free of governmental intrusion in matters of purely personal concern. *See Whalen*, 429 U.S. at 599-600 (the right of privacy is composed of both an "individual interest in avoiding disclosure of personal matters" and an "interest in independence in making certain kinds of general decisions."); *Stanley v. Georgia*, 394 U.S. 557, 564-65 (1969). The Solicitor argues, however, that this Court should turn its back on over sixty years of settled decisions and rule that no fundamental right to reproductive privacy, and few fundamental rights in general, exist. S.G. 12.

20 Just last Term in *Michael H. v. Gerald D.*, 109 S. Ct. 2333 (1989), this Court rejected an analysis for determining liberty interests "in isolation from its effect upon other people," posing as a hypothetical a father who had begotten his daughter by rape. *Id.* at 2342 n.4.

21 The judicial bypass option does not alleviate this notice burden. *See* B.P. 36-38. For example, plaintiff Jackie H. was forced to go to court with her daughter and reveal, in front of her daughter, details of her ex-husband's physical abuse. J.A. 320. Her choice between revealing this information both to a judge and to her daughter, and revealing her daughter's pregnancy to an abusive ex-husband, was no choice at all.

The Solicitor urges this Court to replace its painstaking analysis of which liberty interests should be deemed "fundamental" with a restrictive historical approach.[22] Under the Solicitor's

22 The Solicitor's fallback argument is that abortion is different from the other interests protected by this Court's privacy decisions, because the state has an interest in protecting potential life throughout pregnancy. S.G. 13. This contention ignores the reality that no clear line exists between contraceptives and abortion because some contraceptives act after fertilization but prior to implantation. *See* Brief of 274 Organizations in Support of *Roe v. Wade*, *Turnock v. Ragsdale*, No. 88-790, and *Ohio v. Akron Center for Reproductive Health*, 88-805, at 8-9. Moreover, the Solicitor's argument confuses fundamental rights with limited state interests. In *Roe*, the Supreme Court found a compelling but limited state interest in potential life after viability, because it recognized that a woman's own life and health must be the state's paramount concern. 410 U.S. at 165. Viability marks the hypothetical point in pregnancy when the fetus, *if* independent, would have a chance of survival. It is this point at which, *if* it were outside of the womb, someone or something other than the mother could provide the necessities, like oxygen, to support the fetus. *See* Law, *Rethinking Sex and the Constitution*, 132 U. Pa. L. Rev. 955, 1023 (1984); Tribe, *American Constitutional Law* 1357 (2d Ed. 1988); *cf. Webster v. Reproductive Health Services*, 109 S. Ct. 3040, 3075 n.9 (Blackmun, J., concurring in part and dissenting in part). This is, however, only a hypothetical, *see id.* at 3066 n.* (Scalia, J., concurring in part and concurring in the judgment), and so long as the fetus is still inside the woman's body, it is completely dependent on her for its survival. To recognize a state interest in the fetus from the moment of conception would strip the woman of her personhood, making her rights subordinate to those of the fetus. *See* Gallagher, *Prenatal Invasions & Intervention: What's Wrong With Fetal Rights*, 10 Harv. Women's L.J. 9 (1987); Johnsen, *The Creation of Fetal Rights: Conflicts With Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 Yale L.J. 599 (1986); *cf. In Re A.C.*, 533 A.2d 611 (D.C. 1987), *vacated & reh'g en banc granted*, 539 A.2d 203 (D.C. 1988).

Furthermore, determining that the fetus's "right" to life begins at the moment of conception violates the First Amendment's Establishment Clause. Allowing states to arbitrarily choose the point of conception as the time at which the fetus's interest outweighs the woman's right imposes a particular religious doctrine upon all women. *Cf. Webster*, 109 S.Ct. at 3082 (Stevens, J., concurring in part and dissenting in part) ("I am persuaded that the

theory, because statutes limiting abortion were common when the Fourteenth Amendment was ratified, the abortion decision must be denied constitutional protection.[23] S.G. 13. In *Roe*, however, this Court undertook an extensive historical analysis and concluded that no long-standing tradition of laws proscribing abortion existed. 410 U.S. at 129-41 (1973); *cf. id.* at 171 (Rehnquist, J., dissenting) ("The Court's opinion brings to the decision of this troubling question both extensive historical fact and a wealth of legal scholarship.").[24] The history elucidated by this Court in *Roe* has not changed since 1973.[25]

absence of any secular purpose for the legislative declarations that life begins at conception and that conception occurs at fertilization makes the relevant portion of the preamble invalid under the Establishment Clause.").

23 The Solicitor General's arguments would also defeat the fundamental right to privacy recognized in *Griswold*. Although the first specifically anti-contraception statute was enacted in 1873, Comstock Act, ch. 258 § 1, 17 Stat. 598 (1873), anti-obscenity statutes had been used earlier to prosecute those who disseminated contraceptive information. Reed, *The Birth Control Movement and Amer[illegible]n Society: From Private Vice To Public Virtue* 9 (1983) (in the 1830's, Charles Knowlton was thrice convicted for distributing his pamphlet on birth control, *Fruits of Philosophy*). Further, the Comstock Act itself arose out of the "prevailing orientation of the period towards sexual matters. Contraception, abortion, sterilization, obscenity, vice were blended in the Puritan morality and unequivocally condemned." Dienes, C. Thomas, *Law, Politics, and Birth Control* 33 (1972).

24 Moreover, the Court noted that many of the 19th century anti-abortion laws were designed to protect women from the dangers of primitive medical techniques, not to harm them. *Id.* at 148-49.

25 This Court has held that even if historical analysis does not provide any explicit constitutional or statutory protection of a fundamental liberty interest, such an analysis must at least exclude a tradition of laws *denying* that interest. *Michael H.*, 109 S. Ct. at 2341 n.2. No such tradition exists with regard to abortion, which was permitted at the time of the Framers and at common law. *Roe v. Wade*, 410 U.S. at 140-41; Mohr, *Abortion in America: The Origins and Evolution of National Policy, 1800-1900*, at 3-19 (1978). One *amicus* brief in this case purports to demonstrate that, contrary to this Court's position in *Roe*, abortion was criminal at common law and therefore part of a tradition that denied the existence of a liberty interest in abortion. *See* Brief *Amicus Curiae* of the American Academy of Medical Ethics in Support of Appellants in *Turnock*, No. 88-790, and Cross-Petitioners in *Hodgson*, 88-1309. A careful reading of this brief, however, reveals that its

Even if this Court were to reject its prior decision to look at the whole of our history, the state of the law in 1868 cannot be determinative of fundamental rights.[26] *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 669 (1966) ("In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights."); *cf. Michael H.*, 109 S. Ct. at 2350 (Brennan, J., dissenting) ("Just as the common-law notions no longer define the property that the Constitution protects . . . neither do they circumscribe the liberty that it guarantees."). The Nation's understanding of which interests are "implicit in the concept of ordered liberty" has evolved. *See Palko v. Connecticut*, 302 U.S. 319, 326 (1937). This evolution is illustrated by present-day condemnation of the major reasons for the adoption of anti-abortion laws

author is unable to cite even one early English common law case in which either a woman or an "abortionist" was criminally prosecuted for a successful, voluntary termination of pregnancy. Rather, the cases cited involved assaults that resulted in injury or death of a pregnant woman and her fetus, *see, e.g., R. v. Lichefeld*, K.B. 27/974, Rex m.4 (1505) (defendant charged as accessory to suicide, a felony killing), or the killing of a child born alive, which then, as now, was considered murder, *see, e.g., R. v. de Bourton*, Y.B. Mich. 1 Edw. 3, f.23, pl. 28 (1327) (man who violently beat a woman pregnant with twins indicted for death of twin who was born alive and then died, but not charged in death of unborn twin). These cases do nothing to substantiate the claim that abortion was criminal at common law. In the vain effort to identify a common law tradition of criminalization of abortion, the brief's author is reduced to unconvincing analogies involving the common law's increasing concern with the status of young children. *Id.* at 11-17. For a more thorough description of the origins and nature of abortion regulation in this country, *see* Brief of 281 American Historians as *Amici Curiae* Supporting Appellees, *Webster v. Reproductive Health Services*, No. 88-605.

26 The Solicitor's use of the mid-19th century as the point of reference for determining whether abortion is a right seems arbitrary at best, because he argues in another case pending before this Court that the historical sources to which one must refer include the Framers' understanding of the limits of "liberty," rather than solely the understanding of the 14th Amendment's ratifiers. Brief of the Solicitor General as *Amicus Curiae* Supporting Respondents, *Cruzan v. Director of Missouri Dep't of Health*, No. 88-1503, at 12. The Solicitor's decision not to refer to 1791 as the point of reference is unsurprising, given this Court's previous finding that abortion was not illegal at the time of the Framers. 410 U.S. at 129, 140-41. *See also* n.25 *supra*.

in the 1800's (i.e., nativist fears, the movement to consolidate control over the medical profession, and fears about rising status of women) as obsolete or illegitimate. Mohr, *supra* n.25, at 37, 166-170. To choose 1868 as the sole touchstone by which rights are validated is to state that many of our most unassailable rights are not truly "fundamental" at all.[27] "[N]either liberty nor justice would exist," *Palko*, 302 U.S. at 326, if the power over such a fundamental conscience-based decision as whether to bear a child was transferred from the individual to the government.[28]

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27 " 'Liberty' and 'property' are broad and majestic terms. They are among the '[g]reat [constitutional] concepts . . . purposely left to gather meaning from experience . . . . [T]hey relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged.' " *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 571 (1972) (quoting *Nat'l Insurance Co. of the District of Columbia v. Tidewater Transfer Co.*, 337 U.S. 582, 646-47 (1949) (Frankfurter, J., dissenting)).

28 Indeed, if the Solicitor's argument is accepted, the following would not be constitutionally protected: the right to be free from racial segregation, *Brown v. Bd. of Education*, 347 U.S. 483 (1954), overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896); the right to marry a person of another race, *Loving v. Virginia*, 388 U.S. 1 (1967); the right to live with a person of another race, *McLaughlin v. Florida*, 379 U.S. 184 (1964), overruling *Pace v. Alabama*, 106 U.S. 583 (1883); the right to be free from forced sterilization, *Skinner v. Oklahoma*, 316 U.S. 535 (1942); the right of married persons to use contraceptives, *Griswold; the right of unmarried persons to use contraceptives, Eisenstadt v. Baird*, 405 U.S. 438 (1972); the right to travel, *Shapiro v. Thompson*, 394 U.S. 618 (1969); the right to counsel, *Gideon v. Wainwright*, 372 U.S. 335 (1963), overruling *Betts v. Brady*, 316 U.S. 455 (1942); the right of women to vote, *Minor v. Happerset*, 88 U.S. (21 Wall.) 162 (1875), overruled by U.S. Const. Amend. XIX; the right of women to practice law, *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1873) (holding that women may be excluded from the practice of law); the right of women to serve on juries, *Taylor v. Louisiana*, 419 U.S. 522 (1975), overruling (in effect) *Hoyt v. Florida*, 368 U.S. 57 (1961); the right of poor people to vote, *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966), overruling *Breedlove v. Suttles*, 302 U.S. 277 (1937); the right to raise one's natural but illegitimate children, *Stanley v. Illinois*, 405 U.S. 645 (1972); the right to be free from arbitrary transfers from prisons to psychiatric institutions, *Vitek v. Jones*, 445 U.S. 480 (1980). This list illustrates the hazards of relying exclusively on what the 50 states historically have recognized and legislated in determining the scope of "liberty."

III. COMMON LAW PRINCIPLES DEFINING MINORS' LEGAL RIGHTS WERE NEVER AS RESTRICTIVE AS THIS STATUTE AND CANNOT BE RESURRECTED TO SUSTAIN IT.

Both defendants and the Solicitor rely on history and what the latter calls its "single, powerful voice" to support the parental interests allegedly reflected in the statute. S.G. 17. Having argued that fundamental constitutional rights are generally limited by history, the Solicitor goes on to argue that in the case of minors, history supports the constitutionality of a two-parent notification requirement (with no exceptions or bypass). S.G. 19-20. However, no historical analysis can support the features of subdivision 6 that set it apart from other statutes: namely, its requirement that *both* biological parents be notified and that even emancipated minors be, in effect, subject to its requirements.[29]

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29 *See* B.C-R. 25-27. Defendants admit in a footnote that Minnesota has "no general statutory definition of the term 'emancipation.' " B.R. 2 n.2. However, they argue that two Minnesota statutes, which permit minors living apart from their parents and managing their own affairs and minors who have been married or who have borne a child to consent to all health care, somehow define emancipation. B.R. 2 n.2. But these statutes were enacted 10 years before Minn. Stat. § 144.343(2)-(7), are not recognized as exceptions to subdivisions 2 and 6, and do not define emancipation in Minnesota. Moreover, case law in Minnesota decided after the date these statutes were passed does not mention Minn. Stat. § 144.341 or § 144.342 as the statutory definition of emancipation. *See, e.g., Streitz v. Streitz*, 363 N.W.2d 135 (Minn. Ct. App. 1985). Indeed, Suzanne Smith, supervisor of the Guardian *Ad Litem* Program in Hennepin County, the county used by the majority of minors for court bypass, testified as follows:

> The statute has language that refers to an emancipated minor which leads to many problems that there is such a thing as an emancipated minor. All of the attorneys and judges that have been working with us tell us in Minnesota juvenile court there is no such thing.
>
> . . . .
>
> Q If a minor is living on her own, married and has a child, you don't go through this and say you can go home now, you are not required to go to court under the statute, or do you take it to a judge?
>
> A We would take it to the court. Many of the questions we get from the clinics describe these kinds of situations and since we don't have any guidelines they go to court, so that there aren't any chances taken.

J.A. 230-31.

The common law never required the consent of both biological parents for *any* medical procedure; the consent of a single parent, originally the *father*, was always sufficient.[30] Thus, concerning the possibility that a child's mother might consent to medical treatment, the court in *Browning v. Hoffman*, 90 W. Va. 568, 111 S.E. 492 (1922), wrote "[i]t does not appear that she could have given consent *or obtained authority to do so from her husband.*" *Id.* at 580, 111 S.E. at 497 (emphasis added); *see also* 46 C.J. *Parent and Child* § 103 (1928) ("mother has no right of action at common law where the parents are living together" for injuries to child).[31] Further, the common law rule of parental consent is founded on the presumed incapacity of minors to consent on their own behalf,[32] a reason not proffered by defendants in support of this statute.

Defendants' attempt to characterize notification to both biological parents as a constitutionally-based right of parents flowing from the common-law rule of parental consent thus misconceives both the common law rule (which never required the consent of both parents) and its basis (which was not a parental right, but an inability of the minor to consent for herself). Further, biological parents have no constitutional right to the assistance of the state in fulfilling the parental role or in creating a parental role they never had. *See* B.C-R. 27-32.

30 As the court wrote in finding liability in *Rishworth v. Moss*, 159 S.W. 122 (Tex. Civ. App. 1913), *aff'd*, 222 S.W. 225 (Tex. 1920): "It was not alleged or proved by appellees that appellants [the parents of an 11 year old girl], *or either of them*, had any knowledge of the operation until after the death of the child, or that they, *or either of them*, consented to or authorized the operation." *Id.* at 123 (emphasis added). *See also Zoski v. Gaines*, 271 Mich. 1, 10, 260 N.W. 99, 103 (1935) ("In view of the child's age, the fact that *neither* of his parents were with him at the time of the operation, or came to the hospital with him, . . . we cannot allow consent to be implied in such situations."); *Bellotti II*, 443 U.S. at 648 ("The District Court found it to be 'custom' to perform other medical procedures on minors with the consent of only one parent") (citing *Baird v. Bellotti*, 393 F. Supp. 847, 852 (D. Mass. 1975)).

31 The rule requiring the consent of the father or parent for the physician to avoid tort liability has the same theoretical basis as the old common law rule prohibiting a married woman from suing for personal injury (including the technical assault involved in medical treatment for herself) unless her husband joins in the suit. *See* 30 C.J. *Husband and Wife* § 685 (1923); *see also Thompson v. Thompson*, 218 U.S. 611, 614-15 (1910) (expounding doctrine that "[a]t the common law the husband and wife were regarded as one," but noting that recent statutes have "enabled [a married woman] to protect the security of her person against the wrongs and assaults of others."). Yet even as early as 1908, the general rule requiring "the consent of the husband or father to the performance of an operation upon a married woman or child" was in doubt. 30 Cyclopedia of Law and Procedure, *Physicians and Surgeons* 1577 (1908).

32 The underlying rationale for the common law requirement of parental consent before a physician could treat a minor stems from the truism that unconsented medical treatment represents a tort against the person of the patient. *See, e.g., Rishworth*, 159 S.W. at 124; *see also Bonner v. Moran*, 126 F.2d 121, 122 (D.C. Cir. 1941). Since minors are incompetent to consent to a tort, "the consent of the parent is necessary for an operation on a child." *Id.*

The common law presumption of the incapacity of minors to consent to medical treatment has been abrogated by statute for mature minors in many states (*see* B.C-R. Exhibit F), and for all minors seeking specific types of health care in most states (*see* B.P. Exhibits C and D). Further, the common law rule has itself been modified to permit emergency or life-saving treatment of minors without parental consent or even in the face of parental refusal to consent. *See* cases cited in B.P. 42 nn. 82-83.

CONCLUSION

Petitioners respectfully request this Court to reverse the judgment of the Eighth Circuit Court of Appeals that Minn. Stat. § 144.343(6) is constitutional.

Respectfully submitted,

WILLIAM Z. PENTELOVITCH
REBECCA A. PALMER
Maslon, Edelman, Borman & Brand
1800 Midwest Plaza
Minneapolis, Minnesota 55402
(612) 339-8015

LINDA OJALA
Kurzman, Grant & Ojala
2445 Park Avenue South
Minneapolis, Minnesota 55404
(612) 871-9004

JANET BENSHOOF
(Counsel of Record)
RACHAEL N. PINE
LYNN M. PALTROW
KATHRYN KOLBERT
JOHN A. POWELL
ELLEN K. GOETZ
American Civil Liberties Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800

SIMON HELLER
On The Brief

ROBERT S. HICKS
Minnesota Civil Liberties Union
1021 West Broadway
Minneapolis, Minnesota 55411
(612) 522-2423

APPENDIX

Exhibit A

Percentage of Pregnancies Ending in Abortion in Minnesota, 1975-87*

	1975	1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986	1987
10-17 yr. olds:													
No. of abortions:	1507	2060	2274	2186	2308	2327	1820	1564	1432	1395	1570	1545	1648
No. of pregnancies:	3958	4391	4573	4271	4364	4315	3714	3307	2987	3031	3122	3133	3249
% of pregnancies ending in abortion:	38.1%	46.9%	49.7%	51.2%	52.9%	53.9%	49.0%	47.3%	47.9%	46.0%	50.3%	49.3%	50.7%

(*chart continued on next page*)

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* Numbers of pregnancies and abortions for 1975 to 1986 are taken from the Brief of AAPS as *amicus curiae* at 11a (Table 1). Numbers for 1987 are taken from *Minnesota Health Statistics: 1987*, published by the Minnesota Department of Health at 72 (Table 34). A copy of *Minnesota Health Statistics: 1987* has been lodged with the Clerk for the convenience of the Court by Counsel for Petitioners.

	1975	1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986	1987
18-19 yr. olds:													
No. of abortions:	1758	2511	2693	3054	3293	3380	3064	2799	2547	2586	2531	2372	2306
No. of pregnancies:	6494	7017	7347	7738	8057	8301	7697	7052	6223	6112	5958	5493	5596
% of pregnancies ending in abortion:	27.1%	35.8%	36.7%	39.5%	40.9%	40.7%	39.8%	39.7%	40.9%	42.3%	42.5%	43.2%	41.2%
20-24 yr. olds:													
No. of abortions:	2702	3643	4528	5066	5683	6054	6047	5963	5487	6032	6067	5724	5576
No. of pregnancies:	22001	22431	24524	25058	26747	28093	27820	27256	24943	25032	24585	22792	21634
% of pregnancies ending in abortion:	12.3%	16.2%	18.5%	20.2%	21.2%	21.5%	21.7%	21.9%	22.0%	24.1%	24.7%	25.1%	25.8%

A-2

	1975	1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986	1987
25-54 yr. olds:													
No. of abortions:	2161	2895	3529	3872	4355	4716	4881	5180	5012	5525	5812	6035	6183
No. of pregnancies:	31145	32837	36282	37849	40423	42198	43804	45003	44581	46748	48250	48544	50797
% of pregnancies ending in abortion:	6.9%	8.8%	9.7%	10.2%	10.8%	11.2%	11.1%	11.5%	11.2%	11.8%	12.0%	12.4%	12.2%

A-3

Exhibit B

Relative Risk of Second Trimester Abortions†

Total Number of Abortions

Age Group*	Year											
	1975	1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986
10-17	1507	2060	2274	2186	2308	2327	1820	1564	1432	1395	1570	1545
18-19	1758	2511	2693	3054	3293	3380	3064	2799	2547	2586	2531	2372
20-24	2702	3649	4528	5066	5683	6054	6047	5963	5487	6032	6067	5724
25 +	2161	2895	3529	3872	4355	4716	4881	5180	5012	5525	5812	6035

Number of Abortions Performed After 12 Weeks Gestational Age

Age Group	Year											
	1975	1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986
10-17	270	470	474	403	432	510	365	322	334	360	361	333
18-19	228	426	464	449	460	562	462	425	419	489	441	435
20-24	275	446	512	505	591	681	625	631	626	786	723	668
25 +	189	306	368	302	327	403	363	412	370	461	458	516

† This Exhibit uses raw data provided by the Minnesota Department of Health as reproduced in the Brief of AAPS as *amicus curiae* at 23a-24a (Table 3).

* Definition of symbols: "<" = ages less than; "+" = and ages above; "x/y" = formula for calculating ratio.

Percentage of Abortions Performed After 12 Weeks Gestational Age

Age Group	Year											
	1975	1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986
<18	17.9	22.8	20.8	18.4	18.7	21.9	20.1	20.6	23.3	25.8	23.0	21.6
18-19	13.0	17.0	17.2	14.7	14.0	16.6	15.1	15.2	16.5	18.9	17.4	18.3
20-24	10.2	12.2	11.3	10.0	10.4	11.2	10.3	10.6	11.4	13.0	11.9	11.7
25 +	8.7	10.6	10.4	7.8	7.5	8.5	7.4	8.0	7.4	8.3	7.9	8.6
18 +	10.5	13.0	12.5	10.5	10.3	11.6	10.4	10.5	10.8	12.3	11.3	11.5

Ratio of Percentages of Minors and Adults

Age Group	Year											
	1975	1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986
<18/ 18 +	1.71	1.75	1.67	1.76	1.81	1.88	1.94	1.96	2.15	2.10	2.04	1.88

Exhibit C

Births to Minors by Marital Status*

Minnesota	1980	1981	1982	1983	1984	1985	1986	1987
Births < 18 (Total)	2033	1929	1778	1574	1654	1573	1626	1588
Percent Change in Births to Minors (Total), 1980-1986:				-20%				
Out of Wedlock Births < 18	1438	1396	1364	1243	1339	1335	1427	1390
Percent Change in Out of Wedlock Births, 1980-1986:				-0.7%				
Births to Married Minors	595	533	414	331	315	238	199	198
Percent Change in Births to Married Minors, 1980-1986:				-66.5%				

* Source: Table entitled, "Pregnancy Outcomes and Pregnancy Rates by Age of Woman, Minnesota Residents, 1980-1987," provided by the Minnesota Department of Health, November 1, 1989 (This table gives the numbers of births; the percentages were calculated).

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No. 88-1125 and 88-1309

In the Supreme Court of the United States

OCTOBER TERM, 1989

JANE HODGSON, ET AL., PETITIONERS

v.

STATE OF MINNESOTA, ET AL.

STATE OF MINNESOTA, ET AL., CROSS-PETITIONERS

v.

JANE HODGSON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS IN NO. 88-1125 AND SUPPORTING CROSS-PETITIONERS IN NO. 88-1309

KENNETH W. STARR
Solicitor General

STUART E. SCHIFFER
Acting Assistant Attorney General

THOMAS W. MERRILL
Deputy Solicitor General

PAUL J. LARKIN, JR.
STEPHEN J. MARZEN
Assistants to the Solicitor General

STEVEN R. VALENTINE
Deputy Assistant Attorney General

Department of Justice
Washington, D.C. 20530
(202) 633-2217

35 pp

QUESTION PRESENTED

The United States will address the following question:

Whether the constitutionality of a state statute that requires notification of both parents that their unemancipated daughter has sought an abortion should be assessed under a standard of review that asks whether it is reasonably designed to serve a legitimate state interest and, if so, whether that statute is constitutional.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1125

JANE HODGSON, ET AL., PETITIONERS

v.

STATE OF MINNESOTA, ET AL.

No. 88-1309

STATE OF MINNESOTA, ET AL., CROSS-PETITIONERS

v.

JANE HODGSON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS IN NO. 88-1125 AND SUPPORTING CROSS-PETITIONERS IN NO. 88-1309

INTEREST OF THE UNITED STATES

In *Webster* v. *Reproductive Health Services*, 109 S. Ct. 3040 (1989), the United States filed a brief as amicus curiae in which it joined the State of Missouri in urging the Court to abandon the framework for judicial review of abortion legislation established in *Roe* v. *Wade*, 410 U.S. 113 (1973), and to adopt in its place a standard of review that would ask whether such legislation is reasonably related to the advancement of legitimate governmental objectives. (A copy of our brief has been provided to the parties.) The Court was deeply divided in its response to that submission. Four Members of the Court expressed the view that *Roe* v. *Wade* and succeeding cases should be limited or overruled, 109 S. Ct. at 3056-3058 & n.15 (plurality

opinion); *id.* at 3064-3067 (opinion of Scalia, J.); a fifth Member was willing to reconsider *Roe* in a proper case, *id.* at 3061 (opinion of O'Connor, J.). In addition, although the plurality applied a standard of review similar to that endorsed by the United States, see *id.* at 3057, 3058, three dissenting Justices disagreed with that statement of the applicable standard, *id.* at 3076 (Blackmun, J., concurring and dissenting), and three other Justices authored separate opinions that did not expressly discuss the standard of review. See *id.* at 3058-3064 (O'Connor, J., concurring); *id.* at 3064-3067 (Scalia, J., concurring in part and concurring in the judgment); *id.* at 3079-3085 (Stevens, J., concurring and dissenting). In *Webster*'s wake, there is now considerable uncertainty about the proper standard of review to be applied by courts in assessing the constitutionality of abortion regulations.

The United States has a substantial interest in the resolution of that question. Congress has previously enacted legislation concerning abortion. See, *e.g.*, Act of Sept. 30, 1976, Pub. L. No. 94-439, § 209, 90 Stat. 1434 (1976) (the Hyde Amendment); Title X of the Public Health Service Act of 1970, 42 U.S.C. 300 *et seq.*; the Adolescent Family Life Act of 1981, 42 U.S.C. 300z *et seq.* Moreover, federal regulations implementing Title X of the Public Health Services Act of 1970 are currently being challenged in the lower courts on the ground that they are inconsistent with *Roe* v. *Wade* and succeeding cases. *E.g.*, *Massachusetts* v. *Sullivan*, No. 88-1279 (1st Cir. May 8, 1989) (rehearing en banc granted). The manner in which the Court articulates the standard of review in this case could therefore affect the authority of Congress to enact legislation concerning abortion, and could have a direct impact on the outcome of pending constitutional challenges in the lower courts involving the federal government.

STATEMENT

1. In 1971, Minnesota enacted an exception to the common-law rule that required parental consent before medical treatment could be provided to minor children. 1971 Minn. Laws ch. 544. Section 3 of that statute authorized minors to "give effective consent for medical, mental, and other health services to determine the presence of or to treat pregnancy and conditions associated therewith, venereal disease, alcohol and other drug abuse." Minn. Stat. Ann. § 144.343 (West 1989). Because abortion was at that time a crime under Minnesota law,[1] the statutory exception for pregnancy-related medical care did not authorize minors to consent to an abortion.

On February 2, 1973, less than two weeks after this Court decided *Roe* v. *Wade* and *Doe* v. *Bolton*, 410 U.S. 179, the Minnesota Supreme Court held, on authority of *Roe*, that the Minnesota abortion statute was unconstitutional in its entirety. *State* v. *Hodgson*, 295 Minn. 294, 204 N.W.2d 199; *State* v. *Hultgren*, 295 Minn. 299, 204 N.W.2d 197. By striking down the Minnesota abortion statute, the Minnesota Supreme Court in effect enabled minors to consent to abortions under the exception for pregnancy-related medical care in Minn. Stat. Ann. § 144.343 (West 1989).

In 1981, the Minnesota legislature amended Section 144.343 by adopting the provisions at issue in this case. 1981 Minn. Laws ch. 228. The legislature did not attempt to require parental consent for an abortion.[2] Instead, in Subdivision 2 of the 1981 amendment the legislature qualified the statutory exception to the general parental consent requirement by directing "the physician or an agent" to notify both parents of an unemancipated minor in writing that their daughter has sought to have an abortion. Minn. Stat. Ann. § 144.343(2) (West 1989).[3]

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[1] Minn. Stat. § 617.18 (1971) (repealed 1974) contained an exception for abortions "necessary to preserve the life of the woman or of the child." Minnesota's prohibition of abortions dated from the late 1800s. See 1A M. Dunnell, Minnesota Digest 2d *Abortion* § 2.00 (3d ed. 1982).

[2] In the years between 1973 and 1981, this Court had ruled that a State cannot require parental consent in all cases before a minor can have an abortion. *Planned Parenthood* v. *Danforth*, 428 U.S. 52, 74-75 (1976).

[3] Subdivision 3 requires notification of both parents only "if they are both living, one parent of the pregnant woman if only one is living or if the second one cannot be located through reasonably diligent effort, or the guardian or conservator if the woman has one." Minn. Stat. Ann. § 144.343(3) (West 1989).

Notification can be delivered personally to the parents at their residence, or by certified mail if return receipt is requested and delivery is restricted to the parents. *Id.* § 144.343(2)(a) and (b). Performance of an abortion must be delayed "at least 48 hours" after written notification has been delivered. *Ibid.* Notice is not required in cases in which (1) the attending physician certifies that an abortion is necessary to prevent the death of the minor and there is insufficient time to notify her parents; (2) the abortion is authorized in writing by the person(s) entitled to notice; or (3) the minor declares that she is a victim of sexual or physical abuse, or neglect *Id.* § 144.343(4). The Act makes it a misdemeanor and a basis for a civil action for any person to perform an abortion without complying with its requirements. *Id.* § 144.343(5).

Subdivision 6 of the Act contains an alternative procedure to become effective if the above requirements are held invalid or are restrained by a court. Under the alternative procedure, a minor can obtain an abortion without notifying her parents if she can prove in court that she is sufficiently mature to make that decision for herself or that performing an abortion without notifying her parents is in her best interests. Minn. Stat. Ann. § 144.343(6)(c)(i) (West 1989). The Act specifies procedures to be followed in making those determinations. *Id.* § 144.343(6)(c)(ii)-(iv).

2. On July 30, 1981, just two days before the Act was to go into effect, petitioners filed this class action against the State in federal district court seeking a declaration that the Act was unconsitutional and an injunction against its enforcement. The district court issued a temporary restraining order and later a preliminary injunction enjoining the operation of the parental notification requirement contained in Subdivision 2, but not the alternative procedure in Subdivision 6. 88-1125 Pet. App. 14a. Thereafter, the court granted the State partial summary judgment, ruling that the alternative procedure specified in Subdivision 6 was facially constitutional. The court reserved for trial the question whether Subdivision 6 was being applied in an unconstitutional manner. *Id.* at 146a-157a.

After a bench trial, the district court held that the statute was unconstitutional in its entirety. 88-1125 Pet. App. 10a-52a. Relying on *Bellotti* v. *Baird* (*Bellotti II*), 443 U.S. 622, 647 (1979) (plurality opinion), the court ruled that the parental notification requirement in Subdivision 2 "unduly burden[ed]" a minor's right to an abortion. 88-1125 Pet. App. 38a. Relying on *Bellotti II, City of Akron* v. *Akron Center for Reproductive Health,* 462 U.S. 416 (1983), and *Planned Parenthood Ass'n* v. *Ashcroft,* 462 U.S. 476 (1983), the court determined that the alternative procedure set forth in Subdivision 6, standing alone, would constitutional, although it also found that this procedure did not serve the State's interests in fostering intra-family communication and protecting pregnant minors. 88-1125 Pet. App. 40a-45a. The court then separately considered the constitutionality of the requirement in Subdivision 3 that both parents be notified. The court held that requirement invalid, even though Subdivision 6 permitted a minor to avoid notifying both parents by obtaining court authorization for an abortion. *Id.* at 45a-47a. The court also separately examined the 48-hour waiting period required by Subdivision 2. The court held that "a 48 hour waiting period is excessively long" because it would compound the delays associated with making travel arrangements in rural areas, and because a shorter waiting period would serve the State's interests "as completely." *Id.* at 49a. After ruling that the two-parent notification requirement could not be severed from the remainder of the Act, the court held the Act invalid in its entirety and permanently enjoined the State from enforcing it. *Id.* at 51a-52a.

3. Both sides appealed. The en banc court of appeals, by a divided vote, affirmed in part and reversed in part. 88-1125 Pet. App. 73a-109a.[4] Relying on the plurality opinion in *Bellotti II*

[4] A panel had previously affirmed the district court's judgment in its entirety. 88-1125 Pet. App. 53a-72a. The panel later vacated its judgment and held the case in abeyance pending this Court's decision in *Zbaraz* v. *Hartigan,* 763 F.2d 1532 (7th Cir. 1985), aff'd by an equally divided Court, 484 U.S. 171 (1987). 88-1125 Pet. App. 158a-159a. When this Court evenly divided in *Zbaraz,* the full court of appeals granted rehearing en banc. Pet. App. 160a.

and on the combination of concurring and dissenting opinions in *H.L.* v. *Matheson*, 450 U.S. 398 (1981); see *id.* at 420 (Powell, J., concurring); *id.* at 434-454 (Marshall, J., dissenting), the court held unconstitutional the parental notification requirement of Subdivision 2. 88-1125 Pet. App. 81a. By contrast, the court upheld the alternative procedure set forth in Subdivision 6, ruling that it complied with *Bellotti II*, *Akron*, and *Ashcroft*. *Id.* at 81a-96a. The court also upheld the two-parent notification and 48-hour waiting period requirements, ruling that they serve legitimate state interests and do not unduly burden a minor's right to an abortion. *Id.* at 96a-97a.[5]

SUMMARY OF ARGUMENT

1. This Court's decisions in the highly contested abortion area have suggested a variety of different formulations for the applicable standard of review. Most of those decisions, starting with *Roe* v. *Wade* itself, have proceeded on the assumption that the regulation of abortion implicates a fundamental right, and thus should be subject to a heightened standard of judicial review, such as the "compelling state interest" standard applied by *Roe* itself. See 410 U.S. at 155. In *Webster* v. *Reproductive Health Servs.*, however, the plurality concluded that *Roe* v. *Wade* should be "modif[ied] and narrow[ed]," 109 S. Ct. at 3058; consistent with that judgment, the plurality would have upheld the viability testing required by the Missouri law challenged in that case because it was "reasonably designed" to

[5] The court also rejected petitioners' equal protection challenges to the Act. 88-1125 Pet. App. 98a. Petitioners appear to have abandoned those claims in this Court.

Judges Lay, McMillian, and Heaney dissented. Judges Lay and McMillian concluded that the two-parent notification requirement served no purpose if a minor's parents were divorced or separated and the custodial parent consents to an abortion. 88-1125 Pet. App. 99a-106a. They also concluded that the 48-hour waiting period unduly burdens a minor's right to an abortion. *Id.* at 106a-108a. Judge Heaney said that the two-parent notification requirement is unconstitutional, but a one-parent notification requirement would be valid. *Id.* at 109a.

serve legitimate state interests. *Ibid.* We believe that the Court should adopt the standard articulated by the *Webster* plurality as the applicable standard of review for all abortion regulations.

This Court's recent decisions demonstrate that a liberty interest is "fundamental" and therefore deserving of a heightened standard of review only if our Nation's history and traditions have protected that interest from state restrictions. But the Nation's history and traditions do not demonstrate that there is a fundamental right to an abortion; to the contrary, state laws condemning or limiting abortion were common when the Fourteenth Amendment was ratified. In particular, our Nation's history and traditions do not prove that an unemancipated minor has any such right independent of her parents' consent. At common law, a physician could not operate on a minor patient without the parents' consent. And before *Roe* and *Danforth*, only three of the 17 States that permitted some form of abortion exempted that procedure from the operation of the prevalent statutory or common-law rules requiring parental consent. Finally, even if an unemancipated minor were deemed (under *Roe* and *Danforth*) to have a right to an abortion regardless of her parents' consent, any such right does not imply a fundamental right to an abortion without her parents' knowledge. Thus, Minnesota's parental notification statute cannot be said to implicate a fundamental right. The appropriate standard of review for determining the constitutionality of that statute, therefore, is the standard endorsed by the plurality in *Webster*.

2. There can be little doubt that the Minnesota parental notification law is reasonably designed to serve a legitimate state interest. Parental notification requirements advance the legitimate state interests of informing and involving parents in decisions affecting their minor child's welfare. Given the grave medical, emotional, and psychological consequences of the abortion decision, the State can reasonably provide an opportunity for parental consultation in recognition of parents' traditional concern and responsibility for their child's upbringing. Such consultation benefits even mature minors, and those benefits are more secure when both parents are notified, rather than just one. In the majority of cases, both parents will be

responsible for their daughter's welfare, either because they are married and live together or because they hold custody jointly. Even a non-custodial parent may care very deeply about his or her daughter. Finally, because it is administratively infeasible to restrict notification to "functional" but not "dysfunctional" families, the State may require notification of both parents in all families to achieve the benefits demonstrable in most.

Parental notification requirements are not subject to a judicial cost/benefit analysis. The approach petitioners urge camouflages as impartial truths "expert" opinions that were unpersuasive in the legislative process. Due process does not authorize a court to review de novo the wisdom of a state law in the guise of assessing its factual support, its effectiveness, or its overall merit. Due process only permits a court to ask whether a law deprives a party of a historically protected liberty without sufficient justification. Because this law does not do so, the district court's "factual" findings are immaterial.

ARGUMENT

THE MINNESOTA PARENTAL NOTIFICATION REQUIREMENT DOES NOT VIOLATE THE DUE PROCESS CLAUSE

I. ABORTION REGULATIONS, INCLUDING PARENTAL NOTIFICATION REQUIREMENTS, SHOULD BE UPHELD IF THEY ARE REASONABLY DESIGNED TO SERVE LEGITIMATE STATE INTERESTS

Because none of the opinions in *Webster* commanded a majority of the Court, there is now considerable uncertainty about the standard of review to be applied when abortion legislation is challenged under the Due Process Clause. That uncertainty is compounded in the present case by the divergent formulations of the applicable standard offered by the Court in previous cases concerning abortion and parental rights. In its initial decision on this issue, *Planned Parenthood* v. *Danforth*, 428 U.S. 52, 74 (1976), the Court held that the fundamental right recognized in *Roe* extends to unemancipated minors, and

framed the inquiry in terms of whether a requirement of parental consent would permit a "veto" of that right. Three years later, in *Bellotti II*, a plurality of four Justices reaffirmed *Danforth*, but appeared to formulate the question before the Court in terms of whether a provision for parental notice and consent would "unduly burden the right to seek an abortion." 443 U.S. at 640. And in *H.L.* v. *Matheson*, a different plurality sent conflicting signals about the proper standard. On the one hand, the plurality, using language reminiscent of *Roe* v. *Wade*, see 410 U.S. at 155, stated that a parental notification statute would be upheld if "narrowly drawn" to serve "important state interests." 450 U.S. at 413. But the *Matheson* plurality also quoted language from *Harris* v. *McRae*, 448 U.S. 297, 325 (1980), to the effect that such a measure would be upheld if "rationally related to the legitimate governmental objective of protecting potential life"—suggesting a more relaxed standard of review. 450 U.S. at 413.

The parties to this case devote relatively little attention to the standard of review, but they, too, disagree about what it should be. Petitioners appear to endorse a variation on one of the standards suggested by the *Matheson* plurality, stating that parental notification laws "must 'plainly serve[] important state interests [and be] narrowly drawn to protect only those interests.' " Pet. Br. 28-29 (quoting *Matheson*, 450 U.S. at 413). Petitioners do not, however, consider what impact *Webster* may have had on this standard. The State cross-petitioners briefly discuss the significance of *Webster*, and attempt to synthesize a multi-tiered standard of review based on the various opinions in that case. They conclude that although an "outright prohibition" of abortion is subject to strict scrutiny and may be sustained only upon the showing of a "compelling state interest," when a state statute "imposes some burden short of virtual prohibition or severe limitation it should be upheld if it rationally furthers legitimate public purposes." Cross-Pet. Br. 24. Thus, the cross-petitioners appear to endorse a standard of review similar to that applied by the *Webster* plurality, at least with respect to the issues presented by this case.

The question of the correct standard of review in abortion cases is manifestly in need of clarification by this Court if lower courts, litigants, and legislative bodies are to have adequate guidance in this difficult and contentious area. For the reasons set forth below, we believe that the standard articulated by the *Webster* plurality—which asks whether an abortion regulation is reasonably designed to serve a legitimate state interest—states the correct standard and should be applied both to questions involving parental authority and to abortion regulations generally.

A. Abortion Regulations Are Subject To Heightened Review Under The Due Process Clause Only If They Implicate A Fundamental Right

The Due Process Clause, by its terms, is primarily concerned with ensuring that interests in life, liberty, and property are afforded the "process" to which they are due. In addition, however, this Court's decisions establish that the Clause provides a measure of substantive protection to certain liberty interests. *Turner* v. *Safley*, 482 U.S. 78, 94-99 (1987); *Moore* v. *City of East Cleveland*, 431 U.S. 494 (1977); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925). The Court has been justifiably cautious in identifying such rights, recognizing that once it ventures beyond the "core textual meaning" of liberty as freedom from bodily restraints, the imputation of substantive content to the concept of liberty is necessarily a " 'treacherous' " undertaking. *Michael H.* v. *Gerald D.*, 109 S. Ct. 2333, 2341 (1989) (plurality opinion). As stated in *Bowers* v. *Hardwick*, 478 U.S. 186, 194 (1986), the Court "is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution."

The general standard of review in assessing substantive due process claims is highly deferential to legislative judgments. As a rule, a state (or federal) statute that trenches upon a liberty interest will be upheld so long as it is rationally related to a legitimate state interest. See, *e.g.*, *Califano* v. *Aznavorian*, 439

U.S. 170, 176-178 (1978); *Ferguson* v. *Skrupa*, 372 U.S. 726 (1963); *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 488 (1955). In certain narrow areas, however, the Court has gone further, and has held that particular liberty interests are subject to a more exacting standard of review. The critical determination in finding that a liberty interest will be afforded this heightened protection is the conclusion that it constitutes a "fundamental" right. *Michael H.*, 109 S. Ct. at 2341 (plurality opinion). Thus, the applicable standard of review in substantive due process cases is primarily a function of the method employed by the Court for identifying those rights that are deemed to be constitutionally fundamental.

In recent decisions, the Court has consistently stated that a right will be regarded as fundamental if it is "implicit in the concept of ordered liberty," *Palko* v. *Connecticut*, 302 U.S. 319, 325 (1937), or "deeply rooted in this Nation's history and tradition," *Moore*, 431 U.S. at 503 (plurality opinion). See *Bowers*, 478 U.S. at 192-194. Under either rubric, the applicable methodology is historical. *Michael H.*, 109 S. Ct. at 2342-2343 (plurality opinion); *Moore*, 431 U.S. at 504 n.12 (plurality opinion); *Bowers*, 478 U.S. at 192-194; *Palko*, 302 U.S. at 325. By limiting the scope of "fundamental rights" to those liberties historically regarded as essential to our Nation, the Court has sought, in the words of the *Michael H.* plurality, both to "prevent future generations from lightly casting aside important traditional values," and yet also to assure that the Due Process Clause does not become a judicial license "to invent new ones." *Id.* at 2341 n.2. See *Moore*, 431 U.S. at 504 n.12 (plurality opinion).

B. No Fundamental Right Is Implicated By The Minnesota Notification Requirement

Petitioners' claim that Minnesota's parental notification statute should be reviewed under heightened scrutiny rests on the assumption that the state law implicates a fundamental right. At bottom, of course, the fundamental right on which they rely is the right to abortion identified in *Roe* v. *Wade*. For the reasons discussed below and set forth more fully in our brief in *Webster* v. *Reproductive Health Servs.*, we continue to

believe that *Roe* was wrongly decided and should be overruled. But regardless of *Roe*'s continuing vitality, petitioners' argument in support of heightened scrutiny necessarily rests on two further premises: that the parents of an unemancipated minor may not exercise a "veto" over her decision to have an abortion—the holding of *Danforth*—and that the parents of an unemancipated minor are not even entitled to notice that she has sought an abortion. In our view, none of the three assumptions on which petitioners' case for heightened scrutiny is built is tenable: there is, in view of the Nation's history and traditions, no fundamental right to abortion; there is no fundamental right of a minor to an abortion without parental consent; and there is no fundamental right of a minor to an abortion without parental knowledge. If any of these three claims of fundamental right is rejected by the Court, and each should be, then the statute at issue must be upheld as long as it reasonably advances a legitimate state interest.

1. This Nation's History And Traditions Do Not Establish A Fundamental Right To An Abortion

If abortion is not a fundamental right, there is no appropriate basis for subjecting the Minnesota statute in this case to heightened scrutiny. As we explained more fully in our brief in *Webster*, there is simply no credible foundation for the proposition that abortion is a fundamental right. This conclusion follows whether the inquiry is framed broadly, in terms of a right to "privacy" or a right to "reproductive choice," or narrowly, in terms of a right to abortion. Compare *Michael H.*, 109 S. Ct. at 2344-2345 n.6 (opinion of Scalia, J.), with *id.* at 2346-2347 (O'Connor, J., concurring in part).

Roe discovered a fundamental right to abortion by generalizing broadly from previous decisions, which it characterized as recognizing a "guarantee of personal privacy." 410 U.S. at 152. Those decisions, the Court said, "make it clear that the right has some extension to activities relating to marriage, *Loving* v. *Virginia*, 388 U.S. 1, 12 (1967); procreation, *Skinner* v. *Oklahoma*, 316 U.S. 535, 541-542 (1942); contraception, *Eisenstadt* v. *Baird*, 405 U.S., at 453-454; *id.*, at 460, 463-465

(White, J., concurring in result); family relationships, *Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1944); and child rearing and education, *Pierce* v. *Society of Sisters*, 268 U.S. 510, 535 (1925); *Meyer* v. *Nebraska*, [262 U.S. 390 (1923)]." 410 U.S. at 152-153. The Court then concluded that "[t]his right of privacy * * * is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.* at 153.

If we look more specifically at the historical record regarding abortion, however, it cannot seriously be maintained that abortion is a right so deeply rooted in our history and traditions that it can be ranked as fundamental. To the contrary, state laws condemning or limiting abortion were common when the Fourteenth Amendment was ratified. In 1868, at least 36 state or territorial laws limited abortion, and 21 of those laws were in effect in 1973. *Roe*, 410 U.S. at 174-176 & n.1 (Rehnquist, J., dissenting).[6] Plainly, our history does not "exclude * * * a societal tradition of enacting laws *denying* that interest." *Michael H.*, 109 S. Ct. at 2341 n.2 (plurality opinion). In fact, the historical record in favor of the liberty in question here is no stronger than it was in *Michael H.* or *Bowers*, where the Court found no warrant in the common-law tradition for identifying a fundamental right to visitation privileges for adulterous fathers, or a fundamental right to engage in homosexual sodomy.

Moreover, even if the decisions relied upon by *Roe* may be said to establish a "right of privacy"—or a right "whether to accomplish or prevent conception," *Carey* v. *Population Servs. Int'l*, 431 U.S. 678, 685 (1977)—it does not follow that this right extends to the decision to have an abortion. A decision not to conceive does not entail the deliberate destruction of fetal life; a decision to abort manifestly does. *Harris* v. *McRae*, 448 U.S. at 325; *Carey*, 431 U.S. at 690. The State's interest in protecting fetal life throughout pregnancy thus provides an entirely adequate basis for limiting any right of privacy or procreative choice to the decision not to conceive. Here again, the

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[6] The abortion of a fetus after "quickening" was regarded as a crime at common law. *Roe*, 410 U.S. at 132-136. The earliest English abortion statute, adopted in 1803, made abortion a crime throughout pregnancy. *Id.* at 136.

interest in protecting fetal life is at least as compelling as the interest in promoting family autonomy (at issue in *Michael H.*) or the interest in condemning homosexual conduct as immoral (at issue in *Bowers*)—both of which were found by the Court to be sufficient to defeat any claim that a generalized right to privacy should be extended to those cases. See *Thornburgh* v. *American College of Obstetricians & Gynecologists*, 476 U.S. 747, 792-793 & n.2 (1986) (White, J., dissenting); *id.* at 828 (O'Connor, J., dissenting). In short, whether viewed in terms of a general right of privacy or reproductive choice, or more narrowly in terms of abortion itself, it cannot reasonably be said that the right to abortion is fundamental.[7]

2. An Unemancipated Minor Does Not Have A Fundamental Right To An Abortion Without Her Parents' Consent

Even were the Court not to revisit the underlying question whether there is a fundamental right to an abortion, it may wish to reconsider the next step in petitioners' argument for heightened scrutiny. This Court held in *Danforth* that an unemancipated minor has a fundamental right to abortion that may not be qualified by "an absolute, and possibly arbitrary, veto" by her parents. 428 U.S. at 74. If that conclusion was in error—that is, if the State can constitutionally require that parents must give their *consent* to a minor's abortion—then there can be no claim that an unemancipated minor has a fundamental right to avoid *notice* to her parents that she has sought an abortion. Notice is indisputably a less intrusive form of parental involvement than consent, which necessarily entails notice.

1. Our history and traditions provide no support for the notion that a minor has a fundamental right to an abortion without her parents' consent. That conclusion follows, regardless of the level of specificity at which this inquiry is made.

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[7] By contrast, a state law *mandating* abortions would present a starkly different question. See *Cruzan* v. *Missouri Dep't. of Health*, cert. granted. No. 88-1503 (to be argued Dec. 6, 1989). Our Nation's history and traditions establish that a competent adult may generally refuse unwanted medical intrusions. This right would, we believe, extend to an unwanted abortion.

At the most general level, there can be no doubt that our legal traditions recognize the right of parents to control their childrens' upbringing. Anglo-American law has "historically * * * recognized that natural bonds of affection lead parents to act in the best interests of their children." *Parham* v. *J.R.*, 442 U.S. 584, 602 (1979); *id.* at 621 (Stewart, J., concurring in the judgment) (collecting authorities). See Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights"*, 1976 B.Y.U. L. Rev. 605, 615-619. Accordingly, common law courts were extremely reluctant to interfere in the parent-child relationship as long as the parents did not treat their children cruelly or immorally. See, *e.g.*, *In re Agar-Ellis*, [1883] 24 Ch. D. 317 (C.A.); Recent Development, *Minors' Rights to Medical Care*, 14 J. Fam. L. 581, 581-583 (1975). This strong tradition of parental control continues today. Every State limits the participation of minors in a substantial number of activities in which adults may engage, such as marriage, voting, or driving a car. Such restrictions "reflect[] the simple truth derived from our communal experience, that juveniles as a class have not the level of maturation and responsibility that we presume in adults and consider desirable for full participation in the rights and duties of modern life." *Stanford* v. *Kentucky*, 109 S. Ct. 2969, 2988 (1989) (Brennan, J., dissenting).

This Court's decisions, rendered in a variety of constitutional contexts, reflect the same understanding. The Court has long recognized that "the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." *Ginsberg* v. *New York*, 390 U.S. 629, 639 (1968). "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Pierce*, 268 U.S. at 535. Consequently, this Court has repeatedly acknowledged that "a natural parent's 'desire for and right to "the companionship, care, custody, and management of his or her children" ' " is itself a significant liberty interest. *Santosky* v. *Kramer*, 455 U.S. 745, 758-759 (1982) (citations omitted); see also, *e.g.*, *Michael H.*, 109 S. Ct.

at 2342 (plurality opinion); *Matheson*, 450 U.S. at 410; *Wisconsin* v. *Yoder*, 406 U.S. 205, 231-233 (1972); *Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1944); *Meyer* v. *Nebraska*, 262 U.S. 390, 399-401 (1923). Indeed, if there is a fundamental right implicated by this case, this Court's decisions suggest it is the right of *parents* to direct the upbringing of their children, not the right of children to evade parental control.

The conclusion drawn from the general historical understanding of parent-child relations is reinforced by more specific consideration of the traditions regarding the provision of medical treatment to children. The rule at common law was that a physician could not treat a minor without parental consent. W. Keeton, *Prosser and Keeton on The Law of Torts* ch. 4, § 18, at 115 (5th ed. 1984). Over time, common law courts developed limited exceptions to this rule for emergencies, emancipated minors, relatively safe operations for mature minors, and necessary lifesaving treatment. *Id.* at 114-118; L. Nolan, *The Legal Status of Parent and Child 1986*, at 161-172 (1987). But all jurisdictions today still follow the common-law rule unless it has been modified by case law or statute. L. Nolan, *supra*, at 161. See *Stanford*, 109 S. Ct. at 2988 (Brennan, J., dissenting) (37 States by statute fix 18 as the age of consent for medical treatment); *Bowen* v. *American Hosp. Ass'n*, 476 U.S. 610, 627-628 & n.13 (1986) (plurality opinion) (summarizing current law).

Even when we consider history and tradition at the most specific level—and ask whether a minor was generally recognized to have a right to an abortion without parental consent—the answer is the same: there was no such generally recognized right. Specifically, in those States that had legalized abortion to some extent prior to this Court's decision in *Roe* v. *Wade*, the general rule was that parental consent *was* required before the operation could be performed on an unemancipated minor. Of the 17 States that permitted some form of abortion in 1971, eight had laws expressly requiring minors to obtain parental consent, and six continued to apply the common-law rule of

parental consent. Pilpel & Zuckerman, *Abortion and the Rights of Minors*, 23 Case W. Res. L. Rev. 779, 783-785 (1972). Only three state courts had construed state laws allowing minors to consent to pregnancy-related medical care to permit a minor to obtain an abortion without parental consent. *Ballard* v. *Anderson*, 4 Cal. 3d 873, 484 P.2d 1345, 95 Cal. Rptr. 1 (1971); *In re Diane*, 318 A.2d 629 (Del. Ch. 1974). See *In re Smith*, 16 Md. App. 209, 225, 295 A.2d 238, 246 (1972) (a minor may refuse to have an abortion over parent's objection). See also Note, *The Minor's Right to Abortion and the Requirement of Parental Consent*, 60 Va. L. Rev. 305, 305 (1974).

Thus, whether considered at the most general level of parent-child relations, or at the most specific level of a minor's right to have an abortion without her parents' consent, the historical record speaks with a single, powerful voice. Against this background, it simply cannot be said that a minor's right to have an abortion without her parents' consent is so "rooted in the traditions and conscience of our people" as to be deemed fundamental. *Michael H.*, 109 S. Ct. at 2341 (plurality opinion). To the contrary, the conscience of the American people, as embodied in law, *Snyder* v. *Massachusetts*, 291 U.S. 97, 122 (1934) (Cardozo, J.), stands unmistakably for the proposition that unemancipated minor children are not free to make such profoundly important decisions without the involvement of their parents.

2. Nor does the reasoning of *Danforth*, as amplified by *Bellotti II*, support the notion that a minor has a fundamental right to an abortion without obtaining her parents' consent. Starting with the premise that the State cannot (subject to certain qualifications) veto an adult's decision to have an abortion—the holding of *Roe*—*Danforth* held that a State cannot allow parents to veto their unemancipated daughter's decision to have an abortion. 428 U.S. at 74. But that conclusion does not follow from the premise. While a State cannot ordinarily veto an adult's decision to obtain (or forgo) medical care, a State *can* give a minor's parents the right to select medical care for their child. Thus, even if the decision whether to have an

abortion is ultimately only a medical decision (as *Roe* treated it, 410 U.S. at 156-162), the State should be free to leave the decision to a minor's parents, just as the State leaves all other medical decisions to them.[8]

Danforth also reasoned that a parental consent requirement was unlikely to promote family unity and parental authority when a minor's pregnancy "already has fractured the family structure." 428 U.S. at 75. The *Bellotti II* plurality elaborated on this point, stating that the question of whether a minor should have an abortion is fraught with "grave and indelible" consequences, and that the parent's decision may be "arbitrary." 443 U.S. at 642-643.

The issue, however, is not whether a minor's unwanted pregnancy is a stressful event having lasting consequences both for her and her family; it surely is. And the question is not whether certain parents will exercise poor judgment in deciding what is in the best interests of their daughter; they surely will. Rather, the issue is whether a State may reasonably conclude that a minor's parents are, as a general matter, better suited to make these critical decisions than a minor and her physician, or a minor and her physician in conjunction with a judge. There is no legal presumption that parents will not act in the best interests of their child; to the contrary, the presumption lies in precisely the other direction. *Parham,* 442 U.S. at 602. And unless the minor's life is at risk, her pregnancy is the result of incest, or she is the victim of parental abuse, there is no objective standard by which to determine whether the parents' decision is "arbitrary." The pregnant minor is confronted with choices that implicate the most basic values—not just about the minor's future options, but also about the morality of abortion itself. It strains credulity to think that these matters are more properly resolved by the minor and persons who, in all probability, are

[8] To be sure, a State can intervene in the parent-child relationship, for example, to supply a child with life-saving medical care. *Jehovah's Witnesses* v. *King County Hosp.*, 390 U.S. 598 (1968), summarily aff'g 278 F. Supp. 488 (W.D. Wash. 1967). But just as due process does not require the State to intervene even in that setting in order to protect a minor from her parents, *DeShaney* v. *Winnebago County Dep't of Social Servs.*, 109 S. Ct. 998 (1989), due process should not compel a State to allow a physician to intervene either.

strangers she will never meet again, than by the minor in consultation with those who have a lifetime commitment to her care, nurturing, and upbringing.

3. An Unemancipated Minor Does Not Have A Fundamental Right To An Abortion Without Her Parents' Knowledge

Pretermitting the two foregoing questions—whether there is a fundamental right to an abortion and whether there is a fundamental right on the part of minors to an abortion without parental consent—petitioners still must show that the fundamental right recognized in *Roe* and *Danforth* extends to a provision requiring only that parents be given *notice* of their minor daughter's request for an abortion. Parental notification differs in obvious respects from parental consent. Notification laws like Minnesota's do not empower parents to "veto" their child's decision; at most they postpone that decision for a brief period in order to allow parents to discuss that decision with their child.[9] In fact, a parental notification requirement does no more than preserve for parents the opportunity they have traditionally enjoyed to discuss with their daughter significant decisions that arise during her minority, and to be aware of important actions taken by third parties toward her.

There is utterly no support for the proposition that a minor has a fundamental right to keep her parents in the dark about her welfare. The historical materials surveyed above concerning the right of parents to control the upbringing of their children and their right to select the medical procedures performed on

[9] The Minnesota statute clearly differs from the laws held invalid in *Akron*, *Bellotti II*, and *Danforth*. It requires that written notification be personally delivered to the parents, Minn. Stat. Ann. § 144.343(2) (West 1989), but there is no requirement that the parents (or anyone else) provide written evidence that such notice was given. The attending physician or his clinic can send the notice by mail, *id.* § 144.343(2)(b), and the 48-hour waiting period can run while the abortion is being scheduled, 88-1125 Pet. App. 97a n.18. Only one parent need be notified if the other parent cannot be located by reasonably diligent effort. Minn. Stat. Ann. § 144.343(3) (West 1989). It is an affirmative defense that a person attempted with reasonable diligence to deliver notice, but was unable to do so. *Id.* § 144.343(5). None of these provisions is similar to a parental veto.

their children—including abortion—conclusively refute the notion that a child has a fundamental right to conceal important facts about her physical condition and well-being from her parents.[10] In the final analysis, petitioners' objection to notifying parents—*i.e.*, that disclosure of their minor daughter's pregnancy and desire for an abortion will disrupt everyone's life without any attendant benefit—supports concealing the pregnancy from the parents even *after* their daughter has had an abortion. But there is no support in this Court's cases or common sense for the remarkable principle that a minor has a fundamental right to keep her parents in ignorance about her welfare. What petitioners' argument ultimately reveals is how far afield their claim is from the history and traditions of this Nation, and from what due process can be said legitimately to protect.

C. The "Undue Burden" Analysis Does Not Constitute A Substitute For A Standard of Review

In *Bellotti II*, the plurality analyzed the parental consent provisions at issue in that case not in terms of a conventional standard of review, but rather in terms of whether the statute would "unduly burden the right to seek an abortion." 443 U.S. at 640. Similarly, Justice O'Connor, in her dissenting opinions in *City of Akron* v. *Akron Center for Reproductive Health*, 462 U.S. at 452-475, and *Thornburgh* v. *American College of Obstetricians & Gynecologists*, 476 U.S. at 827-833, examined a variety of abortion restrictions under an "undue burden" analysis. Indeed, the United States, in an amicus brief filed in *Akron*, also urged the Court to adopt an "undue burden" approach.

Although we believe that there is a limited role for an "undue burden" analysis in constitutional adjudication, we do not believe, upon full reflection, that the "undue burden" inquiry

[10] Plaintiffs are correct that a number of States, including Minnesota, have enacted laws increasing a minor's right to consent to medical care. See generally L. Nolan, *supra*, Apps. A-F, at 442-461. Abortion, however, is not among those medical procedures.

can legitimately substitute for a standard of review. The basic problem is revealed within the very formulation of the *Bellotti II* plurality: the question is whether a statute will "unduly burden *the right to seek an abortion.*" 443 U.S. at 640 (emphasis added). In other words, undue burden analysis *presupposes* that there is a fundamental right potentially implicated by the regulation at issue; the analysis cannot assist in distinguishing between fundamental rights and other liberty interests. Thus, unless we are to embrace the assumption that *any* regulation touching upon the question of abortion necessarily implicates a fundamental right, the undue burden analysis begs the question at issue: whether there is a fundamental right at stake that requires application of heightened scrutiny.

The "undue burden" analysis suffers from an additional infirmity when coupled with a judicially created, highly abstract, or generalized right—such as the "right to privacy" or the "right to abortion." In such a context, asking whether a particular measure unduly burdens the right provides no meaningful guidelines for assessing the weight of the competing interests, or for determining how much deference to give to legislative judgments. The only measure of constitutionality would be the courts' own subjective assessment of what is "due" or "undue" in any particular context. In these circumstances, the undue burden analysis would offer "no guide but the Court's own discretion," *Baldwin* v. *Missouri*, 281 U.S. 586, 595 (1930) (Holmes, J., dissenting); see *Webster*, 109 S. Ct 3066 n.* (Scalia, J., concurring in part and concurring in the judgment), and would serve only to mask judgments made on the basis of assumptions that would remain unarticulated. In our view, great caution should be exercised in resolving important constitutional controversies under the "undue burden" mantle.[11]

[11] This is not to say that the "undue burden" approach may not play a proper role in cases where the relevant universe of constitutional rights is fully specified and well defined. In those circumstances, we believe that the "undue burden" inquiry would operate in a fashion analogous to the principle reflected in the maxim *de minimis non curat lex*—that minor or de minimis incursions upon settled rights do not call for judicial redress. See *Ingraham* v. *Wright*, 430 U.S. 651, 674 (1977).

II. PARENTAL NOTIFICATION REQUIREMENTS ARE REASONABLY DESIGNED TO SERVE LEGITIMATE STATE INTERESTS

Because Minnesota's parental notification statute does not implicate any fundamental right, it should be assessed under the standard of review formulated by the *Webster* plurality. As previously noted, that standard asks whether a particular regulation is "reasonably designed" to serve a legitimate state interest. 109 S. Ct. at 3058. There can be little doubt that the Minnesota statute readily passes muster under this standard.

A. Parental Notification Requirements Advance The Legitimate State Interests Of Informing And Involving Parents In Decisions Affecting The Welfare Of Their Minor Children

The State unquestionably has a legitimate interest in informing and involving parents in decisions affecting the welfare of their minor children. See *Matheson, supra.* This interest clearly extends to the decision whether to have an abortion. "The medical, emotional, and psychological consequences of an abortion are serious and can be lasting; this is particularly so when the patient is immature." *Matheson,* 450 U.S. at 411. And a parental notification requirement, in association with a reasonable waiting period, furthers these legitimate interests. Such laws postpone a minor's decision for a brief period to allow her parents to discuss with her what is likely to be the most important and irrevocable decision of her minority life. A State thus has a significant interest in promulgating a parental notice requirement in order to ensure that a minor will not act improvidently, and to preserve her parents' traditional responsibility for her nurturing and upbringing. *Matheson,* 450 U.S. at 409-413; *id.* at 421-425 (Stevens, J., concurring in the judgment); *Zbaraz* v. *Hartigan,* 763 F.2d 1532, 1548-1557 (7th Cir. 1985) (Coffey, J., dissenting), aff'd by an equally divided Court, 484 U.S. 171 (1987).

The foregoing considerations apply whether or not the minor is determined to be "mature" (*i.e.,* able to give informed consent). The abortion decision "is an important, and often a

stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences." *Danforth,* 428 U.S. at 67. A minor's parents can counsel their daughter about the moral and psychological consequences of her decision, and thereby assist her to make an informed judgment. Parents can also help their daughter select a competent physician, and can supply the physician with necessary medical and psychological information, some of which their child may not know. In addition, parents can provide emotional support both before and after the procedure, and ensure that their child receives any necessary post-operative care. *Matheson,* 450 U.S. at 411; *Zbaraz,* 763 F.2d at 1549-1551 (Coffey, J., dissenting). For these reasons, a State may reasonably conclude that parents' awareness of their daughter's pregnancy and consultation about the options available to her will improve the quality of her decision, even if she is mature. And if she is not, we believe that few would genuinely argue that her parents should not be informed about, and involved in, the decision whether she is to have an abortion. It is well to remember that thousands of minors below the age of fifteen have abortions every year; they should not have to face this profoundly important decision alone.[12]

A State may also reasonably conclude that a hearing before a judge is not an acceptable substitute for notification of the minor's parents. First, the respective roles of judge and parents are manifestly different. The judge is charged with determining either that the pregnant minor is mature or that an abortion is nonetheless in her best interests. In contrast, the parents' responsibility is the overall welfare of their daughter, which encompasses advice on a wide range of considerations bearing on her decision. Second, the background and interest of the judge and

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[12] According to statistics supplied by the Alan Guttmacher Institute, whose Director of Research testified for plaintiffs as an expert on the Institute's statistics, J.A. 97, approximately 16,000 women less than fifteen years old had abortions in the United States in 1983. U.S. Department of Commerce, *Statistical Abstract of the United States* 70 (1989).

the parents are by no means identical. The judge has probably never seen the minor before, will likely never see her again, and his duty lies in discharging his statutory obligations. In contrast, a minor's parents, in the typical situation, will have known and cared for their daughter from her birth, and they will be deeply, lovingly concerned about her well-being. Third, the nature of the judicial proceeding prevents judges from acting as surrogate parents. Hearings are secret (to protect anonymity), abbreviated (to minimize delay), and *ex parte*. Even under the best of circumstances and with the best of intentions, a judge would find it enormously difficult to do anything more than make an educated guess about whether a minor is mature or whether an abortion is in her best interests.[13]

It is also reasonable for Minnesota to insist that both parents be notified where possible. If both parents are married and live together, a two-parent notification rule is no more burdensome than a one-parent notification rule. If the parents are separated or divorced but hold custody jointly, both parents will be responsible for their daughter's welfare and will be interested in her decision. Even if only one parent has custody, the noncustodial parent may well have strong emotional bonds with his or her daughter (and vice versa), and notifying the noncustodial parent may help preserve those ties. Moreover, notifying both parents may help to ensure that the attending physician will receive important medical information. On the other hand, it would be administratively infeasible to notify both parents in "functional" families but not in "dysfunctional" families, at least without establishing an expensive and cumbersome (and highly intrusive) threshold judicial proceeding to distinguish between the two. In lieu of that unwieldy process, Minnesota was entitled to require notification of both parents in all families where both parents can be located "through reasonably diligent effort." Minn. Stat. Ann. § 144.343(3) (West 1989).

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[13] The chance that a judge will guess correctly is greatly reduced if he believes that his job is " 'a routine clerical function on my part, like putting my seal and stamp on it.' " Pet. App. 25a (quoting a judge). Moreover, any advice volunteered by the professional staff of an abortion clinic will be limited for similar reasons of role, background, and setting. Peer counseling is even less reliable.

B. Parental Notification Requirements Are Not Subject To Judicial Cost/Benefit Analysis

The district court "f[ou]nd[] as a matter of fact that Minn. Stat. § 144.343(2)-(7) fails to serve the State's asserted interest in fostering intra-family communication and protecting pregnant minors." 88-1125 Pet. App. 42a. That factual finding, if that is what it is,[14] does not contradict the conclusion that parental notification is reasonably designed to advance legitimate state interests. Nor does the district court's "finding" demonstrate that Minnesota's parental notification law is unconstitutional as applied to petitioners. To the contrary, the facts establish that parental notification is valid in the case of the vast majority of unemancipated Minnesota minors.[15]

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[14] The district court's conclusion, like many of the court's other "findings," is not a "fact" in the sense used by Fed. R. Civ. P. 52(a) to identify determinations to which an appellate court must defer. Under that rule, only the evidence and legitimate inferences therefrom are reviewed under the clearly erroneous standard; everything else is subject to de novo review. See *Icicle Seafoods, Inc.* v. *Worthington*, 475 U.S. 714, 715 (1985); *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485, 511 (1984). Because the district court's conclusion presupposes application of the correct legal standard to the evidence, it is a mixed finding of law and fact to which Rule 52(a) indicates no special deference is owed. See *Bose Corp.*, 466 U.S. at 501; *Turner*, 482 U.S. at 93-94 n.*.

[15] As the court of appeals pointed out, the district court's conclusion that parental notification imposed an undue burden on pregnant minors rested "primarily on its factual findings regarding the burden imposed on minors in family units that have either 'broken apart or never formed.' " 88-1125 Pet. App. 92a-93a. These findings in turn were based on "somewhat limited factual findings" predicated on "the minor living in a one-parent household who notified only her custodial parent." *Id.* at 93a n.16. Accepting the district court's factual findings for all they are worth—namely, that involvement of the non-custodial parent introduces either a "traumatic distraction" or "disruptive and unhelpful participation" and that these events are "not uncommon," *id.* at 22a; see *id.* at 30a-31a—those findings still say nothing about the 58% of Minnesota minors who live with both parents, *id.* at 29a, as well as those minors whose parents naturally take an interest in their welfare even though they are living apart.

The district court's unprecedented inquiry represents, according to one of petitioners' counsel, a new mode of fact-based "across-the-board constitutional challenge" dubbed an "operational challenge." Pine, *Speculation and Reality: The Role of Facts in Judicial Protection of Fundamental Rights,* 136 U. Pa. L. Rev. 655, 703 (1988). Under this provocative approach, courts are entitled to weigh for themselves the costs and benefits of legislation. Properly understood, this mode of attack has nothing to do with abortion, or even adjudication of claims involving fundamental constitutional rights. Because all legislation must (if challenged) pass muster under the Due Process Clause, this methodology puts every legislative enactment on trial at least to determine whether it is rational. That novel approach, employed by the district court and urged by petitioners, is misguided both in conception and execution.

To begin with, that approach fails to recognize that legislation is a product of a complex collective judgment by a representative body about the desirability or morality of a specific goal, the social utility of different ways to achieve it, and the trade-offs necessary to enact it. There is no scientifically correct answer to any of these questions, and the Constitution does not demand the impossible—that a legislative judgment be error-proof. To the contrary, the Constitution assumes, absent some reason to presume antipathy, that improvident decisions will be rectified by the democratic process. Cf. *Vance* v. *Bradley,* 440 U.S. 93, 97 (1979).

Indeed, petitioners' approach rests on a pervasive confusion of "facts" and legitimate legislative value judgments. The "factual" inquiry pursued by the district court—whether a parental notification requirement, on balance, benefits or harms minors and their parents—touches matters so subjective, value-laden, and contestable that it is almost meaningless to inquire as to their truth or falsity. Indeed, it transforms the judicial process into that of a super-legislature acting outside the constraints of the democratic process.[16] It is ultimately an assault on the right

[16] It is not obvious that statistics, surveys, or expert opinions—the bulk of petitioners' evidence—can confirm or disprove the hypothesis that, as a general matter, a minor's parents should be aware of and involved in her sexual upbringing, since there is no objective standard to guide a court in making that judgment. Nor is the evidence considered by the district court illuminating. The court dismissed the benefits of parental notification by reference to the opinions of experts who, at bottom, simply disagreed with the state legislature that parents can contribute to their daughter's sexual upbringing. See, *e.g.*, 88-1125 Pet. App. 26a-29a.

of the people, subject to constitutional constraints, to govern themselves. When a law is based on normative, not empirical, grounds, the adducing of "expert" opinions merely camouflages personal value judgments as impartial truths. Cf. L. Hand, *The Bill of Rights* 38 (1958). For that reason, the Court has consistently held that constitutional law does not rest on the opinions of experts. *Stanford* v. *Kentucky,* 109 S. Ct. at 2979-2980 (plurality opinion); *Rhodes* v. *Chapman,* 452 U.S. 337, 348-349 n.13 (1981); *Bell* v. *Wolfish,* 441 U.S. 520, 543-544 n.27 (1979).

This Court firmly rejected an approach similar to that now urged by petitioners in *Harris* v. *McRae,* 448 U.S. at 326, which involved the constitutionality of abortion funding restrictions. The district court in that case, after holding a year-long evidentiary hearing into the public funding of abortions, concluded that " '[t]he interests of . . . the federal government . . . in the fetus and in preserving it are not sufficient, weighed in the balance with the woman's threatened health, to justify withdrawing medical assistance unless the woman consents . . . to carry the fetus to term.' " 448 U.S. at 325-326 (quoting district court decision). This Court held that the district court had undertaken the wrong equal protection inquiry and that the question was one for the legislature, not the court, to decide:

> It is not the mission of this Court or any other to decide whether the balance of competing interests reflected in the Hyde Amendment is wise social policy. If that were our mission, not every Justice who has subscribed to the judgment of the Court could have done so. But we cannot, in the name of the Constitution, overturn duly enacted statutes simply because they may be unwise, improvident,

> or out of harmony with a particular school of thought. Rather, when an issue involves policy choices as sensitive as those implicated [here] . . ., the appropriate forum for their resolution in a democracy is the legislature.

Id. at 326 (citations and internal quotation marks omitted). These observations, grounded firmly in democratic theory, apply with equal force to the wide-ranging "fact finding" undertaken by the district court in this case.

CONCLUSION

The judgment of the court of appeals should be affirmed in No. 88-1125 and reversed in No. 88-1309.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART E. SCHIFFER
Acting Assistant Attorney General

THOMAS W. MERRILL
Deputy Solicitor General

PAUL J. LARKIN, JR.
STEPHEN J. MARZEN
Assistants to the Solicitor General

STEVEN R. VALENTINE
Deputy Assistant Attorney General

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Nos. 88-1125 and 88-1309

In The

Supreme Court of the United States

October Term, 1988

No. 88-1125

JANE HODGSON, M.D., et. al.

Appellants,

vs.

THE STATE OF MINNESOTA,

Appellees.

No. 88-1309

THE STATE OF MINNESOTA,

Appellants,

vs.

JANE HODGSON, M.D., et. al

Appellees.

On Appeal From The United States Court
Of Appeals For The Eighth Circuit

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF THE STATE OF MINNESOTA AND BRIEF AMICUS CURIAE OF AMERICAN FAMILY ASSOCIATION, INC.

PEGGY M. COLEMAN
P.O. Drawer 2440
107 Parkgate Drive
Tupelo, Mississippi 38803
(601) 844-5036

Counsel of Record
For Amicus Curiae

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MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF THE STATE OF MINNESOTA

American Family Association, Inc. (AFA), Moving Party herein, respectfully moves this Honorable Court for an order granting leave to file the attached Brief Amicus Curiae. AFA has requested permission from Appellants by their attorney, Mr. William Z. Pentelovitch, Esq., and from Appellee, State of Minnesota, from its Attorney, Mr. Hubert H. Humphrey, III, Esq.

The attached Brief supports the position of the Appellee in this case. The issue before this Court concerning the constitutionality of the parental notification provision will significantly affect the position of Amicus as it seeks

to encourage the preservation of unborn children and to act to strengthen traditional American families.

INTEREST OF AMICUS CURIAE

The American Family Association, Inc., is a non-profit organization incorporated in 1977 under its original name National Federation for Decency, Inc. (NFD). AFA continues to operate as a leader of citizen and church participation to promote traditional American values and apply the Biblical ethic in society. As Amicus, American Family Association, Inc., has members in all 50 states; over 520 chapters of local citizens who are active in offering individuals alternatives to abortions; and over 360,000 subscribers to its monthly newsletter, AFA Journal. Amicus

also provides counseling and referral services to pregnant women who seek alternatives to abortion.

The ability of a state to protect the welfare of all its citizens, including the unborn, is vital to the efforts of the American Family Association membership. American Family Association, Inc., seeks to promote a healthful family environment for all Americans and it recognizes the need to afford the unborn such an opportunity. The position of the American Family Association, Inc., will support the interest of the State of Minnesota to protect the lives of the unborn and to permit the State to act in a manner which will respect the traditional family structure.

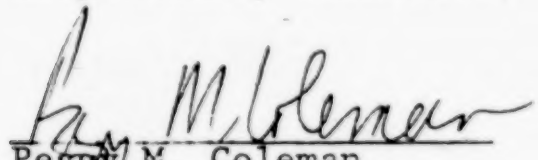
Serious efforts have been underway

to offer minors alternatives to abortions and AFA will continue to do so. In the interest of this educational process on behalf of AFA and its members concerning abortion alternatives this action is most important. The parties have written comprehensive arguments and AFA will not repeat them. Rather, AFA will highlight certain concepts it wishes the Court to consider.

The ability of AFA to continue to offer minors viable alternatives to abortion is fundamentally affected by the court's ruling. Amicus and the citizens they represent would be severely harmed by a finding that the parental notification provision is unconstitutional.

Therefore, AFA respectfully requests this Honorable Court to grant leave to file the attached Brief Amicus Curiae in this important case and to affirm the decisions of the court below.

Respectfully submitted,



Peggy M. Coleman
Attorney for AFA

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LAW AND ARGUMENT

I. THE STATE MAY CONSTITUTIONALLY REQUIRE NOTIFICATION OF BOTH PARENTS OF A MINOR'S DECISION TO OBTAIN AN ABORTION.

A. Parental Notification is a Constitutionally Sound Response By The State For The Protection of Pregnant Minors.

The allegation on the part of the abortion providers that the parental notification requirement actually undermines family interest and communication for many minors is without foundation. Further, this allegation is based upon the false assumption that a minor has the same privacy interests as her adult counterpart.

The Court in Roe v Wade, 410 U.S. 113, 154 (1973), found that a pregnant

woman had a certain privacy right, "but that this right is not unqualified and must be considered against important state interests in regulation." The Court has found that the State's interests have outweighed the pregnant woman's privacy interests, even early in the term, in the use of public monies for abortions, Harris v McRae, 448 U. S. 297 (1980); in the requirement that the abortion be based upon "informed consent," Planned Parenthood of Central Missouri v Danforth, 428 U.S. 52 (1976), and in the prohibition of the use of public facilities or public employees to perform abortions, Webster v Reproductive Health Services, ____ U.S. ____ 57 U.S.L.W. 5023 (1989). It is abundantly clear that the privacy right which has been attached to a woman's decision to

abort a child is limited by certain state interests.

While there has appeared to be a lack of continuity or cohesiveness in the decisions addressing abortion regulation, two underlying principles emerge which may be helpful to the present analysis. First, the State may treat the abortion procedure as it does any other medically similar procedure. Second, the State should be able to treat minors differently from adults who seek an abortion.

Applying the first premise, based upon the interest of the State to regulate medical procedures, the State may impose certain restrictions and notice requirements on medical practitioners. The State requires that before a medical professional removes a

child's tonsils or her appendix he must obtain permission from the parent or guardian. If a child wishes to have her ears pierced, the practitioner must obtain permission from the child's parents or guardian. To suggest that the health interests of the State are less in the case of a child undergoing an abortion than they are when she has her ears pierced is to acquiesce to the absurd.

Second, this Court has long recognized that children and adults may be treated differently under the law and that there is a different protection under the Constitution for children than for adults. In the present case, there are several recognized rights which must be considered. The first is the right of the parents to "establish a home and

bring up children". Meyer v Nebraska, 262 U.S. 390, 399 (1923). The second interest is that of the State in "safeguarding the physical and psycholcgical well-being of a minor." Globe Newspaper Co. v Superior Court, 457 U.S. 596 (1982). The State may require a child to receive educational instruction, Wisconsin v Yoder 406 U.S. 205 (1972); it may prohibit children from being used in production of sexually explicit material, New York v Ferber, 458 U.S. 747 (1982); and it may limit the duration and type of employment in which a child may engage, Prince v Massachusetts, 321 U.S. 158 (1944). In his dissent in Danforth Justice Stevens noted:

> The State's interest in the welfare of its young citizens justifies a variety of protective measures. Because he may not foresee the

> consequences of his decision, a minor may not make an enforceable bargain. He may not lawfully work or travel when he pleases, or even attend the exhibitions of constitutionally protected adult motion pictures. Persons below a certain age may not marry without parental consent. Indeed, such consent is essential even when the young woman's already pregnant. The State's interest in protecting a young person from harm justifies the imposition of restraints on his or her freedom even though comparable restraints on adults would be constitutionally impermissible.

428 U.S.at 102.

Finally, this Court has recognized that minors are entitled to certain protections afforded under the Constitution. Goss v Lopez, 419 U.S. 565 (1975); In re Gault, 387 U.S. 1 (1967); and Tinker v Des Moines School District, 393 U.S. 303 (1969). These Constitutional rights are limited by

virtue of the condition of the person's minority.

Without precedent this Court has acknowledged a distinction between "mature" minors and "immature" minors. Bellotti v Baird, 443 U.S. 622 (1979); City of Akron v Akron Center for Reproductive Health, 462 U.S. 416 (1983). This distinction, however, is not upheld elsewhere in the law.

The courts have not engaged in an analysis based upon the rights of a "mature" versus an "immature" minor in these areas. The debate concerning a "mature" versus an "immature" minor in these circumstances was properly conducted by the Minnesota legislature when it fixed the age of majority. The same is true with respect to the requirement of parental notification.

The legislature found, as evidenced by the statute, that those women under the age of eighteen are immature for the purpose of this statute and must be afforded greater protection. To judicially carve out a subset from the class of minors is an act of assumption of legislative right and authority.

The Court in reviewing the parental notification provision must balance the interests of the state in the child's welfare and the interest of parents in the upbringing of the child against the child's privacy interests in obtaining an abortion. Mr. Justice Stevens, in his dissent, provided an eloquent analysis of the role parents play in a minor's decision making process in Planned Parenthood of Central Missouri v Danforth, 428 U.S. 52 (1986).

> If there is no parental-consent requirement, many minors will submit to the abortion procedure without ever informing their parents, An assumption that the parental reaction will be hostile, disparaging, or violent no doubt persuades many children simply to bypass parental counsel which would in fact be loving, supportive, and indeed, for some indispensable. It is unrealistic, in my judgment, to assume that every parent-child relationship is either (a) so perfect that communication and accord will take place routinely or (b) so imperfect that the absence of communication reflects the child's correct prediction that the parent will exercise his or her veto arbitrarily to further a selfish interest rather than the child's interest. A state legislature may conclude that most parents will be primarily interested in the welfare of their children, and further, that the imposition of a parental-consent requirement is an appropriate method of giving the parents an opportunity to foster the welfare by helping a pregnant distressed child to make and to implement a correct decision.

428 U.S. at 103-04.

This same reasoning is applicable to the present parental notification provision.

The parents are under a legal obligation to care for the child and may be otherwise legally responsible for the child. To require a parent to support a child and have legal responsibilities for the child while preventing or facilitating the prevention of a parent's role in the child's decision to procure an abortion is inconsistent if not irrational.

In Yoder, 406 U.S. 205, 232 (1972). this Court stated that "[t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parent in the upbringing of their children is now established beyond debate

as an enduring American tradition." It is this tradition and function of parenting which is being assaulted by the attempt to eliminate parental notification in favor of notification only to a judicial officer.

B. The Two-Parent Notice Requirement Is Not Unduly Burdensome.

The Eighth Circuit concluded that "[b]y providing for judicial by-pass, the statute safeguards those minors for whom parental involvement may not be in this best interest while at the same time encouraging parental involvement for those minors who may be greatly assisted at a difficult time. We cannot conclude the two-parent notice requirement imposed in conjunction with a bypass option unduly burdens the right of a mature or

best interests minor to obtain an abortion." Hodgson v State of Minnesota, 853 F.2d 1452, 1464 (8th Cir. 1988).

The statute requires notice be given to both parents, if living, or one parent if one is dead or cannot be located through reasonably diligent efforts. Minn. Stat. Ann. §144.343(3). The abortion providers attack the two-parent notice requirement on two bases. First, the abortion providers alleged that the statute is unduly burdensome because of the statistical incidence of divorced or never-married biological parents. Second, the Court heard their allegations that such notification requirements were harmful to the minor particularly in a dysfunctional family.

The Court below noted:

Although some parents may be

> abusive, or at best unhelpful to their minor child faced with the decision whether to have an abortion, that is hardly a reason to discard pages of experience teaching that parents generally do as in their child's best interests. ***. While the District Court found that the non-custodial parent often has little communication with the child, this does not mandate completely casting aside the principles enunciated by the Supreme Court as to the parental role, which apply to non-custodial parents as well as custodial parents.

853 F.2d at 1464.

The argument which is based upon the absence of one parent through divorce or failure to marry versus the notification requirement as an instrument for compelling a certain degree of participation by the non-custodial parent. The statute merely requires notification or a good faith attempt to reach the non-custodial parent. The fact

that a number of minors who seek an abortion do not have regular contact with both parents should not be viewed as an overriding reason to thwart the State's efforts to uphold parental involvement in the child's decision making process.

The State's interests in promoting the general societal welfare are furthered through encouraging and supporting a two-parent family unit, even to the extent those family units may be fractured or may have never legally bonded.

Therefore, since certain minors seeking an abortion may be required to take an additional step prior to the abortion, such a requirement is clearly for the benefit of children and their parents and is not unduly burdensome.

II. THE STATE MAY CONSTITUTIONALLY REQUIRE NOTIFICATION OF A MINOR'S PARENTS 48 HOURS PRIOR TO PERFORMING AN ABORTION.

The Eighth Circuit found that "[c]onsidering the statute as a whole, the 48-hour delay requirement is not a significant burden upon the minor's abortion rights." 853 F.2d at 1465. The primary objection raised to the waiting period requirement has been with respect to external factors such as travel time, scheduling conflicts and weather conditions that may result in a delay of a week or more.

The statute merely prohibits an abortion being performed on a minor until after 48 hours from written notice to the parents. Minn. Stat. Ann §144.343(2). As the Court below noted, the minor is not prohibited from scheduling the

appointment or traveling to the area in which the abortion facility is located prior to the completion of the notification process. 853 F.2d at 1465.

The abortion providers stated that a delay of a period of a week would burden the minor because the pregnancy would have progressed into the second trimester and the minor would face additional costs, inconvenience and risk. As to the effect these factors have on the constitutionality of the statute, only the risk to the minor's health is particularly significant. Such an evaluation of the health risk to the minor in relation to the privacy rights involved in procuring an abortion is best left to the Minnesota legislature. The evidentiary process necessary to make such a determination is best undertaken

in a public hearing before a duly elected legislative body.

As to the two other concerns raised in the objection to a parental delay, the additional cost associated with certain regulations of abortion was recently addressed by this Court in Webster v Reproductive Health Services, ____ U.S. ____, 57 U.S.L.W. 5023 (1989). The Court noted that "the tests in question increase the expense of abortion, and regulate the discretion of the physician in determining the validity of the fetus. ***. But we are satisfied that the requirement of these tests permissibly furthers the State's interest in protecting potential human life, and we therefore believe §188.029 to be Constitutional." 57 U.S.L.W. at 5031.

The District Court found that the

cost for an abortion in the first trimester (under 12 weeks gestation) was $225. The cost for an abortion performed from the twelfth through the fourteenth week of pregnancy was $275. Hodgson v State of Minnesota, 678 F.Supp. 756, 761 (D.Minn. 1986). Applying the abortion providers' argument the increase in cost caused by the delay described would be $50. Such an increase can hardly be said to be burdensome particularly in light of the fact that the court in Webster upheld the viability-testing regulation which would have added $125 to $250 to the cost of an abortion. 57 U.S.L.W. at 5029.

The final reason cited as an undue burden is the inconvenience the minor will be subject to by the delay. The State is permitted to make a value judgment which favors childbirth over

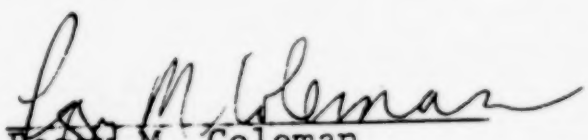
abortion Maher v Roe, 432 U.S. 464, 474 (1977). Any inconvenience a minor may encounter as a result of the 48-hour waiting period is a reflection of the State's responsibility to protect its children and a value judgment to favor childbirth over abortion. To suggest that the State has a Constitutional duty to provide a minor the opportunity to procure an abortion free from inconvenience is an affront to the Constitution and to the millions of individuals who diligently strive to protect unborn life.

CONCLUSION

Parental notification and a reasonable waiting period are Constitutionally sound regulations the State of Minnesota may implement to protect minors and to preserve the family unit.

For these reasons, in addition to those urged by Appellant herein, the decision below should be corrected and reversed.

Respectfully submitted,
American Family
Association, Inc.



Peggy M. Coleman
Legal Counsel
Attorney for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief Amicus Curiae of American Family Association, Inc., have been mailed this third day of August, 1989, to the following counsel of record:

Mr. William Z. Pentelovitch
Maslon, Edelman, Borman & Brand
801 Nicollett Mall
1800 Midwest Plaza
Minneapolis, Minnesota 55402

Attorney General Hubert H. Humphrey III
Mr. John B. Galus
Special Assistant Attorney General
102 State Capitol
St. Paul, Minnesota 55155

All parties required to be served have been served.

Peggy M. Coleman
Attorney for Amicus Curiae

MOTION FILED
AUG 16 1989

No. 88-790, No. 88-805, No. 88-1125

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1989

No. 88-790

TURNOCK v. RAGSDALE

ON CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 88-805

OHIO v. AKRON CENTER FOR
REPRODUCTIVE HEALTH

ON APPEAL TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

No. 88-1125

HODGSON v. ILLINOIS

ON APPEAL TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

MOTION TO ALLOW COUNSEL TO REPRESENT CHILDREN UNBORN AND BORN ALIVE

ALAN ERNEST
COUNSEL FOR MOVANT

P.O. BOX 2963
RESTON, VA. 22090
(703) 437-1178

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MOTION TO ALLOW COUNSEL TO REPRESENT CHILDREN UNBORN AND BORN ALIVE

The Court is moved to allow Alan Ernest to represent the victims being killed by Roe v. Wade, 410 U.S. 113, as counsel or guardian ad litem, for the purpose of defending their right to life under the U.S. Constitution.

INTEREST OF COUNSEL

Alan Ernest is a lawyer in the District of Columbia and a member of the bar of this Court. His purpose is to prove that the guarantee of life to "any person," made in the U.S. Constitution, does include the unborn.

This is effectively a motion to allow retained counsel since there will be no expense to this Court, or to the taxpayers.

SUMMARY OF ARGUMENT

The unborn have a constitutional right to be especially represented by counsel to prove that their lives are specifically guaranteed by the U.S. Constitution.

Argument

THE UNBORN HAVE A CONSTITUTIONAL RIGHT TO BE ESPECIALLY REPRESENTED BY COUNSEL TO PROVE THEIR LIVES ARE PROTECTED BY THE U.S. CONSTITUTION.

1.

THIS COURT EFFECTED AND MAINTAINED THE ROE v. WADE KILLINGS BY UNCONSTITUTIONALLY REFUSING TO ALLOW COUNSEL TO REPRESENT THE UNBORN AND DEFEND THEIR RIGHT TO LIFE UNDER THE U.S. CONSTITUTION.

Counsel did not especially represent the unborn in the U.S. District Court, or at any stage in Roe v. Wade. An original party objected that the unborn should be represented by counsel in this Court:

> (T)he Court should have every benefit of a complete record and the representation of a guardian ad litem for that fetal entity and for its natural right to develop to birth.[1]

But this Court refused to allow counsel to represent the unborn and defend their right to life under the U.S. Constitution. Thus the killings commenced.

And the Supreme Court has maintained the killings by steadfastly refusing to

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1. Petition for Rehearing 5, Doe v. Bolton, 410 U.S. 179 (1973), denied 410 U.S. 959 (1973).

allow counsel to represent the unborn, and defend their right to life under the U.S. Constitution.[2]

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2. The Court has refused to allow counsel for the unborn in all its abortion cases. Some are: Colautti v. Franklin, 439 U.S. 379, motion to allow counsel for the unborn denied 437 U.S. 902; Anders v. Floyd, 440 U.S. 445, motion to allow counsel for the unborn denied 439 U.S. 890; Bellotti v. Baird, 443 U.S. 622, motion to allow counsel for the unborn denied 439 U.S. 1065; Ashcroft v. Freiman, affirmed 440 U.S. 941, motion to allow counsel for the unborn denied, 440 U.S. 941; United States v. Zbaraz, 448 U.S. 358, motion to allow counsel for the unborn denied 444 U.S. 1030; Harris v. McRae, 448 U.S. 297, motion to allow counsel for the unborn denied 445 U.S. 941; H.L. v. Matheson, 450 U.S. 398, motion to allow counsel for the unborn denied 445 U.S. 959; Simopoulos v. Virginia, 462 U.S. 506, motion to allow counsel for the unborn denied 458 U.S. 1104; Planned Parenthood of Kansas City v. Ashcroft, 462 U.S. 476, motion to allow counsel for the unborn denied 458 U.S. 1104; Akron Center for Reproductive Health v. Akron, 462 U.S. 416, motion to allow counsel for the unborn denied 458 U.S. 1104; Diamond v. Charles, 90 L Ed 2d 48 (1986), motion to allow counsel for the unborn denied 87 L Ed 2d 704; Thornburgh v. American College of Obstetricians, 90 L Ed 2d 779 (1986), motion to allow counsel for the unborn denied 87 L Ed 2d 702; Hartigan v. Zbaraz, 98 L Ed 2d (1988), motion to allow counsel to for the unborn denied 93 L Ed 2d 697, and Webster v. Reproductive Health Services, ___ U.S. ___ (1989).

The unborn have a constitutional right to be represented by counsel in this case to defend their right to life under the U.S. Constitution.[3] Judges who willfully

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3. Even in civil proceedings, where crucial deprivations are threatened, such as loss of welfare, due process guarantees (1) prior notice of the factual and legal bases; (2) the right to be represented by counsel; (3) the right to confront and cross-examine adverse evidence; (4) the right to present evidence. Goldberg v. Kelly, 397 U.S. 254, 268-271 (1970). See also, In Re Gault, 387 U.S. 1 (1967).

Could it be possible that procedures, which could not be used to deprive a mother of welfare, could be used to exclude her from the protection of the U.S.Constitution so that she could be killed with impunity from criminal laws? This is preposterous.

The Constitution would not permit any court to condemn even one single Jew to death in a criminal case, but deny any of these procedural rights. Then neither can it permit any court to condemn all Jews in the United States to death, but deny any of these procedural rights, by calling it a civil proceeding, and decreeing the lives of all Jews are not protected by the U.S. Constitution, and it is "liberty" to kill all Jews with impunity from criminal laws.

Any victim is entitled to all these procedural protections before any court can decree that the victim's life is not protected by the Constitution, and the victim can be killed with impunity from criminal statutes. The rule for one is the rule for all; these are the sacred truth-seeking procedures which protect the lives of all Americans.

deny this right are guilty of crime.[4] This denial makes Roe v. Wade void.

2.

THIS COURT EFFECTED THE ROE v. WADE KILLINGS BY UNCONSTITUTIONALLY REFUSING TO ALLOW PRIOR NOTICE OF THE CONSTITUTIONAL STANDARDS, THE BURDENS OF PROOF, OR THE EVIDENCE WHICH IT USED TO INFER THAT THAT THE LIVES OF THE UNBORN ARE NOT PROTECTED BY THE U.S. CONSTITUTION.

The District Court in Roe v. Wade did not even look to see if the lives of the unborn were protected by the Constitution. This question was argued for the first time after the case reached this Court. Since this Court had never previously excluded anyone from the protection of the U.S. Constitution so they could be killed with impunity from criminal statutes, the parties had no prior notice of the factual and legal bases for such an exclusion.

Moreover in the aftermath of Dred Scott v. Sanford, legitimate public

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4. "Even judges ... could be punished criminally for willful deprivations of constitutional rights." Imbler v. Pachtman, 424 U.S. 409 (1976).

expectation rested on the assurance that this Court would never again attempt another exception to the universal terms "any person."[5]

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5. This Court's decision in Dred Scott v. Sanford appears to be the only precedent in American history in which this Court has implied an exception to the universal terms "any person" in the Fifth or Fourteenth Amendments. The Court there ruled that the universal words "any person" did not include Negroes, there was a constitutional right to own a slave, and Congress could not prohibit slavery in the free territories. This decision triggered a civil war. Candidate Abraham Lincoln vowed he would not obey Dred Scott. Opponents said their states would withdraw from the Union rather than be deprived of their assumed constitutional right to own slaves and take them to the free territories. 4 Collected Works of Abraham Lincoln 267 (1953). But President Abraham Lincoln responded that if he were bound by Dred Scott, "the people will have ceased to be their own rulers." Id., at 268. Thus the war commenced.

A purpose of the Fourteenth Amendment was to overrule Dred Scott, and place it beyond the power of judges to ever again produce convulsions by implying an exception the universal words "any person." For over a century legitimate public expectation rested on the assurance that this Court would never again attempt an exception to the universal terms "any person."

But without any prior notice, this Court once again, in the precise manner of Dred Scott, attempted to imply an exception to the universal words "any person." In Roe v. Wade, this Court thus combined both total surprise and violent defiance of the long standing legitimate public expectation that never again would this Court violate the universal words "any person."

In particular, this Court gave the parties in Roe v. Wade no prior notice of the constitutional standards, the burdens of proof, or the evidence, which the Court used to infer that the universal words "any person," as used in the Fourteenth Amendment, did not include the unborn.

The first time the parties had notice was when Roe v. Wade was published, and the victims were already condemned to death. An original party objected that it lacked the prior notice needed to defend the unborn:

> (N)ot only did the Court set a new constitutional standard, but at the same moment the Court applied the standard without giving the Appellees notice or opportunity to present evidence with respect to the point in gestation at which such standards, if they be correct as a matter of law in the first place, should be applied. "Viability", "meaningful life" or existence, "fetal life": all presumably have medical meaning which should be subject to medical testimony before a decision of constitutional import becomes solidified in concrete. These concepts are not even necessarily the appropriate ones.[6]

But this Court refused to allow the original parties to have prior notice. Thus the killings commenced.

And this Court has maintained the killings despite repeated objections that the unborn had no prior notice in Roe v. Wade of the factual and legal basis needed to defend the unborn's right to life under the U.S. Constitution.[7]

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6. Petition for Rehearing 6, Doe v. Bolton, 410 U.S. 179 (1973), denied 410 U.S. 959 (1973). (emphasis added).

7. See cases in note 2, supra.

The unborn have a constitutional right to prior notice of all the factual and legal bases before they can be excluded from the protection of the Constitution so they can be killed with impunity from criminal statutes.[8] Judges who willfully deny this right are guilty of crime.[9] This denial makes Roe v. Wade void.

3.

THIS COURT EFFECTED THE ROE v. WADE KILLINGS BY UNCONSTITUTIONALLY USING A SECRET EVIDENTIARY PROCESS TO FIND EVIDENCE TO INFER THAT THE LIVES OF THE UNBORN ARE NOT PROTECTED BY THE U.S. CONSTITUTION.

This Court used some secret evidentiary process, not open to the parties, to find evidence to infer that the lives of the unborn were not protected by the U.S. Constitution. The Court conducted these evidentiary proceedings in its back rooms; the parties were not allowed to be present; no public record was made of these proceedings. The purpose of these

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8. See note 3, supra.

9. See note 4, supra.

proceedings was to find evidence to infer that the lives of the unborn were not protected by the U.S. Constitution. An original party objected to these secret judicial proceedings:

> The Court has taken judicial notice of innumerable facts and factors, some which are expressly referred to in the Court's decision and some which are unknown to the parties but which apparently were extricated from various sources by the Court's diligent research, which facts nevertheless should be subject to refutation and counter-evidence since they form the foundation for the Court's opinion ... of constitutional stages of fetal growth.[10]

But the Court permitted the killings to commence despite this objection to its secret evidentiary proceedings.

And this Court has maintained the killings despite repeated objections that it used secret evidentiary proceeding in Roe v. Wade.[11]

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10. Petition for Rehearing 4, Doe v. Bolton, 410 U.S. 179 (1973), denied 410 U.S. 959 (1973).

11. See cases in note 2, supra.

The unborn have a constitutional right not to be excluded from the protection of the U.S. Constitution by secret evidentiary proceedings.[12] Judges who willfully deny this right are guilty of crime.[13] This denial makes Roe v. Wade void.

4.

THIS COURT EFFECTED AND MAINTAINED THE ROE v. WADE KILLINGS BY UNCONSTITUTIONALLY REFUSING TO ALLOW ITS EVIDENCE, WHICH IT USED TO INFER THAT THE LIVES OF THE UNBORN ARE NOT PROTECTED BY THE U.S. CONSTITUTION, TO BE CONFRONTED AND CROSS-EXAMINED.

Since the Court used a secret process, the original parties had not seen all the evidence which the Court used to infer that the lives of the unborn are not protected by the U.S. Constitution. An original party asked permission to cross-examine the evidence which the Court used to infer that the lives of the unborn were not protected by the U.S. Constitution:

> The Court has taken judicial notice of innumerable facts and factors, some

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12. See note 3, supra.

13. See note 4, supra.

> which are expressly referred to in the Court's decision and some which are unknown to the parties but which apparently were extricated from various sources by the Court's diligent research, which facts nevertheless should be subject to refutation and counter-evidence since they form the foundation of the Court's opinion .... of constitutional stages of fetal growth.[14]

But the Supreme Court refused to allow the original parties to cross-examine its evidence in Roe v. Wade, which it used to infer that the lives of the unborn were not protected by the U.S. Constitution. Thus the killings commenced.

And this Court has maintained the killings by steadfastly refusing to allow its evidence, which it used to infer that the lives of the unborn were not protected by the U.S. Constitution, to be confronted and cross-examined.[15]

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14. Petition for Rehearing 4, Doe v. Bolton, 410 U.S. 179 (1973), denied 410 U.S. 959 (1973) (emphasis added).

15. See cases in note 2, supra.

The unborn have a constitutional right to confront and cross-examine the evidence which this Court used to infer that their lives are not protected by the U.S. Constitution.[16] Judges who willfully deny this right are guilty of crime.[17] This denial makes Roe v. Wade void.

5.

THIS COURT EFFECTED AND MAINTAINED THE ROE v. WADE KILLINGS BY UNCONSTITUTIONALLY REFUSING TO ALLOW EVIDENCE TO BE PRESENTED ON BEHALF OF THE UNBORN TO ESTABLISH THEIR RIGHT TO LIFE UNDER THE U.S. CONSTITUTION.

In Roe v. Wade, the Court invented new constitutional standards on the protection of life by the U.S. Constitution, which the parties did not see until after Roe v. Wade was decided. The parties never had opportunity to present evidence under these new standards. An original party asked permission to present evidence under the new constitutional standards, which it had not seen before, to show that the lives of

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16. See note 3, supra.

17. See note 4, supra.

the unborn are protected by the

Constitution:

> We are dealing here with a procedure long considered outlawed and which has suddenly become become legal.
> ....
> What the Court has done is to compel the State to condone the killings of prenatal infants and even to encourage it by loose controls.
> ....
> The interest in protecting the concept of the sacredness of human life and the natural rights which follow its emergence, underlies the interest in protecting fetal life and is the root of the State's expressed desire to curb killing.
> ....
> The Court has selected a point in time at which states may protect fetal life, without any record of facts upon which to base the conclusion that only at "viability," as that term is defined by the Court, do the people of a state have authority to demand caution before a prenatal infant is destroyed.
> ....
> Appellees have had no opportunity to show by evidence in a traditional judicial trial setting at what gestational stage the separate life of the fetus is "meaningful" medically; in addition, the Court overlooked the significance of Georgia's legal recognition of meaningful human life as found in case law and statute.
> ....
> With no opportunity for Appellees to demonstrate the factual basis, in terms of current medical science, that its interest attaches at a particular

point in the natural development of a human fetus, the Court has seized upon the convenient point of "viability" and crystallized constitutional command which bars State action.

....

In the medical concept of "life," with its current body of technological knowledge, including such advances as fetal electrocardiography and fetal electroencephalography, legal "life" should not be cemented at an event in a judicial conclusion which does not have the benefit of medical evidence.

....

At any rate, Appellees should have an opportunity to present evidence and testimony to support the State's claim of medically and scientifically sound interest in requiring a cautious approach to the extinguishment of fetal life.[18]

But the Court refused to allow the original parties to present evidence to show that the lives of the unborn were protected by the U.S. Constitution. Thus the killings commenced.

And this Court has maintained the killings by steadfastly refusing to allow evidence to be presented on behalf of the

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18. Petition for Rehearing 3,4,5,6,8, Doe v. Bolton, 410 U.S. 179 (1973), denied 410 U.S. 959 (1973).

unborn to prove that their lives are protected by the Constitution.[19]

The unborn have a constitutional right to present evidence in this case to prove that their lives are protected by the U.S. Constitution.[20] Judges who willfully deny this right are guilty of crime.[21] This denial makes Roe v. Wade void.

The procedures used by the Court to effect and maintain the Roe v. Wade killings are essentially the same procedures cited by the Nuremberg Court as part of the evidence to convict the Nazi judges of complicity in extermination and murder.[22]

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19. See cases in note 2, supra.

20. See note 3, supra.

21. See note 4, supra.

22. "In many instances they were denied the right to introduce evidence, to be confronted by witnesses against them.... They were ... denied the right of counsel of their own choice....(T)he accused learned only a few moments before trial of the nature of the alleged crime for which he was to be tried. The entire proceedings from beginning to end were secret and no

II.
ISSUES RAISED BY COUNSEL NOT RAISED BY THE PARTIES

The parties have not raised the question of whether this Court must overrule Roe v. Wade because the lives of the unborn are protected by the U.S. Constitution.

The unborn have a right to be especially represented by counsel, to present evidence and arguments not presented by the parties, to show that the universal and unalienable guarantee of life to "any person," made in the U.S. Constitution, does include the unborn.[23]

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public record was allowed to be made of them." United States v. Altstoetter, 3 Trials of War Criminals Before the Nuernberg Military Tribunals 1046-1047 (1951).

"Such a mock trial is not a judicial proceeding but a murder." Id., at 1164.

"The dagger of the assassin was concealed beneath the robe of the jurist." Id. at 985.

23. This evidence and arguments are presented in the amicus curiae brief by the Legal Defense For Unborn Children, and incorporated herein by reference.

CONCLUSION

The photograph on the last page shows a child killed by a second stage abortion under Roe v. Wade. These children are entitled to have assistance of counsel to prove that the universal guarantee of life to "any person," made by the U.S. Constitution, includes the unborn.

When judges use the above procedures to defy the guarantee of life to "any person" in order to exclude millions of victims from the protection of the U.S. Constitution, so they can be killed with impunity from criminal statutes, it cannot be pretended it is any longer the government of the United States, or any government of Constitution and laws. "Such a mock trial is not a judicial proceeding but a murder."

This Court, and all the lower judges who have upheld this Court's claim of power to use such procedures to condemn millions

to death, are accused of premeditated capital mass murder.[24] "The dagger of the assassin was concealed beneath the robes of the jurist."

---

24. U.S. DISTRICT JUDGES: Albert V. Bryan, Jr.; Emmett R. Cox; Edward T. Gignoux; Harold H. Greene; J. Thomas Greene; William B. Hand; Joseph C. Howard; Martin F. Loughlin; Robert Earl Maxwell; Louis F. Oberdorfer; Raymond J. Pettine; Aubrey E. Robinson, Jr.; John J. Sirica; James R. Spencer; James C. Turk; D. Dortch Warriner; Don J. Young. U.S. CIRCUIT JUDGES: D.C. Circuit- David L. Bazelon; Carl McGowan; Roger Robb; George E. MacKinnon; Spotswood Robinson III; J. Skelly Wright; Edward A. Tamm; Malcolm R. Wilkey. First Circuit- Levin H. Campbell; Frank M. Coffin; Hugh H. Bownes; Stephen G. Breyer. Fourth Circuit- Harrison L. Winter; Donald S. Russell; H. Emory Widener, Jr.; Kenneth K. Hall; James D. Phillips, Jr.; Fracnis D. Murnaghan, Jr.; James M. Sprouse; Sam J. Ervin, II; Robert F. Chapman. Eleventh Circuit- John C. Godbold; Paul H. Roney; Gerald B. Tjoflat; James C. Hill; Peter T. Fay; Robert S. Vance; Phyllis A. Kravitch; Frank M. Johnson, Jr.; Albert J. Henderson, Jr.; Joseph W. Hatchett; R. Lanier Anderson, III; Thomas A. Clark. AND the judges in Roe v. Wade and Doe v. Bolton who decreed a "liberty" to kill the unborn without any investigation to see if their lives were protected by the Constitution: Circuit Judges Morgan and Goldberg; District Judges Smith, Henderson, Hughes and Taylor.



Alan Ernest
Counsel for Movant

MOTION FILED
AUG 16 1989

(7) (7) (6)

No. 88-790, No. 88-805, No. 88-1125

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1989

No. 88-790

TURNOCK v. RAGSDALE

ON CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 88-805

OHIO v. AKRON CENTER FOR
REPRODUCTIVE HEALTH

ON APPEAL TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

No. 88-1125

HODGSON v. ILLINOIS

ON APPEAL TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE WITH BRIEF BY LEGAL DEFENSE FOR UNBORN CHILDREN

ALAN ERNEST
COUNSEL FOR AMICUS

P.O. BOX 2963
RESTON, VA. 22090
(703) 437-1178

MOTION FOR LEAVE TO FILE

Interest of Amicus

The brief, which does not support any party, defends the constitutional right to life of the unborn, which the parties have not done.

Argument

The amicus proves that the the Fifth and Fourteenth Amendments' guarantee of life to "any person" does include the unborn. Thus this Court must not only overrule Roe v. Wade, 410 U.S. 113, it must rule that the States have a duty to protect unborn life. The parties have not raised this issue; it disposes of all issues in this case.

The universal guarantee of life to "any person" is the most important right in the Constitution, and the lives of millions of children depend on their being permitted to present all relevant evidence to prove their unalienable right to life.

Alan Ernest, Counsel

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Interest of Amicus

The amicus defends the right to life of the unborn, which the parties have not done.

Summary of Argument

The unalienable guarantee of life to "any person," made in the Fifth and Fourteenth Amendments, includes the unborn.

Argument

I.

THE GUARANTEE OF LIFE TO "ANY PERSON," MADE BY THE CONSTITUTION, INCLUDES THE UNBORN.

1. THE LETTER OF THE LAW (THE GUARANTEE OF LIFE TO "ANY PERSON," THE TWO MOST IMPORTANT WORDS EVER ENACTED INTO LAW) ON ITS FACE INCLUDES THE UNBORN.

The 5th and 14th Amendments guarantee that not "any person" can be deprived of "life ... without due process of law." The words "any person" are universal, admit of no exceptions for anyone, make no distinction between born and unborn life, and thus on their face include the unborn, the same as everyone else. The obvious purpose of guaranteeing life universally to "any person" was to forbid making exceptions so some persons could be exterminated.

The Court admitted that if the word "person" included the unborn, then Roe v. Wade "collapses," because the unborn's lives would be "guaranteed" by the Constitution.[1] In ruling "the word 'person' ... does not include the unborn,"[2] the Court hit the Constitution head on, did what is expressly forbidden, and directly defied the letter of the law of its most important guarantee.

The words "any person" are the two most important words ever written into law. The guarantee of life to "any person" is the single most important guarantee because it protects the lives of everybody from government sanctioned extermination, as happened in Nazi Germany.

And the words "any person" give legal body to the spirit that "all men are created equal" and endowed with an "unalienable" right to life. The words "any person" exactly summarize what America stands for,

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1. Roe v. Wade, 410 U.S. at 156-157.
2. Roe v. Wade, 410 U.S. at 158.

its unique contribution to civilization. As Abraham Lincoln said, what made America great was the promise "not alone to the people of this country, but hope to the world for all future time ... that ALL should have an equal chance."

The words "any person" are the very words which guarantee that equal chance to "ALL"; they stand as the supreme political achievement of the human race, the prize of milleniums of struggle. If the Constitution had stated it protected the life of "any person - except the unborn," then its words would support Roe v. Wade. But its words say "any person," without any exceptions at all.

The Supreme Court of West Germany held that the words, "Everybody has the right to life," did include the unborn; it explained that the word "everybody" is universal.[3]

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3. R. Destro, Abortion and the Constitution The Need For A Life Protective Amendment, 63 Cal. L. Rev. at 1341-51 (1975). In 1975 the Supreme Court of West Germany ruled that the phrase in its Constitution, "Everybody has the right to life," did include the unborn, that "Abortion is an act of homicide," and

The Constitution extends its guarantee of life to "any person." The letter of the law permits no exceptions; on their face the words "any person" do include the unborn.

2. THE MODIFIER "ANY" INVOKES A VIRTUALLY IRREBUTTABLE PRESUMPTION THAT THE GUARANTEE OF LIFE TO "ANY PERSON" INCLUDES THE UNBORN.

The Court never studied the letter of the law - the universal words "any person." Instead the Court focused on the isolated word "person," and ignored its modifier "any," which invokes a virtually irrebuttable presumption in favor of life that the words "any person" do include the unborn.[4]

By reading the guarantee of life to "any person" as if it merely said "some persons," the Court did the most forbidden

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the state had a "duty ... to protect unborn life." It noted "Everybody" is universal:

> The right to live is guaranteed to everybody who is "alive." No distinction can be made among the several stages of developing life before birth, or between prenatal or postnatal life. "Everybody" ... means every "living person,"... therefore, "everybody" in this sense also includes unborn human beings.

4. See burden of proof, infra p. 39.

thing and reduced to nothing what is deemed the most important law in the history of political institutions.

3. THE SPIRIT OF THE LAW, THAT "ALL MEN ARE CREATED EQUAL," SHOWS THE GUARANTEE OF LIFE TO "ANY PERSON" INCLUDES THE UNBORN.

Roe v. Wade violates the spirit of the law, as well as its letter. The promise that "all men are created equal" and endowed with an "unalienable" right to "life" is the guiding spirit of American law. The Supreme Court itself ruled it is the spirit of the Fourteenth Amendment:

> "The first official action of this nation declared the foundation of government in these words: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life...' While such declaration of principles may not have the force of organic law ... yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence. No duty rests more imperatively upon the courts than ... to secure the equality of rights which is the foundation of free government." Gulf, Colo. & S. Fe Ry v. Ellis, 165 U.S. at 159-160 (1896).

There is no real medical dispute that the unborn have been created.[5] Reading the letter of the Constitution, the guarantee of life to "any person," in the spirit that "all" are "created equal," and "all" shall get their equal chance to live, proves that the words "any person" do include the unborn. Concerning the right to life, the unborn are the equal of anyone.

4. HISTORY SHOWS THE GUARANTEE OF LIFE TO "ANY PERSON" DOES INCLUDE THE UNBORN.

The last time this Court attempted to imply an exception to the words "any person" was Dred Scott v. Sandford, 19 How. 393 (1857). The 13th and 14th Amendments were intended to overrule this decision that the words "any person," as used in the 5th Amendment, did not include Negroes; there was a constitutional right to own a slave; the phase "all men are created equal" did

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5. The uncontradicted medical evidence in the Texas brief in Roe v. Wade showed the fetal heart begins "pulsations at 24 days"; and "brain waves have been noted at 43 days"; and the unborn child is "alive."

not include Negroes; Congress could not prohibit slavery in the territories; and Negroes could not sue in federal court to see if they were slave or free.

Abraham Lincoln was a leading opponent of Dred Scott. If officials can say all men are created equal except Negroes, he asked, "where will it stop?" He denounced Dred Scott as based on "falsehood," and he alleged a conspiracy by the U.S. Supreme Court, two Presidents, and leading members of Congress, to make slavery legal everywhere and overturn the foundation of our government. Explaining why he would not obey it, President Lincoln said that Dred Scott resulted in "the rule of minority, as a permanent arrangement" which was "wholly inadmissible" and if the President were bound by Dred Scott, "the people will have ceased, to be their own rulers."

Dred Scott triggered a civil war, and President Lincoln defied the Court's decision, that there was a constitutional

right to own a slave, when he emancipated slaves and declared them to be "forever free." He reminded us at Gettysburg that we were fighting to see whether a nation dedicated to the principle that "all men are created equal" could "long endure."

The Fourteenth Amendment was intended to rededicate this nation to this original proposition. One of its framers explained:

> "It establishes equality before the law, and it gives to the humblest ... the most despised ... the same protection before the law as it gives to the most powerful.... Without this ... there is no republican government." Rep. Jacob Howard, quoted in 1 B. Schwartz, Statutory History of the United States: Civil Rights 262 (1970).

The framers intended to prevent another Dred Scott catastrophe of judges ever again implying exceptions to the words "any person" to exclude anyone; they employed the universal words most suited for this purpose. And the people had already enacted criminal abortion laws to protect all stages of unborn life, showing the guarantee of life to "any person" means what it says.

Roe v. Wade is simply another Dred Scott disaster which rests on historical contradictions so insane that to permit it is to confess that men cannot be governed by truth, reason, or laws.[6] The Court did the most forbidden thing, and defied the "unalienable" guarantee of life to "any person," the two most important words ever written into law.

The letter of the law, its spirit, its history, its presumption in favor of life, the medical facts known to the 19th century, as well as the 20th, unite to permit only one lawful conclusion: the guarantee of life to "any person" does include the unborn.

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6. Roe v. Wade rests on the contradiction that without one word of explanation, the framers intended their very promise of life to all, to "any person," to sweep away all their abortion statutes, and make killings, which they had already condemned as criminal, a fundamental "liberty" ranked along with free speech. Roe v. Wade further pretends that the framers somehow silently connived to repudiate a major point of the civil war, so that, in the manner of Dred Scott, judges would be at liberty to again produce more convulsions by implying more exceptions to the words "any person."

II.

ROE v. WADE IS VOID BECAUSE IT CRIMINALLY DEFIED THE UNALIENABLE GUARANTEE OF LIFE TO "ANY PERSON" AND CONDEMNED TO DEATH MILLIONS OF VICTIMS WHOM THE CONSTITUTION ENDEAVORS TO PRESERVE.

1.

ROE v. WADE CRIMINALLY DEFIED THE GUARANTEE OF LIFE TO "ANY PERSON" BECAUSE THIS COURT DECREED KILLINGS TO BE "LIBERTY" WHICH THE PEOPLE HAD DEFINED TO BE "MURDER." THE COURT DECREED "MASS MURDER IS LIBERTY."

When the Fourteenth Amendment was adopted in 1868, an abortion was murder if the child was "born alive." And a child could be "born alive" long before the Court's arbitrary point of "viability."[1]

An 1859 study by the American Medical Association stated the law of murder throughout the United States:

> If a person, intending to procure abortion, does an act which causes the

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1. This Court arbitrarily set the point, where the law could begin to protect the unborn, at "viability" (about 7 months gestation) "because the fetus then presumably has the capability of meaningful life outside the ... womb." Roe v. Wade, supra, 163. The point is arbitrary, because the Court cannot explain why (in legal and medical precedent) it can be criminal to kill the unborn a few days after viability, but must be "liberty" to kill the unborn a few days before. The Court invented it.

> child to be born earlier than its natural time, and therefore in a state much less capable of living, and it afterwards die in consequence of such premature exposure, the person who by this misconduct brings the child into the world, and puts it into a situation in which it cannot live, is guilty of murder.[2]

Yet in 1973, without any investigation of the law of murder, the Court decreed this very killing to be "liberty" which the American people had universally defined to be "murder." In plainest terms, the Supreme Court decreed: "MASS MURDER IS LIBERTY."

A. THE ENGLISH COMMON LAW WAS THE LAW OF THE LAND IN COLONIAL AMERICA

America's first settlement at Jamestown followed the English common law, as did other colonies. The common law defined an abortion in which a "quick" (about 4 months gestation) child died after being "born alive" to be "murder."[3] So if

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2. Reported in A.S. Taylor, A Manual of Medical Jurisprudence 462 (6th ed. 1866). He described the AMA report as "a complete and comprehensive exhibit of laws of each of the United States." Id., at 460.

3. Coke, 3 Inst. 50; Hawkins, 1 Hawkins Ch. 13, s. 16; Blackstone, 4 Bl. Com. 198.

the child were "born alive" (even if not "viable"), Coke said the abortion is "so horrible an offense" and "this is murder."[4]

Regina v. West involved this very abortion of a quick, but pre-viable child:

> "The prisoner is charged with murder; and the means stated are, that the prisoner caused the premature delivery ... by using some instrument for the purpose of procuring abortion; and that the child so prematurely born was, in consequence of its premature birth, so weak that it died.
> ....
> "A medical witness stated ... that it was a healthy child; but that, being born at that period of gestation, it was impossible that it could live any considerable length of time separated from the womb of the mother. It was incapable of maintaining a separate and independent existence." Regina v. West, 2 C & K 784, 786-788 (1848).

Although not yet viable, the judge cited Coke and instructed the jury that if the child were "born alive," the abortion was

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4. Coke, 3 Inst. 50. "This work is executed with so much learning and judgment, that I do not recollect that a single position in it has ever been judicially denied....(I)t may still be considered as the fundamental code of the English law." 14 The Writings of Thomas Jefferson 57 (Bergh ed. 1907). Jefferson was an authority on colonial law, serving on the 1776 committee which adapted Virginia's laws to republican form, the common law being assigned to him.

murder.[6] The English writers cited this as the correct statement of the law.[7]

Thus Roe v. Wade decreed killings to be "liberty" which had been condemned as "murder" since earliest colonial times.

B. "BORN_ALIVE"_ABORTIONS_WERE_MURDER_WHEN THE_FOURTEENTH_AMENDMENT_WAS_ADOPTED.

The English common law is the dictionary which courts use to construe the state and federal homicide statutes.[8]

By the time the Fourteenth Amendment was adopted, American legal authorities had

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6. Regina v. West, 2 C & K at 788: "I am of opinion (and I direct you in point of law), that if a person intending to procure abortion does an act which causes a child to be born so much earlier than the natural time, that it is born in a state much less capable of living, and afterwards dies in consequence of its exposure to the external world, the person who by her misconduct so brings the child into the world, and puts it thereby in a situation in which it cannot live, is guilty of murder."

7. 1 J.F. Archbold, A Complete Treatise on Criminal Procedure, Pleading and Evidence 783 (Waterman Am. ed. 7th ed. 1860); 1 W.O. Russell, A Treatise on Crimes and Misdemeanors 671-672 (4th ed. 1865).

8. Clarke v. State, 117 Ala. 1 (1898); Hamilton v. United States, 26 App. D.C. 382 (1905).

long followed the common law rule that abortions of pre-viable children "born alive" were murder. In 1858 the preeminent legal writer of the 19th century explained:

> "If a person intending to procure abortion, does an act which causes a [quick] child to be born so much earlier than the natural time, that it is born in a state much less capable of living, and afterwards dies, in consequence of its exposure to the external world, the person who by this misconduct, so brings the child into the world, and puts it thereby in a situation in which it cannot live, is guilty of murder" F. Wharton, A Treatise on the Law of Homicide in the United States 93 (1855).

This was the uncontradicted view in the United States when the Fourteenth Amendment was adopted.[9] Courts applied this law of murder.[10] It was still the law in 1973.[11] In 1975 the New Jersey courts

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9. 2 J.P. Bishop, Commentaries on the Criminal Law 365 (4th ed. 1868); A.S. Taylor, supra, 462, 517.

10. Clarke v. State, 117 Ala. 1 (1898). "In Georgia ... the wilful killing of an unborn child so far developed as to be ... called 'quick,' is considered as murder." Porter v. Lassiter, 87 S.E. 2d 100, 102 (1955).

11. R. Perkins, Criminal Law 30 n.17 (2d ed 1969).

applied this 17th century murder law to the killing of a pre-viable fetus born alive:

> That a fetus may be the victim of murder if it be born alive has long been a part of our common law....Coke, Institutes 58 (1648).[12]

For almost four centuries governments came and went, but the law that born alive abortions are murder, which is binding on the U.S. Supreme Court,[13] remained the law of the land.

Thus Roe v. Wade decreed killings to be "liberty" which had been universally condemned by the framers and adopters of the Fourteenth Amendment to be "murder."

C. THE GUARANTEE OF LIFE TO "ANY PERSON" INCLUDES CHILDREN GUARDED BY THE MURDER LAW

The guarantee of life to "any person" in the Fourteenth Amendment must include

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12. State v. Anderson, 343 A. 2d 505, 508 (1975), affirmed 413 A. 2d 611 (1980). The courts rejected the claim it was not murder because "the infants were never capable of maintaining a separate and independent existence." Id. at 615.

13. Chief Justice Marshall ruled that the Supreme Court must accept the construction given by a state to its own statute. Pollard v. Dwight, 4 Cranch 421, 429.

all persons whose lives were protected by the law of murder when the Amendment was adopted. No dispute is even possible.

If the killing of Jews had been defined to be murder in 1868, it is certain that the framers did not intend to exclude Jews from the guarantee of life to "any person" so it would be "liberty" to kill Jews with impunity from criminal laws. Changing the names of the victims does not change the legal result.

The people who framed and adopted the Amendment had condemned the taking of a crying, pre-viable infant from its mother's womb to be murder. Thus it is certain that they did not intend to exclude the lives of these children from the guarantee of life to "any person" so it would be "liberty" to kill them with impunity from murder laws.

By arbitrarily setting "viability" as the point the law could begin to protect unborn life, the Court decreed the same

killing to be "liberty" which the American people had condemned as "murder."

The words "any person" do indisputably include children protected by the law of murder. And since personhood under the Constitution does not just fade away with time, like some magic disappearing ink, the right to life of these children is still guaranteed by the Fourteenth Amendment.

D. ROE_v._WADE_ALLOWS_HYSTEROTOMY_ABORTIONS

Roe v. Wade hysterotomy abortions, basically Caesareans, result in children "born alive."[14] As explained to Congress:

> With few exceptions, babies aborted by this method will all move, will all breathe, and some will cry.... Almost all were born alive.[15]

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14. Jeffries and Edmonds, Abortion: The Dreaded Complication, Philadelphia Inquirer, August 2, 1981.

15. Hearings on Constitutional Amendments on Abortion, before subcomm. on Civil and Constitutional Rights, of the House Comm. of the Judiciary, 94th Cong., 2d Sess., Ser. 46, Part 1, at 397 (1976) (statement by Dr. John Willke, M.D.). There are about 140,000 second stage abortions each year. Washington Post, April 26, 1985, A11. Most methods can result in a child born alive.

When the Fourteenth Amendment was adopted, these hysterotomy abortions were murder. Thus the lives of the children are still guaranteed by the Amendment, and the killings are still murder.

F. THE DECREE "MASS MURDER IS LIBERTY" OVERTHROWS THE U.S. CONSTITUTION

Is a government of laws founded upon evidence, or the mere naked decrees of men holding office for life? The evidence proves that the lives of these children are guaranteed by the U.S. Constitution.

This evidence for the unborn is exactly the same evidence which many people must rely upon to prove their lives are guaranteed by the U.S. Constitution.[16] If

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16. Suppose it were claimed in federal court that it is "liberty" to kill the insane, or invalids, or Jews. What factual, non-argumentative evidence could be found to establish their right to life under the U.S. Constitution?

As with the unborn, it would do no good to object that no one ever heard of a "liberty" to kill them - or to object that such killings had thereto been criminal.

The Amendment merely states that it protects the life of "any person." So, as with the unborn, it does not expressly

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BRIEF OF THE UNITED STATES CATHOLIC CONFERENCE AS *AMICUS CURIAE* IN SUPPORT OF THE STATES OF OHIO AND MINNESOTA

MARK E. CHOPKO *
General Counsel
U.S. CATHOLIC CONFERENCE
3211 Fourth Street, N.E.
Washington, DC 20017
(202) 541-3300

* Counsel of Record

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BRIEF OF THE UNITED STATES CATHOLIC CONFERENCE AS *AMICUS CURIAE* IN SUPPORT OF THE STATES OF OHIO AND MINNESOTA

INTEREST OF *AMICUS*

The United States Catholic Conference ("Conference") is a nonprofit corporation organized under the laws of the District of Columbia. Its members are the active Catholic

Bishops in the United States. The Conference advocates and promotes the pastoral teaching of the Bishops in such areas as education, family life, health and hospitals, social welfare, immigrant aid, poverty assistance, civic education, youth activities, and communications. When permitted by court rules and practice, the Conference files briefs as *amicus curiae* in litigation of importance to the Catholic Church and its people in the United States. Values of particular importance to the Church are the protection of family life and the protection of unborn life.[1] Both are implicated in the cases at bar.

Both Ohio and Minnesota request this Court to clarify the scope of a State's authority to legislate in the area of abortion when it concerns the rights and responsibilities of parents regarding their children. Because both States seek more definitive and detailed judicial direction of the content of their laws, this *amicus* is concerned that the Court will be tempted to grant those requests. Less not more specificity about the intricacies and facets of legislation is required from this Court. Unless plainly unconstitutional, a legislature's balance of the various rights, interests, and obligations in abortion, as in other areas of the law, should receive judicial deference, not redrafting. These cases offer the Court an opportunity to restore what *Roe v. Wade* and subsequent cases have denied: legitimate legislative prerogatives to set public policy in matters deeply affecting the welfare of parents and children.

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[1] Although such values may have religious or denominational roots, they are shared by many, including those who profess no religion. The suggestion that legislation restricting abortion "establishes" religion is spurious. *Harris v. McRae*, 448 U.S. 297 (1980). The mere fact that religious organizations advocate particular legislative approaches does not establish "religion" but only "free expression," a right we do not surrender by either self-restraint or enforced silence. *Compare Webster v. Reproductive Health Services*, 109 S.Ct. 3040, 3085 (1989) (Stevens, J., dissenting) *with* Bernardin, "The Role of the Religious Leader in the Development of Public Policy," 34 *DePaul L. Rev.* 1 (1984) (Address to ABA).

These cases also present an opportunity for this Court to resist efforts to portray parental notice laws as creating conflicts between rights of parents and rights of children, and in the process, to strengthen family integrity. This Court has historically affirmed and strengthened family life in many areas, but has not done so meaningfully in the context of abortion. If a family is to retain any vitality when confronted by this reality, its members must, at a minimum, be entitled to reflect upon and discuss whether a pregnant dependent adolescent should consider termination of her pregnancy through abortion. To rule that a State may not shield the family for a brief time for this kind of consultation is to deny family integrity and ultimately to undermine familial relationships.

Through their counsel, the parties have consented to the appearance of this *amicus*.

SUMMARY OF ARGUMENT

In its most recent Term, this Court upheld portions of a Missouri statute regulating abortion and establishing the State's policy regarding unborn life. *Webster v. Reproductive Health Services*, 109 S.Ct. 3040 (1989). A plurality recognized a conflict with existing decisions on abortion and expressed a willingness to narrow their scope or even overrule them if necessary. Certainly, as the plurality there recognized, the Court's jurisprudence has encouraged judicial involvement in the crafting of a "code of regulations rather than a body of constitutional doctrine." *Id.* at 3057. Its abortion decisions being essentially legislative, this Court until recently effectively reserved to the judiciary the task of writing the rules that would govern abortion regulation.

The States have continually expressed frustration over the constant and detailed involvement of the federal courts in the development of their statutory law. A particular area of concern has been the extent to which this Court has constitutionalized an adolescent's choice to have

an abortion, contrary to her parents' views or even without their knowledge. Starting with *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976), this Court has ruled in one fashion or another on the permissible parameters of that choice some eight times. Still, the ultimate issue of who must settle the scope of parents' involvement in their child's decisions persists. As the courts continue to prescribe the intricate details of the law, the legislatures—the traditional forum in which such issues are resolved—are stripped of their legitimate policy-making functions. In the process, the family unit suffers.

Society owes much of its stability to the strength of the family and has a vital interest in preserving family integrity. "The intangible fibers that connect parents and child . . . are woven throughout the fabric of our society, providing it with strength, beauty, and flexibility." *Lehr v. Robertson*, 463 U.S. 248, 256 (1983). Indeed, "the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural." *Moore v. City of East Cleveland*, 431 U.S. 494, 503-504 (1977) (plurality).

Abortion challenges that institution and its values, as well as society itself, in fundamental ways. Under the abortion decisions of this Court, one member of a household may dictate to all the others whether new life—plainly a member of the family—may be allowed to be born. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. at 70-71, 74-75. When the person making that decision is an adolescent, the implications are especially serious. If she is to appreciate meaningfully the import and consequences of her actions, the adolescent needs guidance from knowledgeable and caring persons, not abortion clinic employees who lack intimate information about her life. *Id.* at 91 (Stewart, J., concurring).

The persons she may and should look to are her parents or those who legally stand in their place. *Bellotti v. Baird (II)*, 443 U.S. 622, 640 (1979) (plurality).

This Court has recognized the importance of parental consultation and consent when the person seeking an abortion is an adolescent. *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476, 490-91, 505 (1983); *H.L. v. Matheson*, 450 U.S. 398, 409-11 (1981). The process of intra-family discussion and decisionmaking is advanced by statutes requiring that an adolescent pause for a brief time, facilitating consultation with her parents. It is well settled that such a legislative judgment, which reflects a proper balance of State, family and individual interests, should not be lightly set aside, and then only when it is "clearly incompatible" with supervening constitutional mandate. *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 530-31 (1870); *Otis v. Parker*, 187 U.S. 606, 608 (1903). The legitimacy of such a legislative judgment, presented in this case, cannot be seriously doubted. The normative principle that should guide this Court is its teaching that parents, even in families under stress, have a "vital interest in preventing the irretrievable destruction of their family life." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). That vital interest is properly advanced by the statutes under review here, and should be affirmed by this Court.

But more is needed. The underlying problem presented by these cases is the narrow role some would accord the legislature in the regulation of abortion. Opponents of parental notice demand that the trial courts entertain their opinion evidence that such laws are impractical and unwise, and for this reason, unconstitutional. Whatever merit these opinions might have, they are misdirected. Such argumentation, with corresponding rebuttal, would ordinarily be presented to the legislatures, not the courts, for debate and resolution. The increasingly intricate jurisprudence of this Court encourages, unfortunately, a

contrary result. A thorough reevaluation of *Roe v. Wade*, 410 U.S. 113 (1973), and the sixteen years of subsequent decisions, would lead to, at least, one singular result—restoration of the legislative function to the State legislatures. That kind of reconsideration should begin with these cases, where such issues are legitimately presented.

ARGUMENT

I

SIMPLIFYING THE INTRICATE RULES IN THIS COURT'S ABORTION JURISPRUDENCE EFFECTIVELY MEANS RECONSIDERATION OF *ROE v. WADE*.

Both Ohio and Minnesota sought review from this Court to clarify certain questions of statutory detail on the general issue of parental notice in instances of adolescent abortion. *E.g.*, Jurisdictional Statement of Ohio at 18-19; Cross-Petition for Writ of Certiorari of Minnesota at 16-17. Both lower courts endorsed the principle of parental involvement in the lives of their children. *Akron Center for Reproductive Health v. Slaby*, 854 F.2d 852, 857-58 (6th Cir. 1988); *Hodgson v. Minnesota*, 853 F.2d 1452, 1455 (8th Cir. 1988) (*en banc*). However, both courts questioned specific aspects of the statutes and in fact found fault in one or another detail of the statutes. *Akron Center*, 854 F.2d at 861; *Hodgson*, 853 F.2d at 1457. Minnesota notes that, in any other context, the principle advanced by the statute would be nondebatable: that parents should know about important aspects of their children's lives and be involved in their significant, life-affecting decisions. Cross-Petition at 15. Ohio goes further, noting that this case is a "paradigm of the inability of State legislatures to enact laws that effectuate the States' interest in encouraging parental involvement in the decision of a minor." Jurisdictional Statement at 16. Both States call for more definitive direction about the details of their statutes

from this Court. In other words, they seek an outline of a permissible statute.

These cases illustrate problems inherent in this Court's abortion jurisprudence. The Court has taken onto itself a broad rule-writing function, and created a code that has become even more ponderous and difficult, not only for the legislatures to interpret and apply, but also for courts to review. Until this Court is willing to face the issues legitimately presented by these cases [2] and reconsider the jurisprudence begun in *Roe v. Wade*, these problems will persist.[3]

A. The Abortion Decisions Reflect Increasingly Complex Legislative Activity by the Court.

In 1973, the Court created a new constitutional right to obtain an abortion with an accompanying "legislative"

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[2] Neither state has yet expressly sought reconsideration of *Roe v. Wade*. *But see* Ohio Jurisdictional Statement at 16-17. There is sentiment on the Court for avoiding such reconsideration unless the issue is actually presented *and* a proper party demands it. *Compare Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 452 (1983) (O'Connor, J., dissenting) (conflict but no demand) *with Webster v. Reproductive Health Services*, 109 S.Ct. 3040, 3060 (1989) (O'Connor, J., concurring) (demand but no conflict). In these cases, however, the scope and role of proper legislative activity is raised legitimately and should be resolved. *See id.* at 3058 (plurality). So too, the legislative balance given to competing interests, each of which this Court has called "fundamental" at one time or another, gives a legitimate basis on which to reconsider *Roe v. Wade*. *See* note 3, *infra*.

[3] Because the existence of a federal constitutional right to abortion is crucial to subject matter jurisdiction, the efficacy of *Roe v. Wade*, under which the federal question is presented, is always at issue in abortion cases, whether raised by a party or not. *See Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541, 547 (1986). It is plain that unless the Court is willing to take action in an appropriate case, such as these, litigation will compound the Court's problems and the problems for those who must live or die with its decisions. Brief *Amicus Curiae* of U.S. Catholic Conference in *Webster v. Reproductive Health Services*, No. 88-605 at 4-6.

outline for how the right should be exercised.[4] *Roe v. Wade*, 410 U.S. at 156. In that case, however, this Court declined to rule that the newly discovered right was broad enough to encompass the decision of a minor to terminate her pregnancy. *Id.* at 165 n.67. In 1976, when the issue was presented, this Court concluded that a child had at least some protected privacy interest that precluded an absolute decision on her behalf by her parents, backed by the authority of the law. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 74 (1976). Although this Court discussed the rights of minors to seek and obtain abortions without regard to the views of their parents, the Court's holding does not use language that reflects the adolescent in her precise status, namely, an unemancipated minor whose most fundamental relationship is not with her physician but with her parents.[5] Instead, it created a conflict between a "patient" (the adolescent) and a "third party" (her parents) and resolved the supposed struggle in favor of the "decision

[4] The Court essentially acts "legislatively" any time it announces rules or guides the subsequent action of the legislature. *Compare Berger v. New York*, 388 U.S. 41 (1967) *with* Omnibus Crime Control Act, Title III, 18 U.S.C. §§ 2510, *et seq.* Nonetheless, the Court's abortion jurisprudence goes much further than other examples of judicial direction of legislation. Whereas other illustrations draw distinctions or offer singular guidance, abortion cases are repetitious and divisive, and involve the courts in readjusting delicate balances, resolving matters of deep dispute, and redrafting the intricate details of statutes and regulations.

[5] Justice Stevens dissented, and implied that there was some broader role for the States to play in this jurisprudence. For example, in *Danforth* he would have voted to uphold the parental consent requirement as consistent with the holding in *Roe*. 428 U.S. at 102-103. On balance, Justice Stevens indicated that "a legislative determination that children should be entitled to the advice and moral support of parents is not irrational." Indeed, he pointed out the absence of focus by the majority on the status of the child and relationship with her parents, and the unseemly focus on the relationship with the physician as the "constitutionally permissible yardstick for determining whether a young woman can independently make an abortion decision." *Id.* at 105.

of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding [parental] consent." *Id.* (emphasis added).

By 1979, the Court took further legislative action in *Bellotti v. Baird (II)*, 443 U.S. 622 (1979),[6] when it not only held the Massachusetts consent law invalid but also specified the circumstances under which parental consent could be valid and included an outline for what has become known as a judicial bypass procedure. It should therefore not have been surprising that in *Planned Parenthood Association v. Ashcroft*, 462 U.S. 476, 490-91, 505 (1983), such a statute was upheld when it followed the recipe offered in *Bellotti II*. Although the present cases deal with parental notice rather than consent, the same kind of detailed judicial direction is common nonetheless.

In these many years of abortion litigation, in only one case has this Court ruled directly on parental notice.[7] In *H. L. v. Matheson*, 450 U.S. 398 (1981), the Court upheld a Utah parental notice statute but only after the majority narrowed the class represented by the plaintiffs to unemancipated dependent minors. It did not answer the question presented by the statute precisely, nor did

[6] In 1976 the Court in *Bellotti v. Baird (I)*, 428 U.S. 132 (1976), held open the prospect that the Court might defer to legislative judgment in particular cases by abstaining from passing on the particulars of the Massachusetts statute until the Massachusetts Supreme Judicial Court had construed that law. By abstaining, this Court reserved the right to decide in appropriate cases when consent could be required and under what circumstances, and decided *not* to strengthen the legislative role. *See Bellotti v. Baird (II)*, 443 U.S. 622, 656 n.4 (1979).

[7] In *Hartigan v. Zbaraz*, 484 U.S. 171 (1987), this Court divided evenly without opinion on the validity of a State statute that coupled parental notice with a waiting period. That order left standing a lower court determination that such a law was unconstitutional. 763 F.2d 1532 (7th Cir. 1985). Unfortunately, despite the narrow effect of the ruling, one of the courts below attempted to read some larger precedential principle into it. *Akron Center v. Slaby*, 854 F.2d at 861.

it answer the question posed by Justice Stevens in his concurring opinion. Justice Stevens pointed out that unlike parental consent laws, parental notice involved a much different calculus of competing values, most notably because it did not require a final parental decision. The principles he espoused in earlier cases (note 5, *supra*) "plainly dictate[d] that the Utah statute now before us be upheld." 450 U.S. at 421. Because the majority specifically narrowed the scope of its own decision, *H. L. v. Matheson* became the subject of speculation in the next series of abortion cases.

In *Akron v. Akron Center for Reproductive Health*, the majority asserted, but did not decide, that an "alternative procedure" is required under any law that would provide for parental involvement in their child's abortion decision. 462 U.S. 416, 428 n.10 (1983). Lower courts reading the Akron majority *dicta* believe they have divined both the mind of the Court favoring particular kinds of statutes as well as the specifics of the "legislative" relief that this Court would provide if the case were presented. *E.g., Glick v. McKay*, 616 F. Supp. 322, 324-25 (D. Nev. 1985).[8] This supposed need for an alternative procedure has invited the lower courts in these very cases to mandate the specifics of parental notice statutes. *Akron Center v. Slaby*, 854 F.2d at 860-61; *Hodgson v. Minnesota*, 853 F.2d at 1455-56. That this issue was not even presented in *H. L.*, as pointed out by Justice O'Connor in *Akron*, 462 U.S. at 469 n.12, was not discussed in those cases. Nor was it apparent that

[8] In the cases at bar, the Ohio litigation is truly a paradigm of the inability of the legislature to legislate. Juris. Stat. at 16. In that case, the court of appeals rejected the statute simply on the alleged inadequacy of various details in the bypass or "alternative" procedure. It is difficult to imagine how a court could act less like a court and more like a legislature in deciding how a statute *should* be constructed. The point is not how an "alternative" procedure is designed or even if one is "required." Rather, the decisionmaker and the designer should be the State legislature, not a federal court.

this kind of judicial role was inappropriate, or subject to any limits.

As the plurality in *Webster v. Reproductive Health Services* noted, the Court's abortion jurisprudence has indeed become "a web of legal rules that have become increasingly intricate, resembling a code of regulations rather than a body of constitutional doctrine." 109 S.Ct. at 3057. The solution to these cases does not lie in adding to the weave of the fabric but in untangling it. When courts usurp the legislative role, they frustrate not only the legislatures but themselves. *Id.* "The goal of constitutional adjudication is to hold true the balance between that which the Constitution puts beyond the reach of the democratic process and that which it does not." *Id.* at 3058. When the legislature balances competing interests to promote meaningful family consultation on issues that are deeply life-affecting, that legislative judgment is entitled to great respect and, unless plainly unconstitutional, should be sustained.

B. Judicial Review of State Health and Welfare Laws Should Exhibit Deference to the Legislative Process.

Chief Justice John Marshall once counseled that judging the unconstitutionality of State legislation was a task of "much delicacy, which ought seldom, if ever to be decided in the affirmative in a doubtful case." *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 128 (1810). *See Butler v. Pennsylvania*, 51 U.S. (10 How.) 402, 415 (1850). Legislation should not be voided "on slight implication and vague conjecture." *Fletcher v. Peck*, 10 U.S. (6 Cranch) at 128. Rather, in reviewing the conformance of a statute with the Constitution, a court must not so act unless and until it forms "a clear and strong conviction of their incompatability [sic] with each other." *Id.* The philosophy inherent in Chief Justice Marshall's admonition is judicial restraint—that courts reach constitutional issues only when strictly necessary. Among other

things, this philosophy serves "the consideration due to the judgment of other repositories of constitutional power concerning the scope of their authority." *Rescue Army v. Municipal Court*, 331 U.S. 549, 571 (1947).

The constitutional authority to resolve public debates over which actions shall be undertaken in the public interest is entrusted primarily to the legislative branch. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 420-21, 423 (1819). A legislature's role in matters affecting important health and safety interests is paramount, especially when it resolves matters of intense public controversy.[9] *See Webster v. Reproductive Health Services*, 109 S.Ct. at 3058; *Berman v. Parker*, 348 U.S. 26, 33 (1954); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 794-96 (1986) (White, J., dissenting). It is not the province of a court to frustrate the legislative will because the law "may seem to the judges who pass upon it, excessive, unsuited to its ostensible end, or based on conceptions of morality with which they disagree." *Otis v. Parker*, 187 U.S. at 608; *see Baltimore Gas & Electric Company v. NRDC*, 462 U.S. 87, 97 (1983); B. Cardozo, *The Nature of the Judicial Proc-*

[9] In the juvenile death penalty cases, this point has been amply illustrated. In *Thompson v. Oklahoma*, 108 S.Ct. 2687, 2698-99 (1988), a plurality decided there were numerous State statutes expressing the view that minors did not have the experience, education, or maturity to evaluate the consequences of their conduct, citing, among other things, *Bellotti v. Baird*. *See id.* at 2709 (O'Connor, J., concurring). This rule of law was strengthened, not vitiated, by reconsideration of the juvenile death penalty cases in the last Term. *Stanford v. Kentucky* stands for the proposition that the jury system is best suited to determine individual responsibility *in the absence of some considered legislative judgment* evaluating the entire class of juveniles. 109 S.Ct. 2969, 2975-76 (1989). Thus the views expressed last Term reinforced the principle that legislative judgments on matters within their competence should ordinarily be upheld. Unfortunately, that has not always been the case when abortion statutes are involved. *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 814 (1986) (O'Connor, J., dissenting).

ess, 141 (1921). Rather, it is incumbent upon those attacking a statute to show that the law is "clearly incompatible" with the Constitution. *Legal Tender Cases*, 79 U.S. at 530-31. Although courts are and should be vigilant in the protection of fundamental rights (such as religious freedom), the means by which the courts act are essentially procedural, allocating burdens of proof and setting standards of certitude. Courts do not displace the legislative process entirely, especially where there is more than one claim to a fundamental interest.[10]

Because the intricate jurisprudence of this Court on abortion has departed from these normative principles, it continues to frustrate even a carefully exercised and balanced legislative will. The problem lies in the nature of the jurisprudence rather than in particular statutes that come before the Court. The law becomes more cumbersome to administer, and more difficult to predict with certainty by the States. *Thornburgh v. American College*, 476 U.S. at 814 (O'Connor, J., dissenting). The answer for the Court, not just for these cases, but for the many cases to come, lies in a thorough reconsideration of the line of cases that begins with *Roe v. Wade*. Such a reconsideration was demanded by the dissenters in *Thornburgh* and *Akron* and finally broached by a plurality in *Webster*. While there may be merit in the

[10] In abortion decisions, the calculation is never simply one of individual interests competing with interests of the State. The choices made in an abortion decision are complex and certainly affect the life interests of others: the unborn child, the father, other members of the family, and society itself. S. Jordan, *Decision Making for Incompetent Persons* 19 (1985). The decision implicates the procreative interests of both partners, can affect the sanctity of a marriage relationship, ends a life, and has other impacts on family relations, alienating children from their parents and separating those parents from their unborn grandchildren. It subjugates liberties that in other contexts are found to be fundamental, but in this context are found to be less worthy of protection. J. Noonan, *A Private Choice: Abortion in America in the Seventies* 90-95, 190 (1979).

suggestion that such reconsideration should allow "time enough . . . to do so carefully," *Webster*, 109 S.Ct. at 3061 (O'Connor, J., concurring), the problem grows more urgent with each case. For this Court the time has come to decide whether to continue to write rules or to allow legislatures to legislate. *Akron*, 462 U.S. at 456 (O'Connor, J., dissenting).

II

A STATE MAY PERMISSIBLY REQUIRE NOTICE TO PARENTS OF THEIR MINOR DAUGHTER'S INTENTION TO SEEK AN ABORTION AND A REASONABLE CHANCE FOR THEM TO CONFER WITH HER PRIOR TO EXECUTION OF HER DECISION TO ABORT HER CHILD.

Both States present a plain, and plainly valid, argument to this Court through their respective parental notice laws: parents should know about and be involved in life-affecting decisions made by their children. Such a proposition would appear to be beyond dispute. However, those who oppose parental notice in these cases suggest that these legislative efforts neither aid families nor promote legitimate exercise of rights, to the extent that parents may act to deny their adolescent daughters unfettered access to abortion. By framing the debate in these cases as a conflict between parents' rights and children's rights, those opponents have missed the most important point. This Court has cautioned against "intrusion by a State into family decisions," *Wisconsin v. Yoder* 406 U.S. 205, 231 (1972), delineating instead a "private realm of the family which the State cannot enter." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). As with other significant subjects that might come up from time to time within a family, the family must be given the opportunity to consider and resolve for itself matters relating to abortion.

A. Protection of Family Integrity Is an Important Public Welfare Interest that Merits Legislative Protection.

The mutual support and interdependence of family members have been strongly endorsed and protected in American law. "The intangible fibers that connect parent and child have infinite variety. They are woven throughout the fabric of our society, providing it with strength, beauty, and flexibility. It is self-evident that they are sufficiently vital to merit constitutional protection in appropriate cases." *Lehr v. Robertson*, 463 U.S. at 256. Protection of the family is a principle of life and law "deeply rooted in this Nation's history and tradition." *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).[11]

Drawing on this rich historical tradition, this Court found the "natural duty of parents" to educate their children to be part of the fourteenth amendment liberty interest in marriage, establishing a home, and raising children. *Meyer v. Nebraska*, 262 U.S. 390, 399, 400 (1923). Parental nurture and direction of children is more than a "right" but a "high duty." *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925).[12] In *Prince v. Massachusetts*, this Court stated:

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[11] At common law in England and in the United States, the duties of parents to maintain, support, and educate their children were well-established. I W. Blackstone, *Commentaries on the Laws of England*, Ch. 16, 435, 440-41 (1765); II J. Kent, *Commentaries on American Law*, 160 (Da Capo ed. 1971). The duties of children relative to their parents were also well-established. *Id.* The common law family relationship may be described as mutual and reciprocal. I Blackstone at 440-41; II Kent at 170-73. Each member was bonded to the other in what one court called a "mutual interest in interdependence." *Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d Cir. 1977). *See* Hafen, "Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to their *'Rights,'*" 1976 *B.Y.U. L.Rev.* 604, 615-17, 651-52.

[12] The Court in *Wisconsin v. Yoder*, 406 U.S. 205, 213, 232 (1972) described *Pierce v. Society of Sisters* as a "charter of the

> It is cardinal with us that the custody, care and nurture of the child must reside first in the parents, whose primary function and freedom include preparation for obligations the State can neither supply nor hinder. And it is in recognition of this that these decisions [*Meyer* and *Pierce*] have respected the *private realm of the family which the State cannot enter.*

321 U.S. at 166 (emphasis added); *see Ginsburg v. New York*, 390 U.S. 629, 639 (1968).[13] The "primary role of the parents in the upbringing of their children is now established as an enduring American tradition." *Wisconsin v. Yoder*, 406 U.S. at 232.

Children, however, have rights as against certain kinds of parental actions and as against the State. Children cannot, at their parents' direction, be refused beneficial medical treatment or subjected to extensive work hours. *See Application of President and Directors of Georgetown College*, 331 F.2d 1000, 1007-1008 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964); *Prince v. Massachusetts*, *supra*. Similarly, children cannot be denied rights to political expression or to an expectation of privacy in public schools. *Tinker v. Des Moines Independent School Dist.*, 393 U.S. 503, 506, 511 (1969); *New Jersey v. T.L.O.*, 469 U.S. 325, 334 (1985). Nor can children be

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rights of parents to direct the religious upbringing of their children." If anything, this should apply even more strongly to situations involving consideration of abortion where strong moral and religious convictions are implicated.

[13] In *Ginsburg v. New York*, the Court upheld a statutory ban on sale of non-obscene but adult-oriented magazines to all minors. 390 U.S. 629 (1968). The Court observed it "has consistently recognized that the parents' claim to authority in their own household is basic in the structure of our society [quotation from *Prince v. Massachusetts* omitted]. The legislature could properly conclude that parents . . . who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility." 390 U.S. at 639.

deprived of liberty without due process in public schools or in courts. *Goss v. Lopez*, 419 U.S. 565, 574, 575 (1975); *In Re Gault*, 387 U.S. 1, 13 (1967). The Court has not automatically either extended these rights to children, or granted them the full adult scope of the rights; both actions have been made dependent upon the nature of the countervailing State and parental interests. *E.g.*, *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971).

The resulting blend of "rights," "duties," and "obligations" is the family unit as it is now recognized in the law.[14] Although it has recognized children's "rights," the Court has affirmed the principle that parents play a "substantial, if not the dominant role" in their children's lives. *Parham v. J.R.*, 442 U.S. 584, 604 (1979); *see Wisconsin v. Yoder*, 406 U.S. at 244 (Douglas, J., dissenting). This role is displaced only where there is a serious threat to the child's health or safety or a "potential for significant social burdens." *Id.* at 233-34; *see Thornburgh*, 476 U.S. at 793 n.2 (White, J., dissenting). Even in families where relations between parents and children are strained, parents, because of their interest in preventing the "destruction of their family life," must have a chance to resolve their problems apart from State interference. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).[15]

In *Bellotti v. Baird (II)*, the plurality strongly endorsed the need for familial involvement in the lives of dependent children. 443 U.S. at 634, 640. Protection of family integrity may be advanced even in competition

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[14] Hafen, *supra* note 11 at 616-17 and authorities noted therein.

[15] This Court recently reaffirmed its long-standing deference to legislative judgments preserving the integrity of the marital family against asserted rights to establish paternity. *Michael H. v. Gerald D.*, 109 S.Ct. 2333, 2342, 2345 (1989).

with the separate interests of its members. "The unique role in our society of the family . . . requires that constitutional principles be applied with sensitivity and flexibility to the special needs of parents and children." *Id.* at 634. In particular, relying on *Ginsburg v. New York* and *Prince v. Massachusetts*, the plurality noted that "minors often lack the experience, perspective and judgment to recognize and avoid choices that could be detrimental to them." *Id.* at 635-36.

Although neither lower court in the cases on review disputed these principles,[16] the opponents of the legislation in effect urge this Court to abandon the time honored conclusion that the integrity of the family unit is itself a privacy interest deserving constitutional protection. *Lehr v. Robertson*, 463 U.S. at 258. For reasons developed below, in many cases such as the present, that interest is superior to and may limit the interest of a minor in unfettered access to abortion. More to the point, protection of the family is sufficiently important to justify appropriate limitations on a minor's access to abortion on her exclusive demand. "There is . . . an important State interest in encouraging a family rather than a judicial resolution of a minor's abortion decision." *Id.* at 648. This case presents an opportunity to reaffirm that principle.[17]

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[16] *Akron Center v. Slaby*, 854 F.2d at 857-58; *Hodgson v. Minnesota*, 853 F.2d at 1555.

[17] The Catholic Church's moral teaching on the role of and protection for the family reflects similar considerations. The Vatican Charter of the Rights of the Family (Oct. 22, 1983) provides that: "[p]ublic authorities must respect and foster the dignity, lawful independence, privacy, integrity and stability of every family (Article 6)." The Bishops of the United States have long recognized the need to stabilize and strengthen family life. U.S. Bishops, *Statement on the Christian Family* ¶¶ 8-10 (Nov. 21, 1949); USCC Administrative Board, *Political Responsibility: Choices for the 1980s* ¶¶ 42-43 (Oct. 26, 1979) (Rev. Ed. Mar. 22, 1984). They have likewise recognized that parents may not do that which is injurious to their children. U.S. Bishops' Committee for Pro-Life Activities and American Jewish Congress, *Joint Statement on Treatment of Handicapped Newborns* (1985).

B. The Court Should Reject Efforts to Redraft State Statutes that Promote the States' and the Family's Interests in Family Integrity.

Parental notice statutes are well within the permissible range of legislative action under this Court's family jurisprudence. Through these statutes, the States assure some private space for a family to discuss an adolescent's decision to seek an abortion. *Bellotti v. Baird (II)*, *supra*. It is as if the State has drawn a line around the family members to shield them for a brief moment to allow discussion of a decision that intimately affects the entire family relationship.[18] Both the parents' rights and their child's rights are implicated by abortion. *Akron v. Akron Center for Reproductive Health*, 462 U.S. at 428 n.10 (1983). The child's desire for her solution can strain against her parents' natural desire to provide guidance, direction, and support in making a responsible decision. In that time and private space, no one "right" is more important than the others. The integrity of the family is at stake. In devising such a statute, the legislature may decide that the family members normally act out of love, concern, and respect for each other. Evidence that a statute is not operating as designed, or that perhaps the legislature incorrectly balanced the various outlooks and perspectives, should not be presented to a court on judicial review, but rather should be presented to the legislature which has the constitutional authority in the first instance to make such a resolution. *Maher v. Roe*, 432

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[18] "The importance of the familial relationship, to the individual involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' . . . ." *Smith v. Organization of Foster Families*, 431 U.S. 816, 844 (1977) (citing *Wisconsin v. Yoder*, 406 U.S. at 231-34).

U.S. 464, 479 (1977). In a doubtful case, in which there are various viewpoints in competition with each other in the legislature, that judgment itself may not be displaced because it is alleged to be unwise or impractical.

What the statutory opponents demand of this Court is that federal district courts become the means by which such legislative action is reconsidered and refined. They insist that, although legislatures may act on the basis of factual presumptions in enacting statutes, subsequent evidence that casts doubt on the wisdom or efficacy of a particular approach and its underlying presumptions is an adequate basis for any court to declare that statute unconstitutional. Hodgson Petition for Writ of Certiorari at 16-17, 21, 23.[19] As the *Hodgson* court noted, the opponents' record in the district court "raise[d] considerable questions about the practical wisdom of this statute. Nevertheless, we believe these are questions for the legislature." 853 F.2d at 1459. The opponents' renewed insistence that the lower courts should have relied only on the trial record that they created[20] appears to be nothing more than a guise to entice a court to substitute its judgment for that of a legislature. Redrafting the law should be the task of those who initially weighed the competing evidence and resolved conflicts in drafting the statute.

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[19] In that petition, the statutory opponents urge the Court to void not just Minnesota's two parent notice statute, but more broadly, "to revisit the question of the constitutionality of [notice] laws . . . on the factual record herein." Hodgson Petition at 17. Such an action would not only be inappropriate for lack of standing and other reasons, it shows the reach of the opponents' aims—to shut children off from parents.

[20] For example, the overwhelming majority of witnesses testified as part of the opponents' main case in *Hodgson v. Minnesota*, 648 F. Supp. 756, 774 (D. Minn. 1986). The district court nonetheless found that parental notice was effective. *E.g.*, Finding 58, *id.* at 766.

These are not cases in which the States blur the distinction between facial and operational challenges by urging a more rational and deferential judicial review. If a statute that is valid on its face nonetheless unduly burdens a constitutional right in practice, a court is free to consider that evidence and so rule without engaging in "legislative" activity. Here, only some of the argument or evidence goes to the application of either statute on review. The bulk of the opponents' case is directed at pushing this Court to redraw lines already set by the legislature, something a court may not do. *See, e.g., Kleppe v. New Mexico*, 426 U.S. 529, 541 n.10 (1976). These opponents, having lost in their legislatures, seek to enlist the courts in refighting their battles. Why these opponents could not just as readily reopen the legislative process goes unexplained. One searches the opponents' papers and the opinions below in vain for some reason excusing their abandonment of the legislative process.

One possible excuse implicit in the opponents' position lies in the fact that this Court continues to describe a woman's choice of abortion in constitutional terms. Although this *amicus* plainly disagrees, assuming *arguendo* the existence of a constitutional right, there is still no reason to second-guess legitimate choices designed to protect the family. First, the mere existence of a constitutional right does not empower the judiciary to assume a greater role. The first amendment interest advanced in *Ginsburg v. New York* is presumably no less fundamental. 390 U.S. at 636. Yet this Court flatly refused to sustain a child's interest as the dominant concern, siding instead with the legislature and the parents' obligations and interests. *Id.* at 639. Neither the absence of an opportunity to demonstrate "emancipation" or "maturity," nor the prospect of a parental veto was fatal. Likewise in the abortion context, at least a plurality has recognized that advancement of parental authority was not "inconsistent with our tradition of in-

dividual liberty . . . . Legal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding." *Bellotti v. Baird (II)*, 443 U.S. at 639. This implicit acknowledgment of the parents' fundamental rights offers more, not less, reason for deference to legislation that seeks to balance and resolve various concerns.

Second, the mere existence of a constitutional right does not guarantee the corresponding capacity to exercise it wisely. For this reason there are many restrictions on otherwise available and necessarily private choices for adolescents, without regard to "emancipation" or "maturity," including, *inter alia*, the privilege to drink, drive an automobile, marry, make purchases or enter into contracts. *Thompson v. Oklahoma*, 108 S.Ct. 2687, 2698-99 (1988); *see* note 9, *supra*. Yet opponents of parental notice accompanied by a waiting period for family discussion assert that such statutes "unduly burden" a minor's decision to obtain an abortion because parents might, on occasion, discourage the abortion that these opponents have decided is in the best interests of all minors.[21] This assertion involves two erroneous assumptions—that parents act contrary to their children's best interests and that abortion *is* in the best interests of the child.

As to the first assumption, our common law heritage from Blackstone and Kent to the most recent decisions of this Court (see note 11, *supra*) presumes that the

[21] For example, one of the principal pieces of evidence that the opponents have used against the Minnesota law is the statistic that the teenage birthrate has increased over the duration of the statute, while remaining more or less constant for the age group not covered by the statute. The implicit assumption is that those births would or should have been prevented by abortion. Hodgson Petition at 11 n.16. This is relevant only if there is a mandate to perform as many abortions as possible.

"natural bonds of affection lead parents to act in the best interests of their children." *Parham v. J.R.*, 442 U.S. at 602. Although "experience and reality may rebut what the law accepts as a starting point . . ., [s]imply because the decision of a parent is not agreeable to the child or because it involves risks does not automatically transfer the power to make that decision from the parents . . . ." *Id.* at 602, 603. This Court has repeatedly resisted the suggestion that it presume the worst. *H.L. v. Matheson*, 450 U.S. at 413; *Wisconsin v. Yoder*, 406 U.S. at 232. Where evidence exists as to specific concerns, it does not serve the public interest for this Court, on the basis of "expert" opinion in one trial court, to upset centuries of tradition.[22] Respecting parental rights and familial obligations, other decisions of this Court allow parents a "substantial, if not the dominant role" in making medical treatment decisions for their children. *Parham v. J.R.*, 442 U.S. at 604 (analyzing and rejecting *Danforth*). Because this Court has found that "children, even in adolescence, simply are not able to make sound judgments concerning . . . medical care or treatment," *Parham v. J.R.*, 442 U.S. at 603, it must not divest parents of meaningful input to their dependent child's abortion decision. What the Court recognized in *H.L. v. Matheson*, 450 U.S. at 412-13, about the grave consequences of abortion strengthens the need for effective and meaningful parental involvement.

As to the second assumption, *H.L. v. Matheson* authoritatively dismissed the assertion that abortion is in the child's best interest:

[22] If this is not the measure for constitutional adjudication, it would be just as reasonable for this Court to note the existence of contrary expert opinion supporting the need for parental consultation in these circumstances. Rue, "Abortion in Relationship Context," 9 *Int'l Rev. of Natural Family Planning* 95, 97-99 (1985). Crisis, argument, and discussion are inherent in family decision-making. Fear of the process does not justify judicially mandated avoidance by those who stand to benefit most.

> If the pregnant girl elects to carry her child to term, the *medical* decision to be made entails few—perhaps none—of the potentially grave emotional and psychological consequences of the decision to abort.

450 U.S. at 412-13; *see id.* at 411 and n.20 (describing unique medical, emotional and psychological complications associated with an adolescent's decision to have an abortion not present in adult cases). These considerations are particularly important in the abortion context:

> The abortion decision differs in important ways from other decisions that may be made during minority.
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> * * * *
>
> [C]onsidering her probable education, employment skills, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor. . . . [T]here are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible.
>
> Yet, an abortion may not be the best choice for a minor. In a given case, alternatives to abortion, such as marriage to the father of the child, arranging for its adoption, or assuming the responsibilities of motherhood with the assured support of family, may be feasible and relevant to the minor's best interest.

Bellotti v. Baird (II), 443 U.S. at 642-43.[23] G. Melton (ed.), *Adolescent Abortion: Psychological and Legal*

[23] The plurality endorsed Justice Stewart's view that the State may encourage a minor "to seek the help and advice of her parents in making the very important decision whether or not to bear a child." *Id.* at 641 (quoting *Planned Parenthood v. Danforth*, 428 U.S. at 91 (Stewart, J., concurring)). Justice Stewart tied his reliance on parental involvement to the fact that the adolescent "under emotional stress, may be ill-equipped to make [the decision] without mature advice and emotional support." *Planned Parenthood v. Danforth*, 428 U.S. at 91 (Stewart, J., concurring). Clinic personnel, with an economic interest at stake, would not likely offer such "counsel and support." *Id.* As the plurality expanded in *Bellotti v. Baird (II)*, 443 U.S. at 642 n.21: "Many minors who bypass their parents probably will resort to an abortion clinic, without being able to distinguish the competent and ethical from those that are incompetent and unethical." Parental "consulation and consent" are the "traditional way by which states have sought to protect children from their own immature and improvident decisions." *Planned Parenthood v. Danforth*, 428 U.S. at 95 (White, J., dissenting).

Issues 84 (1986). Those consequences are too grave to secure unrestricted exercise of the abortion decision for minors.

The effort to overturn the considered judgment of the legislatures, advancing meaningful family discussion over the *de minimis* "burden" imposed on the adolescent, must be firmly rejected. In *H.L. v. Matheson, supra*, this Court found that any inhibition of the decision to obtain an abortion based on actual or perceived parental action due to statutory notice was of *no* constitutional significance. Moreover, this Court has upheld consent statutes which present the possibility that parents may withhold consent and there may be *no* abortion. *Planned Parenthood Ass'n v. Ashcroft, supra.* Given these prior decisions, the statutes challenged here are plainly constitutional.

It is not the province of the courts to speculate about the quality of family relations and about the wisdom of particular legislation. *See Otis v. Parker*, 187 U.S. at 608. To do so is to exercise judicial review by, as John Marshall stated, "slight implication and vague conjecture." *Fletcher v. Peck, supra.* Unless the legislation is "clearly incompatible" with the Constitution, *Legal Tender Cases, supra*, it may not be set aside. Here, both Ohio and Minnesota were on firm constitutional ground in striving to balance important life interests. The opponents of these parental notice statutes seek to discourage parental involvement in their children's lives. Allowing them to succeed contravenes important constitu-

tionally protected interests, and sacrifices family integrity to the adolescent's perceptions of self-interest. There is simply no legitimate basis upon which to allow rejection of the statutes in question.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Sixth Circuit should be reversed and the judgment of the Court of Appeals for the Eighth Circuit should be reversed in part and affirmed in part.

Respectfully submitted,

MARK E. CHOPKO *
General Counsel
U.S. CATHOLIC CONFERENCE
3211 Fourth Street, N.E.
Washington, DC 20017
(202) 541-3300
* Counsel of Record

Nos. 88-805, 88-1125, 88-1309

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF OHIO,
Appellant,
v.
AKRON CENTER FOR REPRODUCTIVE HEALTH, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Sixth Circuit

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JANE HODGSON, M.D., *et al.*,
Petitioners,
v.
THE STATE OF MINNESOTA, *et al.*,
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THE STATE OF MINNESOTA, *et al.*,
Cross-Petitioners,
v.
JANE HODGSON, M.D., *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF THE KNIGHTS OF COLUMBUS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT IN NO. 88-805, AND RESPONDENTS-CROSS-PETITIONERS IN NOS. 88-1125 AND 88-1309

Of Counsel:
W. PATRICK DONLIN
Supreme Advocate
CARL A. ANDERSON
Vice President for Public Policy
Knights of Columbus

Dated: August 28, 1989

BRENDAN V. SULLIVAN, JR.
KEVIN J. HASSON *
WILLIAMS & CONNOLLY
839 17th Street, N.W.
Washington, D.C. 20006
(202) 331-5000

* *Counsel of Record*

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BRIEF OF THE KNIGHTS OF COLUMBUS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT IN NO. 88-805, AND RESPONDENTS-CROSS-PETITIONERS IN NOS. 88-1125 AND 88-1309

INTEREST OF THE *AMICUS*

Amicus curiae Knights of Columbus is an international organization of 1.4 million members. It has a long history of pro-family advocacy. For example, *amicus* underwrote the litigation in *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925). Moreover, a large percentage of its members are themselves parents. Because of its institutional interest, and the interests of its members, *amicus* believes that it can assist the Court by analyzing the impact of the present cases on the broader area of family rights generally. For these same reasons, *amicus* does not believe its interests will be fully attended to by existing parties. All parties have consented to the filing of this brief.

STATEMENT

In *Akron Center for Reproductive Health* v. *Slaby*, 854 F.2d 852 (6th Cir. 1988), and *Hodgson* v. *Minnesota*, 853 F.2d 1452 (8th Cir. 1988) (*en banc*), the United States Courts of Appeals for the Sixth and Eighth Circuits have held that states may not require that the parents of adolescent girls be notified prior to their daughters' obtaining abortions, unless states provide a so-called "judicial bypass" procedure enabling a judge to determine that the girl is mature enough to decide to have an abortion without telling her parents, or that an abortion is in her best interests. As the Eighth Circuit explained, "[i]n view of the unique nature and consequences of the abortion decision, states do not have the constitutional authority 'to give a third party an absolute, and possibly arbitrary, veto,' over the minor's abortion decision." *Hodgson*, 853 F.2d at 1456, *quoting Bellotti* v. *Baird*, 443 U.S. 622, 643 (1979) (plurality opinion). *See also Akron Center for Reproductive Health*, 854 F.2d at 861 ("we hold that a parental notification statute must provide a bypass procedure that is consistent with the dictates of *Bellotti II*"). The Eighth Circuit upheld Minnesota's parental notification statute, provided that its judicial bypass pro-

cedure remains in force. The Sixth Circuit struck down Ohio's statute largely because that court thought the judicial bypass provision inadequate. *Amicus* argues that no "judicial bypass" provision is ever constitutionally required, and thus urges this Court to affirm the Eighth Circuit, except insofar as it found the bypass provision necessary, and to reverse the Sixth Circuit.

SUMMARY OF ARGUMENT

In a nearly unbroken tradition, stretching back to the received English common law, courts and legislatures have recognized that parental authority is not delegated by the state, but rather inheres in the nature of parenthood. Thus, many "fundamental" rights of children have been conditioned on their parents' consent. Children may not marry without their parents' consent. Their interstate travel is largely conditioned on their parents' consent. And their right to enter into contracts is also restricted, and often conditioned on their parents' consent. In a line of cases beginning with *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), this Court has repeatedly emphasized the same principle. Thus, it has insisted that "[t]he child is not the mere creature of the State," but on the contrary, his parents "have the right coupled with the high duty" to direct his education. *Id.* at 535.

Planned Parenthood of Central Missouri v. *Danforth*, 428 U.S. 52 (1976), and the cases following it, are incompatible with the *Pierce* line of cases, and with the long-standing tradition of legislative and common-law recognition of inherent parental authority. Most fundamentally, *Danforth* and its progeny err in asserting that the only authority that parents have over their children's abortions is whatever the state is permitted to delegate to them. Parental authority is most emphatically not the product of state delegation, but of nature itself. The lower courts' decisions in these cases further extending *Danforth*'s reasoning to parental notification stat-

utes, like *Danforth* itself, are symptomatic of *Roe* v. *Wade*'s noted tendency for sudden displacement of time-honroed doctrines, and are thus symptomatic of *Roe*'s flawed nature. *Danforth* and its progeny, and *Roe* itself, should be reconsidered and overruled.

ARGUMENT

There is a nearly unbroken legal tradition, Constitutional, legislative and common-law, that the family has its "origins entirely apart from the power of the State." *Smith* v. *Organization of Foster Families*, 431 U.S. 816, 845 (1977). Familial rights are therefore grounded "not in state law, but in *intrinsic* human rights, as they have been understood in 'this Nation's history and tradition.'" *Ibid.* (emphasis added; citations omitted). The family, in short, is logically prior to the State.[1]

That principle has often been codified in legislation recognizing and reinforcing parental authority. Thus, for example, childrens' rights to marry, to travel, and to make certain contracts are conditioned on their parents' consent. With the sole—and rather conspicuous—exceptions of *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52 (1976), and its progeny, this tradition of family autonomy has been nowhere more forcefully expressed than in the precedents of this Court. *Amicus* respectfully urges the Court to resolve the dissonance created in the law by *Danforth* and *Bellotti* v. *Baird*, 443 U.S. 622 (1979), by restating in this case its long-standing theme of familial autonomy.

[1] Cf. Hobbes, *Leviathan*, ch. xxii (Fuller, ed 1952) ("For the father and master being before the institution of the Commonwealth absolute sovereigns in their own families, they lose afterward no more of their authority than the law of the Commonwealth taketh from them"); Locke, *Concerning Civil Government*, ch. VI, par. 58 (Brit. ed. 1952) ("The power, then, that parents have over their childen arises from that duty which is incumbent upon them, to take care of their offspring during the imperfect state of childhood").

I. THERE IS A LONG LEGISLATIVE AND COMMON-LAW TRADITION RECOGNIZING AND REINFORCING PARENTAL AUTHORITY.

Through both legislation and common law, both the federal government and the States have long acknowledged parents' authority by requiring their consent for important decisions made by their children.

A. Marriage

The most obvious example is marriage. It is a "fundamental right," *Loving* v. *Virginia*, 388 U.S. 1 (1967), and cannot be denied even to prisoners. *Turner* v. *Safley*, 107 S.Ct. 2254 (1987). Yet the requirement that a child obtain the consent of his or her parents before marrying has remained in force ever since its origins in the English common law.

Blackstone explains that the requirement was designed to reinforce a parent's natural duty:

> [t]he consent or concurrence of the parent to the marriage of his child under age, was . . . directed by our ancient law to be obtained: but now it is absolutely necessary; for without it the contract is void. And this also is *another means, which the law has put into the parents' hands, in order the better to discharge his duty;* first, of protecting his children from the snares of artful and designing persons; and, next, of settling them properly in life, by preventing the ill consequences of too early and precipitate marriages.

Blackstone's Commentaries, Book 1, Chap. XVI, par. 2 (Oxford 1966) (emphasis added; original emphasis omitted). In 1753, the rule was codified in "An Act for the better prevention of clandestine marriages," which required the consent of a parent or guardian in order for a person under twenty-one to marry.[2] Interestingly,

[2] The statute provided, in relevant part, as follows: "And it is hereby further enacted, That all Marriages solemnized by License,

that statute allowed for the Chancellor or other officials to approve a "proper" marriage if a party's parent or guardian had been "induced unreasonably . . . to abuse the Truth reposed in him" and to withhold consent. It did *not*, however, provide for application to them in the first instance. And it certainly did not create a mechanism for them to supply their own consent in secret, without the parents' knowledge.

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after the said twenty-fifth Day of *March*, one thousand seven hundred and fifty-four, where either of the Parties, not being a Widower or Widow, shall be under the Age of twenty-one Years, which shall be had without the Consent of the Father of such of the Parties, . . . or if dead, of the Guardian or Guardians . . . and in case there shall be no such Guardian or Guardians, then of the Mother (if living and unmarried) or if there shall be no Mother living and unmarried, then of a Guardian or Guardians of the Person appointed by the Court of *Chancery*; shall be absolutely null and void to all Intents and Purposes whatsoever. XII. And whereas it may happen, that the Guardian or Guardians, Mother or Mothers, of the Parties to be married, or one of them, so under Age as aforesaid, may be *Non compos mentis*, or may be in Part beyond the Seas, or may be induced unreasonably, and by undue Motives to abuse the Truth reposed in him, her or them by refusing or withholding his, her or their Consent to a proper Marriage; Be it therefore enacted, That in case any such Guardian or Guardians, Mother or Mothers, or any of them, whose Consent is made necessary as aforesaid, shall be *Non compos mentis*, or in Parts beyond the Seas, or shall refuse or with-hold his, her or their Consent to the Marriage of any Person, it shall and may be lawful for any Person desirous of marrying, in any of the before-mentioned Cases, to apply by Petition to the Lord Chancellor, Lord Keeper, or the Lords Commissioners of the Great Seal of *Great Britain* for the Time being, who is and are hereby empowered to proceed upon such Petition, in a summary Way; and in case the Marriage proposed, shall upon Examination appear to be proper, the said Lord Chancellor, Lord Keeper, or Lords Commissioners of the Great Seal for the Time being, shall judicially declare the same to be so by an Order of Court, and such Order shall be deemed and taken to be as good and effectual to all Intents and Purposes, as if the Guardian or Guardians, or Mother of the Person so petitioning, had consented to such Marriage. Lord Hardwicke's Act, 1753, 26 Geo. 2. ch. 33.

All 50 States and the District of Columbia still require parental consent for children to marry.[3] Only 5 states

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[3] Twenty-seven States and the District of Columbia simply require parental consent. *See* Ala. Code § 30-1-5 (1983); Ark. Stat. Ann. § 9-11-102-105 (1987); Cal. Civ. Code § 4101 (West 1983); Del. Code Ann. Tit. 13, § 123 (1981); D.C. Code Ann. § 30-110 (1988); Fla. Stat. Ann. 741.04-0405 (West 1986); Ga. Code Ann. § 19-3-2 (1982); Ill. Ann. Stat. ch. 40, para. 203 (Smith-Hurd 1982); Iowa Code § 595.2 (1980 & Supp. 1989); Ky. Rev. Stat. § 402.210 (1988); La. Rev. Stat. Ann. § 9:211 (Supp. 1989); Md. Fam. Law Code Ann. § 2-301 [b] (1984 & Supp. 1988); Mich. Comp. Laws Ann. 551.51 (West 1988); Miss. Code Ann. § 93-1-5 (1972 & Supp. 1988); Mo. Ann. Stat. 451.090 (Vernon 1986); Neb. Rev. Stat. § 42-105 (1988); N.C. Gen. Stat. § 51-2 (1988 & Supp. 1988); N.D. Cent. Code § 14-03-02, 14-17 (1981 & Supp. 1989); Ohio Rev. Code Ann. § 3101.01 (Baldwin 1984); Okla. Stat. Ann. tit. 43 § 3 (West 1979); Or. Rev. Stat. § 106.060 (1983 & Supp. 1988); S.C. Code Ann. § 20-1-260—270 (Law. Co-op. 1985); S.D. Codified Laws Ann. § 25-1-12, 13; Utah Code Ann. § 30-1-2 (1989); Va. Code Ann. § 20-48, 49 (1989); Wash. Code § 26.04.010 (1988); Wis. Stat. Ann. § 765.02[1] (West 1981 & Supp. 1988); Wyo. Stat. 20-1-102 (1987). Eighteen states require a court's consent, in *addition* to parents' consent, in certain circumstances. For example, in New York an 18-year old may not marry without his or her parent's consent, but a 16-year old may not marry without *both* the consent of his or her parent's *and* that of a state superior court or family court judge. *See* N.Y. Dom. Rel. Law § 15 (McKinney 1988); *see also* Ariz. Rev. Stat. Ann. § 25-102 (1976) (same); Colo. Rev. Stat. § 14-2-106[1][a][I]108 (1987) (same); Conn. Gen. Stat. Ann. § 46b-30 (West 1986) (same); Haw. Rev. Stat. §§ 572-1-2 (1985) (same); Idaho Code § 32-202 (1979) (minors under 18 require parental consent; girls under 16 also require consent of probate court); Ind. Code Ann. §§ 31-7-1-6, 31-7-1-7, 31-7-2 (Burns 1980 & Supp. 1986) (minors between 17 and 18 may marry without parental consent; girl under 15 who is pregnant or has given birth may marry with parental consent and judicial approval); Kan. Stat. Ann. § 23-106 (1988) (both parents' and court's consent required for minors under 18); Me. Rev. Stat. Ann. Tit. 19, § 62 (1981 & Supp. 1988) (minors under 18 require parental consent; minors under 16 also require consent of probate court); Minn. Stat. § 517.02 (1969 & Supp. 1989) (minors under 16 require both consent of parents' and consent of juvenile court); Mont. Code Ann. § 40-1-213 (1989) (minors under 18 require parental consent;

permit a court to consent in lieu of the parents, thus effectively emancipating the minor.[4] None, however, requires such a hearing to be conducted secretly from the parents.

B. Travel

A child's right to interstate travel, which is also a fundamental right, *Shapiro* v. *Thompson*, 394 U.S. 618

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minors under 16 require both parental and consent of district court judge); Nev. Rev. Stat. § 122.020 (1985) (same); N.J. Stat. Ann. §§ 37.1, 37.6 (West 1986 & Supp. 1989) (same); N.M. Stat. Ann. §§ 40-1-5, 40-1-6 (1987) (same); Pa. Stat. Ann. Tit. 48 § 1-5 (Purdon 1965 & Supp. 1989) (same); R.I. Gen. Laws § 15-2-11 (1989) (same); Vt. Stat. Ann. Tit. 18 § 5142 (1981) (same); West Va. Code § 48-1-1 (1988) (same). Five states require parental *or* judicial consent. *See infra*, n.4.

[4] Alaska Stat. § 25.05.171 (1988) (minors between 16 and 18 require parental consent; minors between 14 and 18 may receive court approval if marriage is "in best interest" of minor, and parents either have consented or unreasonably refused consent); Mass. Gen. Laws Ann. ch. 207, §§ 7, 24, 25 (West 1987 & Supp. 1989) (minors under 18 require parental consent; court may waive requirement under specified circumstances); N.H. Rev. Stat. Ann. § 457 (1983 & Supp. 1988) (marriage by minors under 18 prohibited; court may waive disability for boys over 14 girls over 13 in its discretion); Tenn. Code Ann. § 36-3-107 (1984 & Supp. 1988) (minors between 16 and 18 can marry with parental consent, but court may waive disability "upon good cause shown"); Texas Fam. Code Ann. §§ 1.51-1.53 (Vernon 1975 & Supp. 1989) (minors under 18 require either parental consent or court order; minors under 14 require court order). Other states, however, permit judicial consent in the limited circumstances where the girl is pregnant. *See, e.g.*, Ohio Rev. Code Ann. § 3101.01 (Baldwin 1984) (minors under 18 require parental consent; court may consent when girl is pregnant); N.J. Stat. Ann. §§ 37.1, 37.6 (West 1986 & Supp. 1989) (parental consent required for minors under 18; court consent also required for minors under 16; but both requirements waived where girl pregnant); Ky. Rev. Stat. 402.210 (1988) (parental consent required for minors under 18; district court may waive consent requirement, in its discretion, in case of pregnant girl).

(1969), is likewise largely conditioned on his or her parents' consent. Forty-six states and the District of Columbia have enacted the Uniform Interstate Compact on Juveniles,[5] which provides rather elaborate procedures

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[5] *See* Ala Code §§ 44-2-1—44-2-7 (1987); Alaska Stat. §§ 47.15.010—47.15.080 (1988); Ariz. Rev. Stat. Ann. §§ 8-361—8-367 (1989); Ark Stat. Ann. §§ 9-29-101—9-29-108 (1987 & Supp. 1987); Cal Welf. & Inst. Code § 1300 (West 1984 & Supp. 1989); Colo. Rev. Stat. §§ 24-60-701-708 (1988); Conn. Gen. Stat. Ann. §§ 17-15—77-81 (West 1988 & Supp. 1979); Del. Code Ann. Tit. 31, §§ 5203, 5221—5228 (1985); D.C. Code Ann. §§ 32-1101—32-1106 (1988); Fla. Stat. Ann. §§ 39.51—39.516 (West 1988); Ga. Code Ann. §§ 39-3-1—39-3-7 (1982); Haw. Rev. Stat. §§ 582-1—582-8 (1985 & Supp. 1988); Idaho Code §§ 16-1901—16-1910 (1979); Ill. Rev. Stat. ch. ¶¶ 2591—2597 (Smith-Hurd 1988); Iowa Code § 232.171-72 (1980 & Supp. 1989); Ind. Code Ann. §§ 31-6-10-1—31-6-4 (West 1979 & Supp. 1989); Kan. Stat. Ann. § 38-1001 (1986); Ky. (K.R.S. 208.600, 208.670); La. Rev. Stat. Ann. §§ 46:1451—46:1458 (West 1982 & Supp. 1989); Me. Rev. Stat. Ann. Tit. 34-A, §§ 9001—9016 (1988 & Supp. 1989); Md. Health-General Code Ann. §§ 6-301—6-310 (1982 & Supp. 1989); Mass. Gen. Laws Ann. ch. 119 App., §§ 1-1—1-7 (West 1969 & Supp. 1989); Mich. Comp. Laws Ann. §§ 3.701—3.706 (West 1982 & Supp. 1989); Minn. Stat. Ann. §§ 260.51—260.57 (West 1981 & Supp. 1989); Miss. Code Ann. §§ 43-25-1—43-25-17 (1981); Mo. Ann. Stat. §§ 210.570—210.600 (Vernon 1983 & Supp. 1989); Mont. Code Ann. §§ 41-6-101—41-6-106 (1989); Neb. Rev. Stat. §§ 43-1001—43-1009 (1989); Nev. Rev. Stat. §§ 214.010—214.060 (1985); N.H. Rev. Stat. Ann. § 169-A:1-9 (1983 & Supp. 1988); N.J. Stat. Ann. §§ 9.23-1—4 (West 1968 & Supp. 1989); N.M. Stat. Ann. 32-3-1—32-3-8 (1978); N.Y. Unconsul. Law §§ 1801—1806 (1979 & Supp. 1989); N.C. Gen. Stat. §§ 110-58—110-64 (1988) Repealed by Session Laws 1979, C 815 S.2, 1180 §§ 7A-684 to 7A-711 (1988); N.D. Cent. Code §§ 27-22-01—27-22-06 (1974 & Supp. 1989); Ohio Rev. Code Ann. §§ 2151.56—2156.61 (Baldwin 1989); Okla. Stat. Ann. Tit. 10, §§ 531—537 (West 1987 & Supp. 1989); Or. Rev. Stat. §§ 417.01—417.080 (1987); Pa. Stat. Ann. Tit. 62 § 731 (1968 & Supp. 1989.; R.I. Gen. Laws §§ 14-6-1—14-6-11 (1989); S.C. Code Ann. § 27-17-10 (1976); S.D. Codified Laws Ann. §§ 26-12-1—26-12-13 (1984 & Supp. 1989); Tenn. Code Ann. § 37-801—37-

for a "parent . . . entitled to legal custody of a juvenile . . . who has run away without the consent of such parent" to petition a state court for a "requisition" securing the minor's return from the state to which he or she has fled. *See, e.g.*, D.C. Code § 32-1102, Art. IV(a) (1988). A child's freedom to leave the country is similarly conditioned.[6] Thus, passport officers may require children under 18 to obtain the consent of a parent or guardian before issuing them a United States passpost. 22 C.F.R. § 51.27 (1988).

C. Contract

The right to enter into contracts—one of the basic rights guaranteed by 42 U.S.C. § 1981—is generally either effectively denied to children (the traditional rule), or else is conditioned on their parents' consent. *See, e.g.*, Cal. Ins. Code § 10-112 (Deering 1989) (requiring parental consent for minors to enter into certain insurance contracts); 18 Del. Code § 2707 (1988) (same). *See generally*, 2 Williston, *Contracts* §§ 222-248 (3d ed. 1959 & Supp. 1989) (discussing "infants'" lack of capacity to contract); Restatement (2d) Contracts, §§ 6, 14 (1981) (same). The federal government likewise requires parental consent before allowing minors to enlist in the military or join R.O.T.C. *See* 10 U.S.C. §§ 505(a), 2104 (b)(4), 2107(b)(4), 2107a(b)(4) (1982).

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806 (1984 & Supp. 1988); Texas Fam. Code Ann. §§ 25.01-09 (Vernon 1986); Utah Code Ann. §§ 55-12-1—55-12-6 (1986); Vt. Stat. Ann. Tit. 33 § 551—575 (1981 & Supp. 1988); Va. Code Ann. §§ 16.1-323—16.1-330 (1988); Wash. Rev. Code Ann. §§ 13.24.010—13.24.900 (1962 & Supp. 1989). The exceptions are North Carolina, West Virginia, Wisconsin and Wyoming.

[6] The ability to travel out of the country, while not a "right," is nonetheless a constitutionally-protected "freedom." *Haig* v. *Agee*, 453 U.S. 280, 306-307 (1981).

These restrictions, and others like them,[7] are not isolated oddities. Rather, they embody a fundamental tenet of the American legal tradition, namely that parents have natural authority over their children, which the law recognizes and reinforces.[8]

II. THIS COURT HAS LONG RECOGNIZED THAT PARENTAL AUTHORITY IS AFFIRMATIVELY PROTECTED BY THE CONSTITUTION.

Apart from *Danforth* and its progeny, these same principles of family autonomy and parental authority have been repeated time and again in the precedents of this Court. Faced with a state statute that required all children to attend public schools, this Court insisted that

> [t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instructions from public teachers only. *The child is not the mere creature of the State; those who nurture him and direct his destiny have the right coupled with the high duty, to . . . prepare him for* [*his*] *additional obligations.*

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[7] Many restrictions on children are quite mundane. *See, e.g.*, Cal. Bus. & Prof. Code § 22-706 (Deering 1989) (requiring parental consent for use by children under 18 of "tanning devices").

[8] This same vision of family and state is apparent in the debates surrounding the Thirteenth and Fourteenth Amendments. The abolitionists argued that the natural evils of slavery the law had to remedy were not limited to involuntary servitude; slavery also caused the slave's "authority and responsibility to rear his children [to be] obliterated. The members of his family might be torn from him and scattered." J. TenBroek, *The Antislavery Origins of the Fourteenth Amendment* 122 (1951); Likewise, Senator Harlan, arguing in favor of the Thirteenth Amendment, noted that one of the evils of slavery was the "abolition practically of parental relation, [thus] robbing the off-spring of the care and attention of his parents." Cong. Globe, 38th Cong., 1st Sess. 1439 (1864). Senator Wilson agreed. He thought the Thirteenth Amendment necessary, in part, because "[t]hen the sacred rights of human nature, the hallowed family relations of husband and wife, parent and child, will be protected by the guardian spirit of that law . . . ." *Id.* at 1324.

Pierce v. *Society of Sisters*, 268 U.S. 510, 535 (1925) (emphasis added). *See also Michael H.* v. *Gerald D.*, 109 S.Ct. 2333, 2342 (1989) (plurality opinion) ("'the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition'") (citation omitted). Earlier, in *Meyer* v. *Nebraska*, 262 U.S. 390, 400 (1923), the Court struck down a statute that purported to criminalize instructing children in foreign languages. The Court noted that "[c]orresponding to the right of control, it is the natural duty of the parent to give his children education. . . ." *Id.* at 400. The statute, the Court inferred "with the power of parents to control the education of their own." *Id.* at 401.

The Court enforced the same principle, under the aegis of the Free Exercise Clause, in *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972). There, the Court held that a state could not require Amish children, against their parents' wishes, to attend high school. Reiterating its insistence that "[t]he child is not the mere creature of the State," *id.* at 233 (*quoting Pierce*, 268 U.S. at 535), the *Yoder* Court rejected the state's argument that it should be permitted to determine what type of education best served the Amish children. "[I]t seems clear that if the State is empowered as *parens patriae*, to 'save' a child from . . . his Amish parents . . . the State will in large measure influence, if not determine, the religious future of the child." 406 U.S. at 232. And that, the Court insisted, was well beyond the pale, since the "primary role of the parents in the upbringing of their children is now established beyond doubt. . . ." *Ibid.*

The *Yoder* Court reserved the question of how it would balance a state's right as *parens patriae* with the rights of parents and children in a hypothetical case where Amish children wished to obey a compulsory education statute against their parents' wishes. *Id.* at 231. Nevertheless, the Court warned "that such an intrusion by a State into family decisions . . . would give rise to grave questions of religious freedom comparable to those raised

here and those presented in *Pierce*. . . ." *Id.* at 231-32 (citation omitted). Six years later, in *Parham* v. *J.R.*, 442 U.S. 584 (1979), the Court went far towards resolving even that question.

In *Parham*, this Court upheld a state statute that authorized state mental institutions to admit temporarily any minor merely upon the application of that minor's parents or guardians. If, after observation, the institution found evidence of mental illness, it was authorized to admit the minor "for such period and under such conditions as may be authorized by law." 442 U.S. at 591. Any child hospitalized for more than five days, however, could always be discharged simply upon the request of his or her parents. *Ibid.* Several institutionalized children filed a class action challenging the statute as a deprivation of liberty without Due Process. They argued that "the likelihood of parental abuse" in having them committed against their will required a formal adversarial hearing. 442 U.S. at 603.

In rejecting that argument, this Court stressed once again that "our constitutional system long ago rejected any notion that a child is 'the mere creature of the State'. . . ." 42 U.S. at 602, *quoting Pierce*, 268 U.S. at 535. On the contrary, the Court emphasized that its "jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children." *Ibid.* Thus, an independent evaluation of the child by a staff physician at the hospital was all that due process required. *Id.* at 607.[9] The Court dismissed the argument that, because of the risk that some parents would abuse their children, a more formal procedure was necessary. "The statist notion that

[9] If the person to be committed were an adult instead of a minor, Due Process would require a full-scale adversary hearing. *See* 442 U.S. at 627 (Brennan, J., concurring and dissenting); *see* also *O'Connor* v. *Donaldson*, 442 U.S. 563, 580 (1975) (Burger, C.J., concurring); *McNeil* v. *Director Patuxent Institution*, 407 U.S. 245 (1972).

governmental power should supercede parental authority in all cases because some parents abuse and neglect children is repugnant to American tradition." *Id.* at 603. The Court added it would not

> assume that the result in *Meyer* v. *Nebraska* . . . and *Pierce* v. *Society of Sisters* . . . would have been different if the children there had announced a preference to learn only English or a preference to go to a public, rather than a church, school.

Id. at 603-04 (emphasis omitted). In short, because the child is not "the creature of the State" his parents' authority over him does not derive from the State.

Of course, as this Court has stressed, the State can and should *reinforce* parental authority. In *Ginsberg* v. *New York*, 390 U.S. 629 (1968), the Court upheld a statute that prohibited sales, to persons under 17, of pictures that "depict[ed] nudity" and were "harmful to minors." *Id.* at 632. The Court held that a state could properly accommodate parental authority by applying to minors a different definition of obscenity than that applicable to adults. "[C]onstitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." *Id.* at 639. Thus a "legislature could properly conclude that parents . . . are entitled to the support of laws designed to aid discharge of that responsibility." *Ibid.* Indeed, the Court has even upheld provisions giving parents complete discretion over what *non-obscene* sexual material may be delivered to their minor children. In *Rowan* v. *Post Office Dep't.*, 397 U.S. 728 (1970), it upheld a federal statute giving parents the right to have both their names and the names of their resident children under 19 deleted from mailing lists for material the parents judged to be "erotically arousing or sexually provocative." [10]

[10] Concurring, Justices Brennan and Douglas would have reserved the question of the constitutionality of applying the statute to all minors under nineteen. See 397 U.S. at 741 (Brennan, J., concurring).

The above cases all stand for the proposition that parental authority should not be invaded by the state, but instead ought affirmatively to be reinforced by it. None of those cases anywhere suggests that the state must create special mechanisms to "bypass" a child's parents without notice to the parents themselves.

Quite the contrary, where this Court *has* required judicial intervention is in cases where the state seeks to *terminate* parents' rights. Thus, the state may not remove a child from his or her parents, except upon notice and hearing. *Santosky* v. *Kramer*, 455 U.S. 745 (1982). And even then the state's case must meet the "clear and convincing" standard of proof. *Ibid.* Indeed, so profound is a parent's right to raise his or her children that a state may not terminate the parental rights of even certain unwed fathers except after notice and an adversary hearing. In *Stanley* v. *Illinois*, 405 U.S. 645 (1972), the Court mandated a hearing on the fitness of a resident, but unwed, father before the state could take custody of his children following their mother's death. "It is cardinal with us," the Court repeated, "that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." 405 U.S. at 651, *quoting Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1944) (emphasis added). *See Michael H.* v. *Gerald D.*, 109 S.Ct. 2333, 2342 (1989) (plurality opinion) (*Stanley* line of cases rests "upon the historic respect—indeed, sanctity would not be too strong a term—traditionally accorded to the relationships that develop within the unitary family") (footnote omitted).

III. *DANFORTH* AND *BELLOTTI II*—AS WELL AS *ROE*—ARE ABERRATIONS IN THE LAW, AND SHOULD BE REPUDIATED

Danforth and its progency are at odds with both the *Pierce* and the *Santosky* lines of cases. *Danforth* and *Bellotti II* forbid a state to accommodate parents' authority over their daughters' abortions, unless the state simultaneously provides for an *ex parte*—indeed affirmatively secret—proceeding to "bypass" the rights of the parents involved. This departure from an otherwise-settled tradition of protecting family autonomy is all the more remarkable because it was accomplished with so little fanfare.

A. *Danforth* And *Bellotti II* Are Incompatible With The *Pierce* Line Of Cases.

In *Danforth*, the Court struck down, among other things, a Missouri statute that required an adolescent to obtain her parents' consent before having an abortion. Writing for the majority, Justice Blackmun alluded only briefly to the *Pierce* line of cases and the fact that the lower court had upheld the parental consent requirement at issue as justified by the state's interest "in safeguarding the authority of the family relationship." 428 U.S. at 73. The *Danforth* majority then struck down that requirement by announcing simply that "the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy. . . ." *Id.* at 74. Earlier in its opinion, the majority elaborated on why it thought that was so. Discussing a spousal consent requirement, which it also invalidated, the majority announced that "since the State cannot regulate or proscribe abortion during the first stage . . . the State cannot delegate authority to any particular person . . . to prevent abortion during that same period." *Id.* at 69. The majority also did not feel that allowing parents to "overrule" a decision "made by the

physician and his minor patient" would "serve to strengthen the family unit." *Id.* at 75. Nor did the majority think that it would "enhance parental authority or control where the minor and the nonconsenting parent are so fundamentally in conflict . . . ." *Ibid.*

Bellotti v. *Baird*, 443 U.S. 622 (1979) ("*Bellotti II*"),[11] followed *Danforth* and struck down a Massachusetts statute which, as construed, required a minor seeking an abortion to first attempt to get her parents' consent. Failing that, she could still have an abortion if she persuaded a state court judge that the abortion was in her best interests.

The *Bellotti II* plurality struck down those provisions because they "g[a]ve a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy. . . ." 443 U.S. at 643, quoting *Danforth*, 428 U.S. at 74. The plurality then announced that a parental consent requirement would only be constitutional if the minor had the opportunity (1) to substitute a judge's idea of her best interest for that of her parents, or else, (2) to convince the judge that she was mature enough to make the decision on her own even if the judge thought it against her best interest. 443 U.S. at 643-44. The plurality stressed that "every minor must have the opportunity . . . to go directly to a court *without first consulting or notifying her parents.*" *Id.* at 647 (emphasis added). And if that court then determines "that she is mature and well enough informed to make intelligently the abortion decision on her own, the court *must authorize her to act without parental consultation* or consent." *Ibid.* (Emphasis added).

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[11] In *Bellotti* v. *Baird*, 428 U.S. 132 (1976) ("*Bellotti I*"), the Court vacated an earlier opinion of the district court, and remanded it to that court for certification of several questions of construction to the Supreme Judicial Court of Massachusetts.

Unlike the *Danforth* majority, the *Bellotti II* plurality paid somewhat more attention to the traditional protection afforded to parental authority. Nevertheless, the plurality said *Pierce* and its progeny were distinguishable because "[t]he abortion decision differs in important ways from other decisions that may be made during minority." 443 U.S. at 642. The plurality reasoned that "[a] minor not permitted to marry before the age of majority is required simply to postpone her decision . . . a pregnant adolescent, however, cannot preserve for long the possibility of aborting, which effectively expires in a matter of weeks from the onset of pregnancy." *Ibid.*[12]

At bottom, therefore, *Danforth* and *Bellotti II* justified their departure from the Court's longstanding protection of family autonomy with three arguments: (1) that bearing a child is a decision with implications more profound and more urgent than those of other decisions traditionally conditioned on parental consent, (2) that the state's interest in safeguarding parental authority would not be promoted when the parents and child are "fundamentally in conflict" over the child's desire to have an abortion, and (3) that the state may not *delegate* a right of consent to parents, because the state itself has no such right to give. None of these arguments compels *Danforth*'s conclusion.

1. To be sure, bearing a child has profound consequences for an unwed adolescent. It is, however, quite debatable whether those consequences are necessarily more profound than those of other decisions subject to parental control—whether or whom to marry for example.[13] And the fact that a girl's unwed pregnancy may be a predicament more urgent than others hardly proves that a judge, who presumably has never met her before, is better capable of assisting her in facing it than her parents would be.

In short, neither the importance nor the urgency of a girl's pregnancy supports the notion that parents should be kept in ignorance of it. To the contrary, that a girl's decision to have an abortion will have so profound an impact on her, and that it may be influenced by the pressure of time and other practical considerations, only underscore the value of her parents' involvement.[14]

2. The Court suggested in Danforth that recognizing parents' right to "veto" their child's decision to have an abortion would not "enhance parental authority or control where the minor and the nonconsenting parent are so fundamentally in conflict and the very existence of the

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[12] *Danforth*'s reach, of course, extends beyond *Bellotti II*. *See Planned Parenthood Ass'n of Kansas City* v. *Ashcroft*, 462 U.S. 476, 490-93 (1983); *Akron* v. *Akron Center for Reproductive Health*, 462 U.S. 416, 439-42 (1983); *H. L.* v. *Matheson*, 450 U.S. 398 (1981). *See also Zbaraz* v. *Hartigan*, 763 F.2d 1532 (7th Cir. 1985), *aff'd by an equally divided Court*, 108 S.Ct. 479 (1987) (requiring judicial bypass for parental notification statute).

[13] It is not only difficult, but probably fruitless, to guess whether a marriage or an unwed pregnancy, by itself, would have the greater impact on a child's future. For it is surely the entirety of *childhood*, an entirety not separable into discrete decisions amenable to one-at-a-time judicial proceedings, that has the greatest lifelong consequences.

> *To safeguard the right of parents* to raise their children as they see fit, free of government intrusion, except in cases of neglect and abandonment, *is to safeguard each child's need for continuity.* This preference for minimum state intervention and for leaving well enough alone is reinforced by our recognition that *law is incapable of effectively managing, except in a very gross sense, so delicate and complex a relationship* as that between parent and child.

J. Goldstein, A. Freud & A. Solnit, *Beyond The Best Interests Of The Child* 13 (1973) (emphasis added). Cf. *Parham*, 442 U.S. at 504 ("Neither state officials nor federal courts are equipped to review such parental decisions").

[14] *Danforth* seems to presume that an adolescent will suffer adverse consequences only if she proceeds to bear her child. But abortion itself has adverse consequences, and the girl may live profoundly to regret that choice.

pregnancy has already fractured the family structure." 428 U.S. at 75. But there is no reason to assume that the family structure has been "fractured" whenever an adolescent wishes to conceal her pregnancy from her parents. That, no doubt, is the initial reaction of virtually every adolescent who becomes pregnant. Nor does the fact that the parents and their daughter are "in conflict" mean that the State's interest in reinforcing parental authority is somehow diminished. Parents and their children disagree all the time, and it is precisely when they do that parental authority is ordinarily exercised.

3. Most fundamentally, the *Danforth* majority misapprehended the source of parents' rights. It announced that the state cannot "give" to parents a right that it itself does not have—the right to "overrule a determination made by a physician and his minor patient." 428 U.S. at 75. Implicit in that statement is the notion that parents have only such authority as the State gives them to act in its stead. But " 'the child is not the mere creature of the state.' " *Parham*, *supra*, 442 U.S. at 602, *quoting Pierce*, 268 U.S. at 510. And since the family has its "origins entirely apart from the power of the State," parents' rights have their source "not in state law, but in intrinsic human rights. . . ." *Smith*, *supra*, 431 U.S. at 845. Thus, parents require no special legislative grace in order to "claim . . . authority in their own household to direct the rearing of their children . . . ." *Ginsberg*, *supra*, 390 U.S. at 639. Quite the contrary, "[i]t is cardinal . . . that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince*, *supra*, 321 U.S. at 166.

The statutes at issue in the present cases, like those limiting childrens' rights to marry, to travel, etc., thus do not *delegate* anything. Rather, they recognize and reinforce the natural authority of parents over their children.

Parental authority is affirmatively undermined by the requirement, which both lower courts said they found in the Constitution, of a "judicial bypass" procedure for hiding childrens' abortions from their parents. That "requirement," as well as *Danforth* and *Bellotti II*, on which it rests, should be seen as the radical departure from constitutional, common-law and legislative tradition that it is. Cf. *Bellotti II*, 443 U.S. at 657 (White, J., dissenting) ("Until now, I would have thought inconceivable a holding that the United States Constitution forbids even notice to parents when their minor child who seeks surgery objects to such notice and is able to convince a judge that the parents should be denied participation in the decision.").

As Justice Harlan once noted, protected liberties are defined

> in the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound.

Poe v. *Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting). *Danforth* and its progeny constitute just such a departure from a long tradition of protecting family autonomy.

B. The Lower Courts' Decisions Highlight The Flaws In *Roe*.

Amicus recognizes that a majority of the Court in *Webster* v. *Reproductive Health Services*, 109 S.Ct. 3040 (1989), did not believe a full-dress reconsideration of *Roe* v. *Wade*, 410 U.S. 113 (1973), was in order until the Court was presented with a starker conflict with its

holding. *Amicus* nonetheless respectfully suggests that the lower court decisions in this case are so symptomatic of much that is wrong with *Roe* that the Court should take this opportunity to reconsider it.

The decisions of the lower courts in these cases, and *Danforth* and *Bellotti II*, which underlie them, rest on the proposition that there is a constitutional right to abortion sufficiently "unique" to justify departing from the Court's traditional approach to parents' rights. See, *e.g.*, *Hodgson*, 853 F.2d at 1456.[15] That a right to abortion is claimed to be unique in this area of constitutional law—as it is said to be in so many others—demonstrates once again that it does not fit naturally anywhere in the Constitution. Established rules must always be changed to explain its presence. It is "painfully clear that no legal rule or doctrine is safe from *ad hoc* nullification . . . where an occasion for its application arises in a case involving state regulation of abortion." *Thornburgh* v. *American College of Obst. & Gyn.*, 476 U.S. 747, 814 (1986) (O'Connor, J., dissenting). The result is that *Roe*'s "scheme for constitutionalizing the regulation of abortion has had [an] institutionally debiliating effect" on the law. *Ibid.* The present case provides the Court with an example of that debilitating effect in the context of over two centuries of family law. Overruling *Danforth* and *Bellotti II* would go far toward resolving that particular anomaly, but a definitive resolution of all such anomalies can result only from overruling *Roe* itself. *Amicus* thus respectfully urges this Court to reconsider and overrule *Roe*, or, if it goes no further, to restore its traditional jurisprudence of respect for parents' rights and family autonomy by at least disavowing, if not overruling, *Danforth* and *Bellotti II*.

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[15] *Amicus*' submits that there is and can be no constitutional right to abortion. See Brief of Knights of Columbus, as *Amicus Curiae*, in *Webster* v. *Reproductive Health Services*, No. 88-605.

CONCLUSION

For the foregoing reasons, the judgment of the Eighth Circuit should be affirmed, except insofar as it held a "judicial bypass" to be constitutionally required. The judgment of the Sixth Circuit should be reversed.

Respectfully submitted,

Of Counsel:
W. PATRICK DONLIN
Supreme Advocate
CARL A. ANDERSON
Vice President for Public Policy
Knights of Columbus

Dated: August 28, 1989

BRENDAN V. SULLIVAN, JR.
KEVIN J. HASSON *
WILLIAMS & CONNOLLY
839 17th Street, N.W.
Washington, D.C. 20006
(202) 331-5000

* *Counsel of Record*

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Nos. 88-1125 and 88-1309

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JANE HODGSON, *et al.*,
Petitioners and Cross-Resondents,
v.
STATE OF MINNESOTA, *et al.*,
Respondents and Cross-Petitioners.

On Writ of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF AMICI CURIAE OF FOCUS ON THE FAMILY AND FAMILY RESEARCH COUNCIL, RACHEL ELY, MYOSHI CALLAHAN, TERESA WIBBLESMAN FANGMAN, HOLLY TRIMBLE, LINDA ROSELLI, ANN MARIE LOZINSKI, ROBERT C. WIBBLESMAN, AND AMERICAN VICTIMS OF ABORTION, IN SUPPORT OF RESPONDENTS AND CROSS-PETITIONERS

H. ROBERT SHOWERS
(Counsel of Record)
RICHARD M. CAMPANELLI
GAMMON & GRANGE
1925 K Street, N.W.
Suite 300
Washington, D.C. 20006
(202) 862-2000
Attorneys for Amici Curiae

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

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INTEREST OF *AMICI CURIAE**

Amici **Focus on the Family** and the **Family Research Council,** representing the concerns of more than 1.7 million American families, have broad experience and interest concerning the impact of abortion on minors and on the family.

Five of the *amici* are women who have suffered severe harm because, as minors, they were allowed—indeed, encouraged—to undergo abortions without the benefit of parental guidance. **Rachel Ely** is now permanently wheelchair-bound; **Myoshi Callahan** has endured severe physical problems, including a hysterectomy; **Teresa Wibblesman Fangman, Holly Trimble,** and **Linda Roselli** each suffered severe emotional anguish and psychological turmoil. These women offer their experiences to the Court to illustrate the very real, practical effect of severing the normal parent-child relationship in the abortion context.

One of the *amici*, **Ann Marie Lozinski,** is the parent of a young woman who suffered the ultimate harm: Debra Lozinski died after two-and-a-half months in a coma, as a direct result of an in-clinic abortion performed without adequate care, and without notice to her parents. Four years later, Debra's mother is still suffering from severe depression.

Amicus **Robert C. Wibblesman,** Teresa Fangman's father, offers a parent's perspective, unique because he has also had the opportunity to help another daughter, faced with an unplanned pregnancy, avoid the pain that Teresa suffered alone.

Many of the individual *amici* are associated with *amicus* **American Victims of Abortion,** which is a national organization of persons whose lives have been adversely affected by abortion.

All of the *amici* have particular knowledge and experience concerning the impact on minors of abortion without parental consultation, which will be helpful to the Court.

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* A full description of the *Amici* appears in Appendix A. This brief is submitted with the written consent of both parties, filed with the Clerk of this Court. *Amici* are concerned with parental notification and consent issues raised in *Ohio* v. *Akron Center for Reproductive Health*, No. 88-805, and *Hodgson* v. *Minnesota*, Nos. 88-1309 and 88-1125, and thus are filing this brief in both cases.

SUMMARY OF THE ARGUMENT

Courts and state legislatures remain uncertain about whether parental consultation laws are constitutional, and if so, within what specific legal parameters. Presently, sixteen parental consultation laws have been enjoined. Only five such statutes have been found constitutional. A clear enunciation that reasonable parental notification and consent laws do not unconstitutionally limit the right to an abortion is needed to permit states to protect minors and their families. Because state legislatures are best suited to provide these protections, the Court should limit its review to whether a statute or regulation is supported by a rational relationship to legitimate state interests.

Many legitimate, if not compelling, state interests are involved in parental consultation laws, particularly when a pregnant teenager is making the difficult and traumatic abortion decision. The courts recognize at least three state interests for parental consultation laws: (1) the peculiar vulnerability of children; (2) minor's inability to make critical decisions in an informed, mature manner; and (3) the importance of the parental role in child rearing. In light of the growing body of scientific evidence about the adverse physical and psychological effects of abortion, parents and the state have an additional and heightened interest in ensuring that the pregnant adolescent is protected from rash, ill-informed or pressured decisions on this traumatic question.

The initial state and parental interest in adolescent pregnancy and abortion is to reduce or eliminate medical and psychological problems of the pregnant minor. Negative medical consequences from abortion include hemorrhage, perforated uterus, subsequent fetal malformation, cervical trauma, ectopic pregnancies, infection, menstrual disturbances, infertility, Pelvic Inflammation Disease (PID), miscarriage and high-risk prematurity in subsequent pregnancies. Since adolescents generally have immature cervixes, researchers have concluded that adverse physical health effects are more common and severe in teenage abortions. Young women who have abortions have also been found to be more predisposed to adverse outcomes in future, planned pregnancies than their sexually mature adult counterparts.

Compared to adults, adolescents appear to also have more negative emotional and psychological responses following abortion. The immediage negative psychological responses include severe guilt, anxiety, depression and psychosis. The long-term adverse psychological effects, which include denial, depression, isolation, alienation, suicide attempts and a family of psychiatric symptoms called Post Abortion Stress (PAS), appear to be more problematic and more devastating for the adolescent aborter.

Parental consultation also enhances a legitimate state interest to help adolescents make better, well-informed decisions about their pregnancy. Parents who have knowledge of a pending abortion can help their daughter assess the medical and psychological risks involved. After consultation, if she still decides to abort, they can relate important medical and psychological information to the abortionist. If adverse complications result, the parents will be aware of the cause and can give important medical information to the subsequent treating physician.

Family involvement in the abortion decision promotes important state interests of family unity and parental control in three ways: (1) it permits the parents to deal with issues underlying adolescent pregnancy; (2) it helps avoid the compounding problems of alienation, isolation and depression, which secret abortions frequently entail; and (3) it provides emotional and psychological support for whatever decision the minors make.

Parental consultation laws clearly have a rational relationship to these legitimate state interests. In addition, consultation laws with a waiting period and a judicial bypass provision cannot be said to unduly burden the minor's abortion right because parents do not have arbitrary, absolute veto power over her decision. After sixteen years, the Court should return to the constitutional principles historically employed in reviewing state health and safety laws, adopt the rational basis standard of review in the parental consultation requirements and jettison the conflicting, intricate set of abortion-related rules that are unrelated to Constitutional doctrine.

the evidence is ineffective for the unborn, then the Roe v. Wade precedent can grow to a "liberty" to kill virtually anyone. If the Supreme Court decreed it "liberty" to kill Jews, this same evidence would prove it "murder," and not "liberty." Judges may have more sympathy for other victims, but changing the names of the victims will not change the legal result.

Roe v. Wade murders reason itself. In his novel, "1984," Orwell described how a tyranny defrauded its subjects into obedience with the "doublethink" slogan "FREEDOM IS SLAVERY." Although this science fiction appears improbable, the U.S. Supreme Court has defrauded the United

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refer to them; and its legislative history does not appear to expressly refer to them.

The principle that all people are "created" equal, with an "unalienable" right to "life," having been sneered out of court in Roe v. Wade, now provides no assurance for anyone.

As with the unborn, the murder laws don't expressly refer to the insane, or invalids, or Jews; the intention of the legislators is found in the common law.

If the evidence cannot protect the unborn, the lives of many are imperiled.

States into obedience with the ultimate falsehood: "MASS MURDER IS LIBERTY."

Abraham Lincoln ridiculed Dred Scott by reducing it to its plainest terms:

> [We hold these truth to be self-evident, that] all men are created equal - except Negroes.
> That if any one man, choose to enslave another, no third man shall be allowed to object.

The Fourteenth Amendment intended to prevent this forever. Yet Roe v. Wade, reduced to its plainest terms, asserts:

> We hold these truths to be self-evident, that all men are created equal - except those created to be murdered.
> That if any one man, choose to murder another, no third man shall be allowed to object.

By changing the names of the victims, the Supreme Court has duplicated the decree of "the supreme judge" of Nazi Germany who asserted the killing of Jews to be legal.[17]

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17. United States v. Altstoetter, 3 Trials of War Criminals Before the Nuernberg Military Tribunals 1011-1014 (1951). The Nazi judges claimed that they could not be held accountable for complicity in extermination and murder, since they had acted "within the authority" of the "decrees" of "the supreme judge." Id. at

The key doctrines of the Nazi judiciary have been adopted by the courts of the United States: a "supreme judge" which decrees mass murder to be legal; and lower judges who rule they must blindly obey.[18]

The Court did exactly what the guarantee of life to "any person" was intended to prevent, and decreed murder to be legal, by giving "murder" the new name "liberty." But Chief Justice Marshall condemned such sham:

> "Is the proposition to be maintained that the Constitution meant to prohibit names and not things? That a very important act, big with great and ruinous mischief which is expressly forbidden by words most appropriate for its description; may be performed by the substitution of a name? That the Constitution, in one of its most important provisions, may be evaded by giving a new name to an old

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983-85. Their "supreme judge" had decreed killings to be legal which had been defined by statute to be criminal. But the tribunal held, "The dagger of the assassin was concealed beneath the robe of the jurist."

18. Ernest v. U.S. Attorney etc., cert. denied 475 U.S. 1084 (1986). The U.S. District Judge ruled that Roe v. Wade was "the worst decision by the Supreme Court in the history of the Court." But he stated that even if the Supreme Court decreed it liberty to kill Jews, he must obey and permit the killings to continue.

thing? We cannot think so." Craig v. Missouri, 3 Pet. at 433 (1830).

Thus the United States is ruled by the decree "MASS MURDER IS LIBERTY." But murder is still murder, no matter what new name the Court gives it. This is the most catastrophic crime in history. This precedent of judicial alchemy to convert murder into "liberty" can be evoked at whim to kill anyone; it cancels the "unalienable" guarantee of life and makes everybody a mere hostage of this Court; it is a virtual murder gun held to everyone's head - all life now depends merely on judicial whim; it defies the consent of the governed; it smashes the hopes of the whole human race for government by truth and laws, and reduces government to the mere matter of which murderer can grab power and be obeyed. Again people must struggle to ensure that the nation dedicated to the proposition that "all men are created equal" shall not "perish from this earth."

ROE v. WADE CRIMINALLY DEFIED THE UNALIENABLE GUARANTEE OF LIFE TO "ANY PERSON" BECAUSE THIS COURT FABRICATED EVIDENCE TO FALSELY IMPLY THAT THE WORDS "ANY PERSON" DO NOT INCLUDE THE UNBORN.

The 19th century abortion statutes supplanted the medieval view that unborn life began at "quickening"[1] and expanded protection of law to all stages of unborn life; they prove the guarantee of life to "any person" includes the unborn, that no distinction can be made among the stages of unborn life.

When the Fourteenth Amendment was adopted in 1868, over three-fourths of the ratifying states had already made abortion at any stage of gestation a crime.[2] Within a few years, these statutes were universal.

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1. "Life is the immediate gift of God, a right inherent by nature in every individual: and it begins in contemplation of law as soon as the infant is able to stir in the mother's womb." 1 Bl. Com. 126.

2. The statutes are set out in Quay, Justifiable Abortion, Medical and Legal Foundations, 49 Geo. L. J. 447-520 (1961).

And in those few States still following the common law, judicial revision makes it impossible for this Court to assert with any assurance that it was any different than the prevailing statutes:

> By the ancient common law ... as the life of an infant was not supposed to begin until it stirred in the mother's womb, it was not regarded as a criminal offense to commit an abortion in the early stages of pregnancy. A considerable change in the law has taken place in many jurisdictions by the silent and steady progress of judicial opinion; and it has been frequently held by Courts of high character that abortion is a crime at common law without regard to the stage of gestation.[3]

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3. Lamb v. State, 67 Md. 524 (1887). Some state supreme courts rejected medieval medical views and ruled that the common law made abortion at any stage of gestation a crime. Mills v. Comm., 13 Pa. 631 (1850); State v. Slagle, 83 N.C. 544 (1880); State v. Reed, 45 Ark. 333 (1885).

Wharton, a standard 19th century text, stated that under common law "the protection of the law was cast round an unborn child from its first stage of ascertainable existence, no matter whether 'quickening' had taken place or not." F. Wharton and M. Stille, Treatise on Medical Jurisprudence 927-28 (2d ed. 1860).

And those state supreme courts which ruled that abortion prior to quickening was not a common law crime were immediately

The theory of a "liberty" to kill the unborn faced a fatal contradiction. How could the Court dare to Dred Scott-like imply an exception to the guarantee of life to "any person" in order to declare killings to be "liberty" which the people had defined to be criminal? This absurd contradiction wrecks Roe v Wade.

To resolve this fatal contradiction the Court fabricated the hypothesis that the 19th century criminal abortion statutes were not intended to protect unborn life, but were only intended to protect the mother. This falsely implied that the people never intended the lives of the unborn to be protected by law. This false hypothesis was fabricated as follows.

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overruled by their legislatures which made abortion at any stage of pregnancy a crime. Comm. v. Parker, 50 Mass. 263 (1845), was immediately overruled by Mass. Acts & Resolves ch. 27 (1845). State v. Cooper, 22 N.J.L. 52 (1849), was immediately overruled by N.J. Laws at 266 (1849). Abrahams v. Foshee, 3 Iowa 274 (1856) was overruled by the next legislature, Iowa Rev. Laws, tit. XXIII, ch. 165. art. 2, sec. 4221 (1860).

A.

The Court first asserted as fact:

> "When most criminal abortion laws were first enacted, the procedure was a hazardous one for the woman." Roe v. Wade, 410 U.S. at 148.

The only authority cited was a 20th century medical history book.[4] But this book only described the hazards of major surgery in general prior to Lister's discovery of antiseptics; the abortion operation was not mentioned anywhere in the entire book.

The 19th century obstetric authorities throughout the Western world prove that abortions by physicians were "perfectly safe" to the woman.[5] They prove the Court's assertion of fact to be false.

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4. Haagensen and Lloyd, A Hundred Years of Medicine 19 (1943), cited in Roe v. Wade, supra, at 148 n.43.

5. 2 T. Denman, M.D., An Introduction to the Practice of Midwifery 96 (1802). He was a standard English authority. They based their judgments on their own experience in performing abortions, and from hundreds of cases reported from around the world. In addition to perforation, other procedures were also safe. A French physician wrote "experience has proved that the dangers of the operation are reduced to a small

The Supreme Court never revealed the "hazardous" abortion "procedure" to which it was referring. Actually, the 19th century physicians generally used the ancient method,[6] which one physician traced back 2000 years,[7] and which they described as "perfectly safe" to woman.

The Court did not examine even one 19th century obstetric textbook; and they prove its assertion, "the procedure was a hazardous one for the woman," to be false.

Since abortion was not dangerous to the life of the mother, the only motivating

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matter." A.L.M. Velpeau, M.D., A Complete Treatise on Midwifery 530 (4th Am. ed. 1852). The preeminent American physician wrote "to the mother there is very little danger." H.L. Hodge, M.D., The Principles and Practice of Obstetrics 293 (1864).

6. Dr. Denman, a standard authority in England, wrote in 1802: "the membranes of the ovum are punctured," which permitted "the discharge of the waters," which induced the "action of the uterus," which resulted in the expulsion of the fetus from the womb, which was "perfectly safe" to the woman. 2 Denman, supra, at 96-99.

7. F. Ramsbotham, M.D., The Principles and Practice of Obstetric Medicine 724 (4th ed. 1856).

purpose the abortion statutes could have had was to protect the lives of the unborn from destruction by abortions, even safe abortions by physicians. Had it been the purpose of the legislators to only protect the mother, they would have simply required abortions, which were known all over the western world to be safe to the mother, to be performed only by physicians.

B.

The Court next asserted: "Abortion mortality was high."[8] This is asserted as fact. The Court cited no authority to support it. The 19th century obstetric authorities prove this assertion to be false; their medical texts show that the abortion operation was "perfectly safe."

The purpose of the Court's false assertion of fact is to go beyond the mere theory that abortion was hazardous to the mother, and infer that the carnage was so

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8. Roe v. Wade, 410 U.S. at 149.

great as to call for legislation to protect women from the medical profession.

C.

Upon these two false assertions of fact, the Court next falsely inferred:

> "[A] State's real concern in enacting a criminal abortion law was to protect the pregnant woman, that is, to restrain her from submitting to a procedure that placed her life in serious jeopardy." Roe v. Wade, 410 U.S. at 149.

This is a false inference, drawn from two false assertions of fact. Moreover, the 19th century treatises on criminal law expressly stated that these abortion statutes were intended to supplant the ancient common law and protect the lives of the unborn during all stages of gestation:

> "The notion that a man is not accountable for destroying the child before it quickens, arose from the hypothesis that quickening was the commencement of vitality with it, before which it could not be considered as existing. This "absurd distinction" ... is now exploded in medicine.... The foetus is certainly ... as much a living being immediately after conception, as at any other time before delivery.
>
> ....
>
> "There is as much vitality ... on one side of quickening as on the other, and ... the infant is as much entitled to

> protection ... a week before it quickens as a week afterwards.... Acting under these views, the legislatures ... passed acts making ante-quickening-foeticide individually penal." 1 F. Wharton, A Treatise on the Criminal Law of the United States 656-57 (5th ed. 1861).

There is no 19th century authority to the contrary. If the purpose of these laws had been to protect the mother, and not the child, these texts would certainly have noted such an important thing.

And State supreme courts ruled that these statutes protected the unborn:

> "(T)he statute ... essentially changed the common law. There is a removal of the unsubstantial distinction, that it is no offense to procure an abortion, before the mother becomes sensible of the motion of the child, notwithstanding it is then capable of inheriting an estate.... It is now equally criminal to produce abortion before and after quickening." Smith v. State, 33 Me 48 (1851).

Since abortions by physicians were known all over the western world to be safe to the mother, the motivating purpose of these abortion laws could only have been to protect the lives of unborn children from destruction from abortions. That

legislatures prohibited safe abortions by physicians, despite the great danger to the mother from abortions by criminals,[9] shows their great respect for unborn life.

D.

The Court next made its irrelevant study of the single word "person," and held it "does not include the unborn":

> "(O)ur observation ... that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, persuades us that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." Roe v. Wade, 410 U.S. at 158.

The Court could not find even one 19th century authority to support this result; the whole weight rests on the Court's "major portion - far freer" assertion, which is false.[10] The reverse is closer to

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9. "In thirty-four cases of criminal abortion ... twenty-two were followed...by death, and only twelve were not. In fifteen cases necessarily induced by physicians, not one was fatal." H.R. Storer, M.D., On Criminal Abortion in America 43 (1860)

10. The ancient common law only prevailed in the early 19th century. By mid-century, a majority of the States which ratified the Amendment had already enacted statutes

the truth. The evidence indicates that legal abortion was far freer in 1973, than when the Amendment was adopted.[11]

The Court's "major portion - far freer" doctrine, were it even true, is absurdly irrelevant[12] and ominously skirts

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which punished abortion throughout gestation. (Supra n.2) By 1868, over three-fourths had enacted such statutes; and shortly they were universal. In those few states with no statute, this Court cannot claim with assurance that the common law was any different. (Supra n.3) Thus the "prevailing law" for the last half of the 19th century; it was about the same as existed in most states in 1973; and "legal" abortion was not "far freer" then.

11. The statutes listed in Roe v. Wade, 410 U.S. at 140 n37, show that by 1973 four states permitted abortion on demand, while fourteen permitted abortions for other reasons not allowed in 1868. The statutes prevailing in 1868 only permitted abortions to save the life of the mother or child. Thus legal abortion was far freer in 1973 than in 1868, although in most states it was still about the same as it was in 1868.

12. The same thing could be said about "legal slavery," which really was "far freer" for the "major portion" of the 19th century than it is today. Would this prove a right to own a slave today? If the Court could ignore the events of 1860 to 1866 - it could plausibly reaffirm its Dred Scott rule that there was a right to own a slave.

the central issue of the law existing in 1868, and the reason for the vast change.

The Court's assertion that "legal abortion" was then "far freer" refers to the ancient common law that abortion prior to "quickening" was not a crime, on the theory that life began at "quickening." A physician, who helped draft Virginia's 1848 abortion statute, explained its purpose was to supplant this "exploded error":

> "(T)hat the embryo is endowed with an inherent vitality from the first moment of conception, and is therefore as much entitled to the protection of the law before the period of 'quickening' as after it, every well-informed physician must yield a ready assent. The old doctrine, once held by medical men ... that the foetus first becomes animated, or endowed with distinct vitality, at the moment when the sensation of quickening is experienced by the mother, has been long since banished from the domain of science ... and now only finds a retreat in the dark and ancient caverns of the common law.
> ....
> "(T)he civil rights of the unborn child are perfect from the very commencement of its being." L.S. Joynes, M.D., "Foetus in Utero," Virginia Medical Journal 179-180, 187 (1856).

The 19th century medical and legal authorities, with none to the contrary, condemned this ancient theory of life:

> "(I)t is the duty of every accoucheur earnestly to protest against the ancient theological and legal opinion that, prior to the fourth month, the embryo had no proper existence.... (T)he merest tyro in physiological investigations must be convinced of the falsity of all such opinions." H.L. Hodge, M.D., The Principles and Practice of Obstetrics 78 (1864).

Yet the Court exactly adopted, as constitutional law, a view of unborn life which the 1860 president of the AMA called "a barbarous physiology" and which courts ruled "never ought to have been the law anywhere,"[13] and which 19th century legislatures condemned as criminal. The AMA president said in urging States to protect all stages of unborn life:

> "This relic of a barbarous physiology needs to be exploded, and the truth should be generally promulgated, that, from the moment of conception, a new being is engendered." 13 Transaction of the American Medical Association 56-57 (1860).

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13. Mills v. Commonwealth, supra, 632.

The abortion statutes were urged by America's most eminent medical professors and physicians, and they were intended to protect all stages of unborn life:

> From the moment of fecundation, the new being becomes independent ... its individuality is complete.... (T)here is a progressive ... advancing from one degree of perfection to another. Every protection, therefore, which is extended by human legislation to the young infant ... should be equally effectual in securing the life of the embryo from the earliest period of its existence.[14]

The abortion statutes show the universal guarantee of life to "any person" was not based on "a barbarous physiology"; the Amendment recognizes that there is no time during unborn life that a rational line can be drawn to permit the killings.

But the Court accepted the medieval view, that life began at "quickening"

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14. H.L. Hodge, M.D., The Principles and Practice of Obstetrics 78 (1864). Hodge's "name had become a household word throughout the land" and his book "valued among the very first works on obstetrics ever issued from the American or foreign press." R. Penrose, M.D., Discourse on Life of H.L. Hodge 20-21 (1872)

(about 4 months), and arbitrarily enlarged it to "viability" (about 7 months), making a "liberty" to kill which even its only authority, the ancient common law, condemned as criminal. Thus the basis of the Court's decree that "the word 'person'... does not include the unborn." Thus 20th century constitutional law was founded on medieval medical theory which was rejected as false in the 19th century, and remains false today.

In short, the Court manufactured a constitutional right to kill, out of "an exploded error" that an ante-quick child was not alive, which the "merest tyro" knew to be false, and was universally condemned as "a barbarous physiology" found only in "dark and ancient caverns," which 19th century judges ruled "never ought to have been the law anywhere," and which legislatures condemned as criminal everywhere, in order to Dred Scott-like blast an exception to the guarantee of life to "any person," so

tens of millions of victims could be killed with impunity from criminal statutes. This is not law; it is murder under ruse of law.

The Court's arbitrary shopping among medieval notions, rejected by the framers as "barbarous," to define the unalienable guarantee of life to "any person," is a another murder gun precedent pointed at the head of all Americans; it makes everyone a hostage of this Court; judges can arbitrarily pull its trigger to destroy anyone.

The Court now has bloody precedent for doing the most forbidden act; it directly defied the unalienable guarantee of life to "any person," the two most important words ever written into law, and condemned to death millions of victims whom the U.S. Constitution endeavors to preserve. It can now happen to anyone; the Court has cancelled the "unalienable" guarantee of life to "ALL," and sealed it in blood.

E.

In construing its equivalent word "everybody," the Supreme Court of West Germany ruled it did include the unborn:

> "No distinction can be made among the several stages of developing life before birth, or between prenatal and postnatal life." [Supra page 3 n.3]

The history of the criminal abortion statutes proves the framers made this same conclusion when they universally guaranteed life to "any person" without any exceptions: there is no time during unborn life that the law can withdraw its protection and permit the killings; rather it is the duty of the law to protect the weak.

Without need of assistance from Chief Justice John Marshall's burdens of proof, as described in the next section, history permits only one rational conclusion: the universal and "unalienable" guarantee of life to "any person" includes the unborn during all stages of unborn existence.

3.

THIS COURT CRIMINALLY DEFIED THE UNALIENABLE GUARANTEE OF LIFE TO "ANY PERSON" WHEN IT DEFIED THE RULINGS OF JOHN MARSHALL AND USED A "GUILTY UNTIL PROVEN INNOCENT" BURDEN OF PROOF TO INFER THAT THE WORDS "ANY PERSON" DO NOT INCLUDE THE UNBORN.

The Court used the correct burden when it previously construed "any person."[1] Yet when it came to the unborn, it used a "guilty until proven innocent" burden.

A.

THE BURDENS, DESCRIBED BY CHIEF JUSTICE MARSHALL, PROVE THE GUARANTEE OF LIFE TO "ANY PERSON" DOES INCLUDE THE UNBORN.

Chief Justice John Marshall described the conditions the Court must satisfy to lawfully imply an exception to universal terms in the U.S. Constitution.

Before the Court can exclude the unborn from the guarantee of life to "any

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1. The Court properly ruled that the words "any person" included Chinese aliens, saying the words are "universal in their application, to all persons ... without regard to any differences." Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886). And this Court was so sure that the words "any person" included "corporations," it refused to even allow counsel to argue against it. Santa Clara v. So. Pac. RR, 118 U.S. 394, 396 (1886).

person," so they can be killed with impunity from criminal laws, the Court must prove that including the unborn within the terms "any person" would be "so monstrous, that all mankind would, without hesitation, unite in rejecting the application."[2]

The Court must prove that if the right to life of the unborn had "been suggested [to the framers] the language would have been so varied, as to exclude it,"[3] and the

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2. Sturges v. Crowninshield, 4 Wheat. 122, 202-203 (1819). When the Constitution uses universal words, and a case is "within the very words of the Constitution," it would be "dangerous in the extreme" to infer the case "is not within its spirit" because "we believe the framers of that instrument could not intend what they say" unless the "absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application."

3. Dartmouth College v. Woodward, 4 Wheat. 518, 644-45 (1819). "It is not enough to say that this particular case was not in the mind of the Convention, when the article was framed, nor of the American people, when it was adopted. It is necessary to go farther, and to say that, had this particular case been suggested, the language would have been so varied, as to exclude it, or it would have been made a special exception. The case being within

framers would have changed the guarantee to read: "Nor shall any state deprive any person, except unborn persons, of life ... without due process of law."

These are the burdens which protect the lives of all Americans from government sanctioned extermination, as happened in Nazi Germany; they carry the life of each American in their hands. The Court bears the heaviest burden of proof to imply an exception to the guarantee of life to "any person" so millions of victims can be killed with impunity from criminal laws.[4]

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the words of the rule, must be within its operation likewise, unless there be something in the literal construction so obviously absurd ... as to justify those who expound the constitution in making it an exception."

The Court used these burdens when it ruled it could not read its jurisdiction, which includes "all cases" arising under the Constitution, as if it merely said "some cases." Cohens v. Virginia, 6 Wheat 264 (1821); Martin v. Hunter's Lessee, 1 Wheat. at 339 (1816).

4. The truth of this extraordinary burden can be demonstrated by applying it to various cases. Before the Court could imply an exception to the universal terms "any person," so that Jews could be deliberately

Chief Justice Marshall's rules prove the guarantee of life to "any person" does include the unborn because "all mankind" would not unite "without hesitation" to exclude them. And the framers would not have changed the guarantee to read "any person - except the unborn," so it would be liberty to kill them, because the people had already enacted criminal statutes to protect the lives of the unborn by law. Thus the guarantee of life to "any person" does include the unborn.

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killed with impunity from criminal laws, the Court would have to prove that "the absurdity and injustice" of including Jews within the universal terms "any person" would be "so monstrous, that all mankind would, without hesitation, unite in rejecting the application." And the Court must prove that if the case of the Jews had been suggested to the framers, they would have changed the Amendment to read: "No state shall deprive any person, except Jews, of life without due process of law." This same burden protects us all.

B.

THIS COURT EXACTLY DEFIED THE BURDEN DESCRIBED BY CHIEF JUSTICE JOHN MARSHALL.

Instead of placing the burden on the advocates of the killings to prove that including the unborn within the guarantee of life to "any person" would "be so monstrous, that all mankind would, without hesitation, unite in rejecting the application," the Court reversed the burden:

First, the Court declared a "liberty" to kill the unborn with impunity from criminal laws, before it even looked to see if the guarantee of life to "any person" included the unborn.[5]

Second, subsequently, the Court looked to see if the guarantee of life to "any person" included the unborn.[6]

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5. Roe v. Wade, 410 U.S. at 153: "(T)he Fourteenth Amendment's concept of personal liberty ... is broad enough to encompass a woman's decision ... to terminate her pregnancy."

6. Roe v. Wade, 410 U.S. at 156-157. "The appellee ... argue that the fetus is a 'person' within the language and meaning of the Fourteenth Amendment."

Third, the Court admitted that if the words "any person" included the unborn, its predetermined assertion of a "liberty" to kill the unborn "of course, collapses."[7] But the Court decreed a "liberty" to kill the unborn before it looked to see if the unborn had a "guaranteed" right to live.

Thus the Court had passed its sentence of death, before it even looked to see if the Constitution guaranteed a right to live. It is analogous to a court sentencing an accused to be hung before it even heard the evidence. As Alice's Queen demanded: "Sentence first; verdict afterwards."[8]

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7. Roe v. Wade, 410 U.S. at 156-157: "If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment."

8. The vengeful Queen in "Alice in Wonderland" shouted "Off with her head" and when admonished that the jury must first consider its verdict, she said: "No! No! Sentence first- verdict afterwards."
So it was in Roe v. Wade - first the sentence of death; then the verdict whether the law allowed the victim to live.

Fourth, the Court's purpose for first predetermining a "liberty" to kill the unborn, was not only to shift the burden of proof from the advocates of the killings onto the unborn, but also to impose its heaviest "compelling" burden on the unborn, a burden of proof so devastating that state statutes seldom, if ever, survive it.[9]

Fifth, the Court stated that the evidence did not prove "with any assurance" that the guarantee of life to "any person" included the unborn.[10] This confirms that the Court placed the burden on the unborn to prove with "assurance" that the words "any person" included the unborn. This is the heaviest burden which can be imagined.

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9. Roe v. Wade, 410 U.S. at 155: "Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest.'" As its compelling state interest, Texas claimed that the lives of the unborn were protected by the Fourteenth Amendment. Id., at 156.

10. Roe v. Wade, 410 U.S. at 157. "Assurance" means: "To make certain and put beyond doubt." Black's Law Dictionary (4th ed. 1968).

Finally, by calling upon its false evidence to raise trifling doubts, the Court said that the unborn had not met their burden of proof and ruled "the word 'person' ... does not include the unborn."

If the Court used such burdens to decree a "liberty" to kill Jews, surely none would deny it would be murder. Judges may have more sympathy for other victims, but changing the name of the victims will not change the legal result.

When courts use such burdens to condemn victims to death, it can no longer be pretended it is still the government of the United States - any government of laws. This is still another "murder gun" precedent pointed at the head of every American; judges can arbitrarily use it to destroy anyone. The true burden proves beyond dispute that the guarantee of life to "any person" does include the unborn.

ROE v. WADE CRIMINALLY DEFIED THE UNALIENABLE GUARANTEE OF LIFE TO "ANY PERSON" BECAUSE THIS COURT USED "IRON CURTAIN" PROCEDURES TO IMPLY THAT THE WORDS "ANY PERSON" DO NOT INCLUDE THE UNBORN; IT USED THESE PROCEDURES TO MAINTAIN ITS KILLINGS.

The Court effected Roe v. Wade by using unconstitutional "iron curtain" procedures in a mock trial without truth.[1]

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1. A. Denial of Assistance of Counsel
Counsel did not especially represent the unborn in the U.S. District Court in Roe v. Wade. And the U.S. Supreme Court denied a request by an original party to allow counsel to especially represent the unborn and defend their right to life. Thus, counsel did not represent the unborn at any stage of the original proceedings.

B. Denial of Prior Notice
The District Court did not even look to see if the lives of the unborn were protected by the U.S. Constitution; this question was argued for the first time after Roe v. Wade reached the Supreme Court. And the Supreme Court gave the parties no prior notice of the constitutional standards, or the burdens of proof, or the evidence, which the Court used to infer that the lives of the unborn were not protected by the U.S. Constitution. The first time the parties had notice was when Roe v. Wade was published, and the victims were already condemned to death. An original party objected that it lacked the prior notice needed to defend the unborn.

C. Secret Evidentiary Proceedings
The Court used some secret evidentiary process, not open to the parties, to find

And the Court maintains its killings by using "iron curtain" procedures in mock trials without truth, despite continual objection that the Court was using criminal procedures to maintain its killings:

1. The Supreme Court willfully refuses to allow retained (no cost to taxpayers) counsel to represent the victims being

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evidence to infer that the lives of the unborn were not protected by the U.S. Constitution. An original party objected that the Court's facts were "unknown to the parties" and it never had opportunity to cross-examine the Court's evidence.

D. Denial of Right to Cross-Examine

An original party asked permission to cross-examine the evidence which the Court used to infer that the lives of the unborn were not protected by the Constitution. Since the Court found its evidence in secret proceedings, the parties had not previously seen the evidence. But the Supreme Court would not allow its evidence to be cross-examined.

E. Denial of Right to Present Evidence

An original party asked permission to present evidence under the new constitutional standards, which it had not seen before, to show that the lives of the unborn are protected by the Constitution. But the Court refused to allow it. And thus the killings commenced.

killed and defend their right to life.[2]

2. The Supreme Court willfully refuses to allow its evidence in Roe v. Wade, which it used to infer that "the word 'person'...

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2. Some of the cases are: Colautti v. Franklin, 439 U.S. 379, motion to allow counsel for the unborn denied 437 U.S. 902; Anders v. Floyd, 440 U.S. 445, motion to allow counsel for the unborn denied 439 U.S. 890; Bellotti v. Baird, 443 U.S. 622, motion to allow counsel for the unborn denied 439 U.S. 1065; Ashcroft v. Freiman, affirmed 440 U.S. 941, motion to allow counsel for the unborn denied, 440 U.S. 941; United States v. Zbaraz, 448 U.S. 358, motion to allow counsel for the unborn denied 444 U.S. 1030; Harris v. McRae, 448 U.S. 297, motion to allow counsel for the unborn denied 445 U.S. 941; H.L. v. Matheson, 450 U.S. 398, motion to allow counsel for the unborn denied 445 U.S. 959; Simopoulos v. Virginia, 462 U.S. 506, motion to allow counsel for the unborn denied 458 U.S. 1104; Planned Parenthood of Kansas City v. Ashcroft, 462 U.S. 476, motion to allow counsel to for the unborn denied 458 U.S. 1104; Akron Center for Reproductive Health v. Akron, 462 U.S. 416, motion to allow counsel to for the unborn denied 458 U.S. 1104; Diamond v. Charles, 476 U.S. 54, motion to allow counsel for the unborn denied 473 U.S. 932; Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, motion to allow counsel for the unborn denied 473 U.S. 931; Hartigan v. Zbaraz, 98 L Ed 2d 478 (1988), motion to allow counsel for the unborn denied 479 U.S. 1003.

does not include the unborn," to be confronted and cross-examined.[3]

3. The Supreme Court willfully refuses to allow evidence to be presented to show that the Constitution's unalienable guarantee of life to "any person" includes the unborn.[4]

These are basically the procedures cited by the Nuremberg Court as part of the evidence to convict the Nazi judges of complicity in extermination and murder.[5]

The Supreme Court's own rulings on due process of law show these procedures to be

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3. See cases, supra note 2.

4. See cases, supra note 2.

5. "The trials ... did not approach even a semblance of ... justice. The accused ... were denied the right to introduce evidence, to be confronted by witnesses against them.... They were ... denied the right of counsel of their own choice.... (P)roceedings ... were secret." United States v. Altstoetter, supra, at 1046-47 (1951). "Such a mock trial is not a judicial proceeding but a murder." Id., at 1164. "The prostitution of a judicial system for the accomplishment of criminal ends involves an element of evil to the State which is not found in frank atrocities which do not sully judicial robes." Id., at 1086.

unconstitutional,[6] and the willful use of these procedures to be criminal.[7]

If the Court had used these procedures to decree it "liberty" to kill Jews, it

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6. Even in civil proceedings (such as where loss of welfare is threatened) due process guarantees (1) prior notice of the factual and legal bases; (2) the right to assistance of counsel; (3) the right to cross-examine adverse evidence; and (4) the right to present evidence. Goldberg v. Kelly, 397 U.S. 254, 268-271 (1970). See also, In Re Gault, 387 U.S. 1 (1967).

Could it be possible that procedures, which could not be used to deprive a mother of welfare, could be used to exclude her from the protection of the U.S.Constitution so that she could be killed with impunity from criminal laws? This is preposterous.

The Constitution would not permit any court to condemn even one single Jew to death in a criminal case, but deny any of these procedural rights. Then neither can it permit any court to condemn all Jews in the United States to death, but deny any of these procedural rights, by calling it a civil proceeding, and decreeing the lives of all Jews are not protected by the U.S. Constitution, and it is "liberty" to kill all Jews with impunity from criminal laws.

Any victim is entitled to all the procedural protections before any court can decree that the victim's life is not protected by the Constitution, and the victim can be killed with impunity from criminal statutes.

7. "Even judges ... could be punished criminally for willful deprivations of constitutional rights." Imbler v. Pachtman, 424 U.S. 409 (1976).

would be condemned as murder. Judges may have more sympathy for other victims, but changing the names of the victims will not change the legal result.

The Court maintains its decree "MASS MURDER IS LIBERTY" by refusing to allow truth to work in its Court. No truth seeking process was left unbloodied. It is notorious that truth is not permitted to work in this Court, and that the Court falsifies history to achieve its ends.[8]

The record proves the Court used "iron curtain" procedures, a mock trial without

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8. "The Court ... has flouted the will of the framers and substituted an interpretation in flat contradiction of the original design.... Such conduct impels one to conclude that the Justices are become a law unto themselves.... It perilously resembles ... Hitlerism." R. Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment 408-12 (1977).

"Court had adjourned in the real world and reconvened in Cloud Cuckooland. [The Justices] began to invent a country suited to their purposes.... They have falsified the American past ... and no one in charge seems prepared to do anything about it." T. Landers, To A Traditionalist, Mr. Ron Sounds So Good, Wall St. J., edit. page, Dec. 27, 1984.

truth, to do the most forbidden thing, to defy the guarantee of life to "any person" so millions of victims could be killed with impunity from criminal statutes; and the Court maintained its killings for fifteen years by using "iron curtain" procedures in mock trials without truth. In the words of the Nuremberg court, "Such a mock trial is not a judicial proceeding but a murder."

These procedures are still another "murder gun" precedent which this Court holds to the head of every American; everyone is now a hostage of this Court; judges can use this "iron curtain" process to destroy anyone. The process makes Roe v. Wade void.[9]

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9. A more detailed description of the procedures is made in the MOTION TO ALLOW COUNSEL REPRESENT CHILDREN UNBORN AND BORN ALIVE, filed in this case, and incorporated by reference.

DUE PROCESS OF LAW HAS COMPELLED THE U.S. SUPREME COURT TO CONFESS IN COURT THAT IT IS GUILTY OF MASS MURDER, AND TO ADMIT THAT THE UNALIENABLE GUARANTEE OF LIFE TO "ANY PERSON" DOES INCLUDE THE UNBORN.

For the 101st time, the U.S. Supreme Court is accused of criminally defying the guarantee of life to "any person" and exterminating millions of victims whom the U.S. Constitution endeavors to preserve.

For the 77th time, the U.S. Supreme Court is accused of mass murder in violation of state and federal statutes.

For the 81st time, this Court is accused of using criminal procedures to effect and maintain Roe v. Wade killings.

John Marshall would have called Roe v. Wade "treason to the Constitution."[1]

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1. Chief Justice Marshall wrote that this Court could not extend the Constitution "to objects not...contemplated by its framers." Ogden v. Saunders, 12 Wheat. at 332. If the Court usurped such power, it would be "treason to the Constitution." Cohens v. Virginia, 6 Wheat. at 404. By decreeing "liberty" to be the very thing which the framers had condemned to be "murder," the Court has indisputably extended the Constitution to objects not contemplated by its framers. For 15 years, "treason to the

But, for fifteen years, the U.S. Supreme Court has never denied the charges, much less attempted to prove the charges to be false. These facts are unparalleled in the legal history of the world.

Under this Court's own rulings, its silence year after year, while the victims

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Constitution" has masqueraded as "the supreme law of the land."

The Court supplanted the Constitution as the supreme law. Chief Justice Marshall wrote that "the Constitution derives its whole authority" from the consent of the governed. McCulloch v. Maryland, 4 Wheat. at 403. Yet, the Court now defies this consent; it simply invents a dream world and imposes it on the people by decree. A divided Congress is unable to control this Court, which results in rule by minority.

Thomas Jefferson warned that this Court was "the most dangerous" branch because judges were "installed for life, responsible to no authority (for impeachment is not even a scarecrow)"; and judges twist words to make "anything mean everything or nothing, at pleasure" with judges finally becoming "despots." Thus Roe v. Wade fully explained.

People have lost faith in the simple power of facts to prove: falsehood is called truth; murder is called liberty; treason is called law. This defeat of the consent of the governed as the basis of law is the most momentous revolution in human history. The way out was shown by Abraham Lincoln, who would "call things by their right names, no matter who was offended."

are being killed, is an admission that the charges are true.[2] In the Court's words:

> "Failure to contest an assertion, however, is considered evidence of acquiescence only if it would have been natural under the circumstances to object to the assertion in question." United States v. Hale, 422 U.S. 171, 176 (1975).

The circumstances leave no doubt that due process has compelled the U.S. Supreme Court to confess that the charges are true.

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2. Under the tacit confession rule, failure to deny a charge is admissible as a confession that the charge is true. 4 Wigmore, Evidence, § 1071-1072 (Chadborn rev. 1972). "Underlying the rule is the assumption that human nature prompts an innocent man to deny false accusations and consequently a failure to deny a particular accusation tends to prove belief in the truth of the accusation." McCormick on Evidence, § 161 (1972). The Court has often affirmed this rule. "(T)he Court has consistently recognized that ... silence in the face of accusation is a relevant fact.... Silence is often evidence of the most persuasive character." Baxter v. Palmigiano, 425 U.S. 308, 319 (1976). And the rule is ancient. As Socrates cross-examined at his trial 2400 years ago: "(Y)ou are silent, and have nothing to say. But is not this rather disgraceful, and a very considerable proof of what I was saying?" "I may assume that your silence gives consent." Plato 41, 45 (Jowett tr. 1942).

First, the evidence makes it as clear as daylight why the Court is silent in the face of the charges: the charges are proved to be true.[3] Truth cannot be proved false.

Second, the charges were made in cases filed pursuant to the Constitution and laws of the United States. Chief Justice John Marshall ruled that judges who "close their eyes on the Constitution" and "condemn to death those victims whom the Constitution endeavors to preserve" commit "crime."[4]

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3. The Court decreed killings to be "liberty" which States had defined to be "murder." This is mere historical fact; no denial is possible. As John Marshall said, "a fact which has existed cannot be made never to have existed." Marbury v. Madison, 1 Cranch at 167 (1803).

4. Marbury v. Madison, 1 Cranch 137, 179-180 (1803). This correctly states the criminal law. Where there is an affirmative duty to act, the deliberate omission to do that duty, which results in death to others, can be prosecuted as homicide. Perkins, Criminal Law 604 (2nd ed. 1969).

The only Nazi to plea guilty at Nuremberg cited this law. When warned of Auschwitz, Speer wrote: "I did not investigate - for I did not want to know what was happening there.... From fear of discovering something which might have made me turn from my course, I closed my eyes." A. Speer, Inside the Third Reich 375-76

The Court had a legal duty to fully hear allegations that Roe v. Wade was wrongly decided. The Court affirmed its duty:

> "(I)ts opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported." The Passenger Cases, 7 How. 282, 470 (1849).

Third, the Court's steadfast silence for fifteen years in the face of the scores of accusations is unparalleled in the legal history of the world; the Court cited this very circumstance as making confession by silence more trustworthy.

> "Silence gains more probative weight where it persists in the face of accusation, since it is assumed in such circumstances that the accused would be more likely than not to dispute an untrue accusation." United States v. Hale, 422 U.S. 171, 176 (1975).

Fourth, not only has the Court's silence persisted in the face of repeated accusations, but it has persisted even in

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(1970). This "deliberate blindness" is complicity in criminal extermination.

the teeth of warnings that its silence was being taken as an admission that the charges are true.

Fifth, the charges described judicial crimes not surpassed in all history, that (1) judges had done the most forbidden thing, and defied the unalienable guarantee of life to "any person," the two most important words ever written into law, and criminally exterminated millions of children; (2) the United States was being ruled by the most corrupt decree which the human mind could even imagine: "MASS MURDER IS LIBERTY"; (3) due process of law had compelled the judges to confess to guilt of mass murder; and (4) the judges schemed to reaffirm the legitimacy of their murders in mock trials designed to keep truth from working in all state and federal courts.[5]

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5. In Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983), the Court reaffirmed Roe v. Wade by stare decisis in a mock trial without truth.

The parties did not ask the Court to overrule Roe v. Wade. This was done by the amicus curiae brief by the Legal Defense

The United States being ruled by the decree "MASS MURDER IS LIBERTY" is the most catastrophic crime in the history of civilization; it smashes the hopes of the whole human race for a government of laws, and

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Fund for Unborn Children, as follows: "For the 52nd time, the U.S. Supreme Court is accused in its own court with mass murder." The amicus brief laid out the evidence, and concluded: "THE U.S. SUPREME COURT HAS CONFESSED IN COURT TO GUILT OF CRIMINAL EXTERMINATION, INCLUDING MASS MURDER, AND THIS IS THE LEGAL EQUIVALENT OF THE EXPRESS OVERRULING OF ROE v. WADE." But this Court responded to these arguments by saying:

> And arguments continue to be made, in these cases as well, that we erred in interpreting the Constitution. Nonetheless, the doctrine of stare decisis, while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law. We respect it today, and reaffirm Roe v. Wade.

Thus, the Court's response to "arguments" that it was guilty of mass murder. When a court rules that its decree "MASS MURDER IS LIBERTY" must be obeyed without a hearing or even a question, then history could not reveal a more murderous mockery of "the rule of law." The Court hid behind stare decisis in a mock trial and used this ruse of law to defraud all lower courts into obeying Roe v. Wade without question.

reduces government to the matter of which murderer can grab power and be obeyed.

Never in the legal history of the world was it more imperative to deny charges if they were untrue. Judges, under solemn legal duty to uphold the law, are accused of mass murder. The evidence is laid out in court. The judges have done the most forbidden thing, and defied the guarantee of life. Little children are being killed. The killings violate criminal statutes. Pictures of the dead are shown to the judges. But for 15 years the judges do not meet the evidence; do not prove it false.

A government of laws can permit only one conclusion to be drawn from these facts: The U.S. Supreme Court was met in court with the truth; truth worked in the only manner in which it was permitted to work; and due process of law compelled this Court to admit, in the most emphatic manner which the mind can imagine, that the words "any person" do include the unborn.

Any judge who closes his eyes on these facts, and chooses to take part in a national scheme to kill little children, in defiance of the guarantee of life to "any person," and criminal statutes, to maintain the decree "MASS MURDER IS LIBERTY," knows he is guilty of complicity in mass murder and criminal defiance of the Constitution.[6]

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6. Roe v. Wade asserted to legalize killings which statutes had made criminal. Since Roe v. Wade is a mistake of law, all the killings since 1973 can be prosecuted.

The ex post facto provisions of the U.S. Constitution do not apply to judicial decisions which are a mistake of law. Ross v. Oregon, 227 U.S. 150, 161 (1912).

The general rule is that mistake of law is no excuse for breaking the law. R. Perkins, Criminal Law 920 (2d ed. 1969).

The limited affirmative defense of reasonable reliance on an official judicial opinion, thereafter determined to be a mistake of law, does not apply to homicide cases. Model Penal Code, Tentative Draft No. 4, Comments Sec. 2.04, page 138; R. Perkins, Criminal Law 928 (2d ed. 1969).

Thus, the law applied at Nuremberg applies to this case. Obedience to the orders of judicial superiors is no excuse for complicity in murder. United States v. Altstoetter, supra, at 983-985.

Perhaps judges responsible for the Roe v. Wade murders did not believe they were breaking the law. But as Oliver Wendell Holmes wrote: "Ignorance of the law is no excuse for breaking it.... It is no doubt true that there are many cases in which the

In explaining how the Nazi regime got away with its monstrous crimes, Winston Churchill quoted Machiavelli: "Men avenge slight injuries, but not grave ones." The Court knows that truth well; the legal foundation of the United States now rests on the assumption that the gravest crime in history cannot be avenged.

The photo on the last page shows a second stage abortion under Roe v. Wade. If the child were born alive, this Court would be guilty of murder. If the child were born

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criminal could not have known that he was breaking the law, but ... the lawmaker has determined to make men know and obey." O.W. Holmes, The Common Law 41 (1963).

Even if the Supreme Court held a gun to the head of a lower judge, and threatened death unless he obeyed Roe v. Wade, it would not be a defense to murder, for "he ought rather to die himself than escape by the murder of an innocent." 4 Bl. Com. 30.

The law makes a mortal distinction between killing and not killing: (1) any judge who stopped the Roe v. Wade killings, and made a mistake of law, could only be overruled on appeal; (2) but any judge who allows the killings to continue and makes a mistake of law, can be convicted of murder, and be sentenced to death. The law of capital murder is a hard school, where lessons are taught only one time, and mistakes of law are not forgiven.

dead, this Court would be guilty of extermination under 18 U.S.C. § 242.

Truth has worked in this Court; judges cannot stop it. Due process has compelled this Court to admit that the unalienable guarantee of life to "any person" does include the unborn.

CONCLUSION

Merely overruling Roe v. Wade will simply continue its crimes, perhaps on a less extensive scale. The Court misguided this nation and the entire world.

Now the Court must promulgate the truth, that the universal and unalienable guarantee of life to "any person," made in the Fifth and Fourteenth Amendments of the U.S. Constitution, do include the unborn, and States have a duty to protect unborn life.

Alan Ernest
Counsel



ARGUMENT

I. PARENTAL CONSULTATION PROTECTS VULNERABLE ADOLESCENTS AND FAMILIES FROM HARM, IN FURTHERANCE OF LEGITIMATE STATE INTERESTS.

The Court has a prime opportunity to clear up the muddied waters surrounding parental notification and consent which has plagued state legislatures, courts, parents, doctors and pregnant minors for the sixteen years since abortion was legalized in *Roe* v. *Wade*, 410 U.S. 113 (1973). Thirty three states have enacted statutes requiring some form of parental consultation where a minor is considering an abortion. Twenty one states require parental consent and twelve states require parental notification before a minor can obtain an induced abortion. See Appendix B, The Confused State of Parental Consultation Laws. Sixteen parental consultation laws have been enjoined by court action. *Id.* Only thirteen presently in effect have not been challenged in federal court, and only five state statutes have been found to be constitutional. *Id.* Eight Supreme Court decisions have been rendered on this issue with conflicting results. *Id.* The last parental notification case to reach this Court ended in a four to four split; and the *per curiam* decision without opinion offered little guidance to state legislatures. *See Hartigan* v. *Zbaraz*, 763 F.2d 1532 (7th Cir. 1985) *aff'd mem.* 108 S. Ct. 479 (1987). The Sixth Circuit in *Akron Center for Reproductive Health* v. *Ohio*, 854 F.2d 852 (6th Cir. 1988) ("*Akron II*") declared that [*Hartigan*] leaves the principle of law presented by the recent case . . . unsettled." *Akron II*, 854 F.2d at 861.

The effect of unsettled parental consultation law is exacerbated by the unprecedented rise in teenage pregnancies and abortion. Teenage pregnancies, which are most often unwanted, together with teenage abortion, are a national tragedy. In 1981, approximatly 1.3 million teenage pregnancies occurred—a pregnancy rate of 134 per 1000. Henshaw, Binkin, Blaine and Smith, *A Portrait of American Women Who Obtain Abortions*, 17 FAMILY PLANNING PERSPECTIVES 90-96 (1985) (hereinafter "*Portrait*"). Approximately 28% of the 1.6 million abortions each year are performed on teenagers. Centers for Disease Control, U.S. Department of Health and Human Services, Abortion Surveillance (1985). Fifteen thousand pregnancies occurred in girls under age fourteen. *Portrait* at 92. The abortion rate among teenagers has risen sharply with a 60% increase being recorded for all teenagers between 1972 and 1976, and a 120% rise for adolescents under age fifteen. Worthington, *Decision Making in Adolescent Pregnancy* in VALUES AND PUBLIC POLICY 119, 124 (G. Regier Ed., 1988) (hereinafter "Worthington"). Forty five percent (45%) of teenage pregnancies end in abortion. In most cases parents are not even told by their teenagers or notified by doctors. *Portrait* at 93; *see also* Russo, *Adolescent Abortion: The Epidemiological Content* in ADOLESCENT ABORTION: PSYCHOLOGICAL-LEGAL ISSUES 40, 49 (G. Melton Ed., 1986).

Although the legal standards surrounding parental consultation regulations are unsettled, this Court has recognized the important state interests that such laws protect:

> We have recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.

Bellotti v. *Baird*, 443 U.S. 622, 634 (1979) ("Bellotti II"). These interests are expanded when viewed against the backdrop of potential harms to teenagers from abortion.

A. Parental Consultation Promotes Maternal Health In The Pregnant Adolescent By Reducing The Physical And Psychological Risks Of Abortion.

The decision to terminate pregnancy involves one of the most complex and difficult decisions of a woman's life. *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52, 67 (1976) ("Danforth"). Medical and psychological risk factors are often overlooked or unknown, and her decision involves other multiple social, economic and moral factors which are further confused by the physiological and psychological changes pro-

duced by pregnancy. Minor women, in particular, are often ill-informed about abortion and its serious ramifications and unable to make mature, rational decisions in their own best interest.

This Court in *H. L.* v. *Matheson*, 450 U.S. 398 (1981) stated:

> The medical, emotional and psychological consequences of an abortion are serious and can be long lasting; this is particularly so when the patient is immature. An adequate medical and psychological case history is important to the physician. Parents can provide medical and psychological data, refer the physician to other sources of medical history, such as family physicians, and authorize family physicians to give relevant data.

Id. at 411.

Numerous scientific studies by independent medical sources confirm the Court's point of view, concluding that induced abortion frequently results in significant, negative and often permanent physical, psychological and social effects on the pregnant woman and her family.

1. Physical Risks From Abortion.

The serious physical complications which have been associated with abortion specifically include: hemorrhaging, cervical trauma, infection, Pelvic Inflammatory Disease (PID), ectopic pregnancy, infertility and subsequent fetal malformations, miscarriages and high risk premature birth in later planned pregnancies and death. *See Amicus Brief* of Focus on the Family in *Turnock* v. *Ragsdale*, No. 88-790, Appendix, Table 1. Researchers who analyze data collected under the auspices of the Centers for Disease Control on Teen Abortion Morbidity and Mortality concluded that women under age eighteen who obtain abortions were more susceptible to physical injury than were older women: "[T]hese findings cause concern because cervical injury in initial, unplanned pregnancies may predispose young women to adverse outcomes in future planned pregnancy . . . [S]ome of the most catastrophic complications occur in teenagers." Cates, Schultz and Grimes, *Risk Associated With Teenage Abortion*, 309 NEW ENGLAND JOURNAL OF MEDICINE 621, 624 (1983). Hence, one abortion decision can impact the entire child bearing potential of a teenage patient.

One abortionist reported on his post-abortion follow up, ranging from two to twelve years, of fifty teenage mothers whose pregnancies he had aborted: "The cervix of the young teenager pregnant for the first time is invariably small and tightly closed and especially liable to damage on dilation." Russel, *Sexual Activity and Its Consequences in the Teenager*, 3 CLINICS IN OB AND GYN 683-698 (1974); *see also* J. Wilke, ABORTION QUESTIONS AND ANSWERS 108-109 (rev. 1988) (hereinafter "ABORTION QUESTIONS"). In fifty-three subsequent pregnancies, he found that six had another induced abortion, nineteen had spontaneous miscarriages, one delivered a stillborn baby at six months, and six babies died between birth and two years. Only twenty one babies survived. Two-thirds of the teenagers subsequently experienced miscarriage or high-risk premature birth of their second wanted pregnancies. *Id.*

From 1974 to 1978, a study was conducted on approximately 84,000 teen abortions performed in Canada which represented 30.9% of all legal abortions. The complications listed from that study were as follows: retained products of the conception (69%); laceration of the cervix (12%); hemorrhage (8%); infection (7%); perforation of the uterus and other complications (4%). The director of the Therapeutic Abortion Unit and the Health Division of Statistics, Canada, acknowledged that there is a high rate of complications (4.1 per 100) in adolescent abortions. Wadhera, *Legal Abortions Among Teens 1974 through 1978*, 122 CAN. MED. ASS. J. 1386-1389 (1980). One Canadian researcher noted:

> Physical and emotional damage from abortion is greater in a young girl. Adolescent abortion candidates are different from their sexually mature counterparts, and these differences contribute to high morbidity. They have immature cervixes and run the risk of difficulty, or potentially traumatic dilatation . . .

ABORTION QUESTIONS at 111-12 (1979) (quoting C. Cowell, *Problems of Adolescent Abortion*, Ortho Panel 14, Toronto General Hospital) (1975).

In 1977, over 100,000 abortion complications were reported in the United States, which is nearly a 10% morbidity rate for immediate and short term complications. D. Reardon, ABORTED WOMEN—SILENT NO MORE 93 (1987) (hereinafter "Reardon"). However, some medical experts believe that these reported morbidity rates from abortion are the "tip of the iceberg," given likely widespread, massive under reporting. *Id.* at 92, 106-109.[1]

2. Mortality Risks From Abortion.

A truly irreversible complication of teenage abortion is death of the mother. Unfortunately, tragic accounts of teenagers dying after an abortion, like the daughter of *amicus* Ann Marie Lozenski, are all too common. *See* Reardon at 109-113, and Appendix A. While statistics are difficult to obtain, it has been reported that in the United States alone, from 1972 to 1981, there were 175 maternal deaths caused by legal abortions, a figure which does not include ectopic pregnancy deaths. Like other post-abortive complications, however, deaths are also grossly underreported. According to one estimate, less than 10% of deaths from legal abortion are reported as such. HANDBOOK ON ABORTION at 80, 98-99.[2]

[1] The only information available on morbidity comes from voluntary reporting. Since abortion providers want to hide their failures and conceal the fact that legal abortion is not safe, underreporting of abortion complications is the rule rather than the exception. J. Wilke & B. Wilke, *HANDBOOK ON ABORTION* 78-80, 89 (3rd ed. 1979); *see also* Zekman & Warrick, *The Abortion Profiteers*, Chicago Sun Times, November 12, 1978 at 1, Col. 1. In Britain where reporting is much better than the United States, medical experts believe that less than 10% of abortion complications are actually reported to government health agencies. Wynn & Wynn, *Some Consequences of Induced Abortion to Children Born Subsequently*, 4 Marriage and Family Newsletter, 8-9 (1973). "Two meticulous studies in England reveal 35.7% and 36% respectively of aborted women suffer from abortion related physical complications. *Id.* at 17.

[2] Underreporting of abortion deaths and physical complications occur for primarily three reasons: (1) abortionists are seeking to protect their personal and professional reputations; (2) the existence of unfavorable records must be minimized so that abortionists can minimize the availability of damaging evidence in the event of malpractice suits; and (3) abortionists want to maintain the generally accepted myth that abortion is safe. D. Reardon, *ABORTED WOMEN SILENT NO MORE* 90 (1987).

However, even if abortionists were willing to report and the government required accurate statistics, under reporting would still occur for the following five reasons: (1) most out-patient clinics do not provide follow up examinations and thus, without a direct complaint, assume that there are no complications; (2) even if a post abortion examination is insisted upon, conditions which may develop into long range complications such as sterility or an incompetent uterus are not easily detectable without prolonged surveillance; (3) many women hide their identities when seeking abortion and may fail to return for a post abortion examination even when one is available; (4) over 60% of the women who need emergency treatment following an outpatient abortion go to a nearby hospital instead of going back to the abortionist; and (5) when women are treated for long term complications such as infertility, they may hide their past abortion experience or simply not realize that it is relevant. *Id.* at 91.

A 1974 random survey of 486 obstetricians (6% of the total 21,700 in the U.S. in 1979) about their experience with complications resulting from legal abortion revealed that: 91% treated patients for complications; 87% had to hospitalize one or more patients; and 6% reported one or more patients having died from a legal abortion. A. Saltzenberger, EVERY WOMAN HAS THE RIGHT TO KNOW THE DANGER OF LEGAL ABORTION 51 (1982) (hereinafter "EVERY WOMAN"). The Center for Disease Control admits that the reported rate of deaths due to legal abortion may be deliberately kept low through selective under reporting. *Id.*

Dr. Lester Hibbard, Chairman of Los Angeles County Medical Society, which is charged with keeping track of maternal deaths, reported that while only four abortion related deaths were officially reported in one year, he personally knew of at least four other unreported abortion-related deaths. HANDBOOK ON ABORTION at 80. Furthermore, he said that he was certain that the under-reported abortion deaths were only the "tip of the iceberg." *Id.* The Chicago Sun Times uncovered twelve unreported abortion deaths in only four abortion clinics. Zekman and Warrick, *The Abortion Profiteers*, Chicago Sun Times, Nov. 12, 1978, at 1, Col. 1.

Other countries' mortality rates from abortion strongly suggests that the United States seriously under reports abortion-related deaths. For example, Sweden's death rate for legal abortions is 39 per 100,000, Denmark's reported deaths are 30 per 100,000, Canada lists 36 per 100,000, and in one study in Britain, a fatality rate of 75 per 100,000 was found. By suspicious contrast, the United States reports less than 2 deaths per 100,000 legal abortions. Reardon at 112.[3]

3. Emotional And Psychological Harms From Abortion.

In addition to the mortality and physical risks of abortion, the risks to the emotional and psychological well being of adolescent mothers are profound. *See* Focus on the Family *Amicus Brief* in *Turnock* v. *Ragsdale*, (No. 88-790), Appendix, Table 2. "Compared with adults, adolescents appear to have somewhat more negative responses on the average following abortion." Adler & Dolcini, *Adolescent Abortion: Psychological Issues In Abortion For Adolescents*, in ADOLESCENT ABORTION: PSYCHOLOGICAL AND LEGAL ISSUES 84 (G. Melton Ed., 1986) (hereinafter "Adler & Dolcini"); Freeman, *Abortion: Subjective Attitudes and Feelings*, 10 FAMILY PLANNING PERSPECTIVES 150 (1978).

Relying on medical and psychological studies, the Court in *Matheson* observed that:

> The emotional and psychological effects of the pregnancy and abortion experience are markedly more severe in girls under eighteen than in adults. Wallerstein, Kurtz and Bardin, *Psychological Sequelae of Therapeutic Abortion in Young, Unmarried Women*, 27 ARCH. GEN. PSYCH. 828 (1972) (hereinafter "Wallerstein"); *see also* Babikian and Goldman, *A Study of Teenage Pregnancy*, 128 AM. J. PSYCH. 755 (1971) (hereinafter "*Study of Teenage Pregnancy*").

Matheson, 450 U.S. 411 n.20.

One study found that relatively more minors than older women suffered severe anxiety, acute depression, and long-term guilt following abortion. Cates, *Adolescent Abortion in the United States*, 1 J. ADOLESCENT HEALTH CARE 18 (1980), while another study reported that nearly one third of the young women who had abortions showed moderate to severe decline in psycho-social functioning five to seven months after the abortion. Wallerstein at 830.[4] The research in that study concluded:

> [I]n the fourteen to seventeen year age span consequent symptom manifestations, even when only transient, tended to be more dramatic and more severe in this younger group . . . [o]verall it is clear that the pregnancy and abortion experience in the younger and less mature, is at considerable heightened risk, a point of potential major maturational skewing.

Wallerstein, at 832; *see also* Perez-Reyes & Falk, *Follow UP After Therapeutic Abortion in Early Adolescence*, 28 ARCH. GEN. PSYCH. 120, 124 (1973) (hereinafter "Perez-Reyes").

One of the particular difficulties for adolescents is the problem of dealing with the very real sense of loss after an abortion is performed. Horowitz, *Adolescent Mourning Reactions to Infant and Fetal Loss*, 59 SOCIAL CASE 551 (1978) (hereinafter "Horowitz"). In an extensive community based study in Denmark of 17,378 women carrying to term and 27,234 women aborting, the psychiatric hospitalization rate for teenage abor-

[3] The present claims for low abortion mortality rates in the United States should also be compared to experience prior to *Roe* v. *Wade* when states with permissive abortion laws were allowed to *require* reporting of legal abortion related deaths. Oregon reported 13.9 abortion deaths per 100,000 legal abortions compared to only 8.4 maternal deaths per 100,000 live births, while Maryland reported 40.5 deaths per 100,000 legal abortions compared to 23.1 maternal deaths per 100,000 live births. According to these pre-*Roe* statistics, the mortality rate for legal abortion was nearly twice as high as the overall maternal mortality rate, a statistic which has been confirmed in many foreign countries. Reardon at 111-112.

[4] These young women, at initial follow up, were suffering with a variety of specific symptoms of maladaptive behavior, including mild to moderate depressive episodes, a variety of new physical complaints for which medical attention had not been sought . . . difficulty in concentrating in school, withdrawal from previous social contacts, lowered self-esteem explicitly related to the pregnancy and abortion experience, a newly begun promiscuous pattern in relationships with men, and regression to more infantile modes of relationships with parents. These difficulties did not pre-date the pregnancy. Wallenstein, at 830, cited in *Matheson*, 450 U.S. at 412 n.20.

ters was 11.4 per 10,000 while only 6.2 per 10,000 for teenagers who carried the baby to term. David, Rausmussen and Holst, *Postpartum and Post Abortion Psychotic Reations*, 13 FAMILY PLANNING PERSPECTIVES 88-92 (1981). Heightened risk of teen suicide following abortion and severe cases of anniversary reaction have also been observed. Tishler, *Adolescent Suicide Attempts Following Elective Abortion: A Special Case of Anniversary Reaction*, 68 PEDIATRICS 670 (1981).

Teenage abortion may also involve a severe double loss for the adolescent, who may compensate for her first abortion by becoming pregnant, and then may decide to have another abortion. *Portrait* at 92; *see also* Teitze, *Repeat Abortions, Why More?*, 10 FAMILY PLANNING PERSPECTIVES 205, 286 (1978).[5] Many researchers and clinicians strongly believe that parental participation will solve this cycle of problems. *See* Torres, Forrest and Eisman, *Telling Parents: Clinic Policies and Adolescents Use of Family Planning and Abortion Service*, 12 FAMILY PLANNING PERSPECTIVE, 284-289 (1980) (hereinafter "*Telling Parents*"); Butler & Fujita, *Abortion Screening and Counseling: A Brief Guide for Physicians*, 50 POST GRAD MED 208, 212 (1971); Horowitz at 551.

A pregnant teenager is frequently overwhelmed by her feelings surrounding the problem pregnancy and subsequent abortion. Appellate Record at 868, *Hodgson* v. *Minnesota*, 850 F.2d 1452 (8th Cir. 1988) (Nos. 86-5423 and 86-5434) (testimony of Dr. Vincent Rue). To the extent she does not share these feelings with her parents, she becomes more isolated and alienated which in turn triggers a host of other psychological sequelae like guilt, depression and anxiety, which increase the risk of replacement pregnancies and multiple abortions. *Id.* at 868-869. However, when the "secret" pregnancy and con-

[5] One study shows that 17% of women under eighteen who had abortions were pregnant again within a year. Steinhuff, *Women Who Obtain Repeat Abortions: A Study Based On Record Lineage*, 11 Family Planning 30, 37 (1979). Another study showed that 41% of adolescents who had therapeutic abortions had resumed sexual intercourse six months later, more than two thirds of whom were then doing so without contraceptives. Perez-Reyes at 123.

templated abortion become known to her parents, her most stable and respected support, the teenager immediately reduces the psychological risks associated with keeping the "secret" and gains emotional strength and positive ideas from the family unit. Parental consultation can thus serve as an important catalyst to work through her psychological crisis. *Id.* at 867.

Adolescent aborters who avoid facing the difficulties of the abortion decision experience more psychological problems than the non-avoiders. Cohen, Laurie, Roth and Susan, *Coping With Abortion*, 10 JOURNAL OF HUMAN STRESS 140, 142 (1984). Besides the natural sounding board and emotional support which the family provides in times of crisis, parental consultation can provide significant help to promote maternal health of the pregnant teenager. J. Burtchael, RACHEL WEEPING AND OTHER ESSAYS ON ABORTION 42 (1982) (hereinafter "RACHEL WEEPING"). For example, parents can provide the abortion providers or subsequent physician treating the complications from abortion with medical and psychological history which would be critical to reducing or avoiding altogether physical and psychological risks from teenage abortions. *Matheson*, 450 U.S. at 411.

B. Parental Consultation Substantially Benefits The Minor's Decision Making Process.

There is substantial evidence that adolescents change markedly as they progress through adolescence, and differ significantly from adults, in at least five ways, in how they make decisions on whether to abort or carry the baby to full term:

(1) Adolescents consider fewer and different factors in pregnancy decisions and in potential childrearing decisions;

(2) Adolescents consider future solutions and goals less than adults;

(3) Adolescents delay their decision more than adults;

(4) Adolescents differ from adults in consideration of future consequences in hypothetical dilemmas; and

(5) Adolescents have been found to differ from adults in their ability to understand aspects of moral decisions from the viewpoint of others.

Worthington at 134-135 (citations omitted).

The foregoing differences in decision making between adolescents and adults suggest that parental involvement helps adolescents, especially younger ones, make better decisions about how to react to her pregnancy in at least five ways.

First, parental notification requires the adolescent, through the waiting period provision of parental notification laws, to take 24 to 48 hours to consider the decision to abort, rather than respond immediately to the often demand-laden situation of finding that she is pregnant while at a clinic that does abortions. One study suggests that pregnant adolescents are particularly vulnerable to immediate situational cues in making pregnancy resolution decisions. Cobliner, *Pregnancy and Single Adolescent Girls: The Role of Cognitive Functions*, 3 JOURNAL OF YOUTH AND ADOLESCENTS 17-29 (1974).

Second, notifying parents allows them to give her balance and support in the decision making. While the initial response to learning about the pregnancy may be stressful for the parents, and they may consider their own wishes and fears in addition to their daughter's, parents will generally have more experience in making decisions under emotional strain and will be more likely to carefully consider a variety of options than will the adolescents. Worthington, *The Benefits of Legislation Requiring Parental Involvement Prior to Adolescent Abortion* in VALUES AND PUBLIC POLICY 221, 226-227 (G. Regier Ed. 1988) (hereinafter *Parental Involvement*).

While the decision to abort is difficult, even for an adult woman, teenage girls are particularly subject to ambivalence and confusion regarding the abortion decision. Horowitz at 557. One study found that almost one third of young women (31.8%) changed their minds once or twice about continuing the pregnancy or having the abortion, and 18% changed their minds even more frequently. Klerman, Bracken, Jeckel and Bracken, *The Delivery-Abortion Decision Among Adolescents*

in PREGNANCY AND ADOLESCENCE 219, 227 (1982) (hereinafter "*The Delivery-Abortion Decision*"); *see also* Wallerstein at 829 (reported that nearly 60% of young women studied reported conflict regarding the abortion decision). Nearly 20% stated that a central emotional issue revolved primarily around their deception of their families and the burden of secrecy. *Id.*

Parents will supply other points of view and provide other alternatives, such as adoption, marriage to the putative father, and raising the child at home. Their impact can help broaden her understanding of the ramifications of her decision. *Parental Involvement* at 227. As this Court has recognized:

> Abortion may not be the best choice for the minor . . . Alternatives to abortion, such as marriage to the father of the child, arranging for its adoption, or assuming the responsibility of motherhood with the assured support of family may be feasible and relevant to the minor's best interests.

Bellotti II, 443 U.S. at 642-43.

Third, parents are also able to correct any misapprehensions that their daughter might have and to challenge her erroneous beliefs. Mirachek, *Counseling Adolescents with Problem Pregnancies*, 42 AMERICAN PSYCHOLOGISTS 84-88 (1987). One frequent erroneous belief that would be corrected is that parents will reject the adolescent because of her pregnancy. In fact, parents usually react less negatively than adolescents anticipate. There is substantial evidence that most parents will support their daughters during an adolescent pregnancy. Barglow, Bornstein, Etsome, Wright and Visodsky, *Some Psychiatric Aspects of Illegitimate Pregnancy During Early Adolescence*, 37 AMERICAN JOURNAL OF ORTHOPSYCHIATRY 266, 267 (1967).

After a preliminary period of disequilibrium (anger, disappointment, disgust), there appears to be a more stable problem solving and acceptance process when both the mother and daughter take steps toward resolving these problems in the pregnancy. *Parental Involvement* at 230. In numerous studies, over two-thirds of the families reported that members strongly

support each other, participate with the pregnant adolescent, and demonstrate attachment to the new child prior to birth. *Id.* In one study, young women felt that 67% of their mothers and 74% of their fathers would have negative reactions toward abortion. Among those minor women who did finally inform their parents of their decision to have an abortion, reported reaction to the news expressed by both parents were overwhelmingly positive. Few negative responses were reported. Clary, *Minor Women Obtaining Abortion: The Study of Parental Notification in Metropolitan Areas*, 72 AM. J. PUB. H. 283-284 (1982) (hereinafter "Clary").

Fourth, parents supply the real life experience in autonomy and problem solving which adolescents often lack—young women rely on less analytic approaches to the problem such as following the normative behavior of their peers in basing their decisions on romantic, unrealistic scripts. Ramsey, *Representation of a Child in Protection Proceedings: The Determination of Decision Making Capacity*, 17 FAMILY LAW QUARTERLY 315, 344-345 (1983) (hereinafter "Ramsey"):

> The ability to reason abstractly and foresee consequences which is so important making a good decision of such magnitude, [i.e., pregnancy resolution] is lacking in most teenagers.

Eisen, Zellman, Liebonitz, Chow and Evans, *Factors Discriminating Pregnancy Resolution Decisions of Unmarried Adolescents*, 108 GEN. PSYCH. MON. 69, 94 (1983). "Minors often lack the experienced perspective and judgment to avoid choices that could be detrimental to them." Clary at 284.

Fifth, parental involvement tends to moderate the emotional upheavals of adolescents which often impact heavily upon their ability to make sound judgments. "Teenagers may tend to be egocentric and to make irrational and emotional decisions about themselves and others. A particular fourteen year old may have been more capable of making a certain decision when she was younger, before the emotional upheavals of adolescence interfered with her judgments." Ramsey at 315.

This Court has recognized the significance of parents in the minor's decision making process:

> There can be little doubt that the state furthers a consitutionally permissible end by encouraging an unmarried, pregnant minor to seek the help and advice of her parents in making the very important decsion whether or not bear a child. That is a grave decision and a girl of tender years under emotional stress may be ill equipped to make it without advice and emotional support. It seems unlikely that she will obtain adequate counsel and support from the attending physician at the abortion clinic.

Danforth, 428 U.S. at 91 (Stewart, J., concurring). *See Bellotti II*, 443 U.S. at 637. A consistent thread in these cases and others is a recognition of the profound significance to the minor's well being of parental participation in the abortion decision.

C. Parental Consultation Helps Protect Vulnerable, Immature Minors From Exploitation.

Pregnant teenage girls are "particularly vulnerable" to abortion clinics which offer immediate answers to an unwanted pregnancy, and to the influence of their peers and boyfriends. *See Bellotti II*, 443 U.S. at 634. "There is no logical relationship between the capacity to become pregnant and the capacity for mature judgment concerning the wisdom of an abortion." *Matheson*, 450 U.S. at 407. In a 1980 survey of abortion clinics, it was found that less than half require parental notice even for teenagers fifteen years of age or younger; and even fewer require parental notification before performing abortions on minors aged sixteen and above. *Telling Parents* at 285 (Table 1). Almost half (45%) of the 1170 teenage abortion patients interviewed admitted that their parents had no knowledge of their intended abortion. *Id.* at 289 (Table 5). Over 90% of these teenagers were living with their parents, with only 4% living with relatives or friends. *Id.* at 287.

Numerous studies reveal, however, that adolescents have a particular need for adult guidance in areas like abortion in which they have no childhood experience to guide them, E. Hurlock, ADOLESCENT DEVELOPMENT 250 (4th ed. 1973), and which create severe emotional stress and psychological pressure "to avoid or escape the problem." *Bellotti II*, 443 U.S. at 635. Benson & Stack, *Help or Hindrance: Parental*

Impact on Pregnant Teenagers' Resolution Decisions, 31 FAMILY RELATIONS 271, 279 (1982); R. Mnookin, IN THE INTEREST OF CHILDREN 158, 237-239 (1985).

The majority of abortions now are performed by strangers in unfamiliar surroundings, where minors are alone, furtive and frightened visitors subjected to assembly line abortion techniques to give them their "quick fix." *See Danforth*, 428 U.S. at 91, 92 n.2 (Stevens, J., concurring); Blum, *Impact of Parental Notification Law*, 77 AM. J. PUBLIC HEALTH 619 (1987). Dr. Edward Allred, whose chain of abortion clinics performs 60,000 abortions per year, grossing twelve million dollars annually, has stated:

> Very commonly we hear patients say they feel like they're on an assembly line. We tell them they're right. It is an assembly line . . . We're trying to be as cost effective as possible and speed is important . . . [W]e try to use the physician for his technical skill and reduce the one-on-one relationships with the patient. We usually see the patient for the first time on the operating table and then not again . . ."

"Doctors Abortion Business is Lucrative," The San Diego Union, Oct. 12, 1988, at 3A, Col. 5.

The abortionist has a direct conflict of interest—profit—when counseling a vulnerable, frightened, pregnant teenager whether to have an abortion.

The typical abortion "counselor" also has such a personal, psycho-social stake in abortion that she often cannot give meaningful, objective counsel, even if she was instructed to. Abortion counselors have promotional jobs in which they exploit the natural, centrifugal pressures that make communication between adolescents and parents difficult, and are willing to weaken whatever remains of the parent-child link of honest interaction to promote abortion.[6] RACHEL WEEPING at 41-44. According to past counselors, "at the abortion clinic you aren't really expected to present alternatives to abortion." *Id.* at 43. "Counselors are just to give the appearance of help . . . They think of themselves as company for the women . . . The counseling was more of an assurance process." Weed, *Curbing Births Not Pregnancies*, The Wall St. J. Oct. 14, 1986, at 42, Col. 4. (citing L. Francke, THE AMBIVALENCE OF ABORTION 25, 30 (1978).

[6] Family planning programs "are more efficient at convincing teens to avoid birth than to avoid pregnancy." Weed, *Curbing Births Not Pregnancies*, The Wall St. J., Oct. 14, 1986, at 36, Col. 4 (hereinafter Weed). Despite a massive, government-financed campaign that has increased the provision of family planning services to teenagers by 600% in twelve years (in 1980, 30% of all teens were involved in family a planning program), and despite predictions by family planners that the rate of pregnancy among teenagers would drop by 200—300 *pregnancies* for every 1000 teenagers involved in family-planning programs, Olsen & Weed, *Effects Of Family Planning Programs For Teenagers On Adolescent Birth and Pregnancy*, 20 FAMILY PLANNING PERSPECTIVES 153, 157-61 (1986) [hereinafter Olsen & Weed], recent research found "a net increase of about 100 pregnancies" for every 1000 teenagers using family planning services. *Id.* at 160, 151; Weed & Olsen, *Effects of Family-Planing Programs on Teenage Pregnancy—Replication And Extension Rates*, 20 FAMILY PLANNING PERSPECTIVES 173, 190 (1986) [hereinafter Weed & Olsen]. Instead of reductions of more than 150 *abortions* per 1000 teenagers using family planning services, predicted by family planners, Weed & Olsen found that the rate of abortion increased by more than 100 per 1000 teenage family planning clients. Weed at 36; Olsen & Weed, *supra* a 161-645, 67; Weed & Olsen, at 190. "Family planning is associated with higher, not lower, abortion rates." *Id.*

Many similar stories are reflected by the following teenager who obtained a "safe," legal abortion with no immediate, physical complications:

> 'When I was 17 I found myself in a crisis pregnancy . . . When I went to the local family planning clinic, I sought guidance and wanted to know what I could do about my situation. I wanted a helping hand. When I walked into the clinic, I trusted the nurses and doctors, and thought they were concerned about my health enough to help me make a decision, not make my decision for me.
>
> Only one solution was strongly recommended that day. When I questioned the development of my baby, I was told it wasn't a baby yet, and that it looked like a tadpole. Since that day I have learned differently . . . *I was told that abortion was simple and safe and that I could go and live the rest of my life and have children* when I was in a position to provide for them. I heard no scientific facts that day, only biased opinions. I was not told what abortion itself could do to me in the years to come, only that it was

> "safe and simple." I was not told that I would *abuse myself with alcohol, try to kill myself, develop an eating disorder, and have terrible dreams*. Worst of all, I was not told that I might never have another child. It has been 14 years since my "safe and simple" abortion and *I will never be able to have another child.*

Letter from Sue Liljenberg to Sen. Gordon Humphrey June 6, 1983 (emphasis supplied). *Amici* Focus on the Family, Family Research Council and American Victims of Abortion have received or heard of thousands of similar or worse stories of exploitation; and thus, Justice Stewart's conclusion in his concurring opinion in *Danforth* may be an understatement: "[I]t seems unlikely that she will obtain adequate counsel and support from the attending physician at an abortion clinic, where abortions for pregnant minors frequently take place." *Danforth*, 428 U.S. at 91.[7]

Without the required parental notification/consent laws, pregnant adolescents who are ashamed, fearful and confused will not generally consult their parents even in the best of families as illustrated ~~by the~~ real life experiences of *amici* (*see* Appendix A). In one recent study of pregnant teenagers considering abortion, 71% informed a best friend, while only 37% informed mothers and 26% informed fathers. The Delivery-Abortion Decision Among Adolescents, at 219; *see also Telling Parents* at 289, Table 5. As Justice Stevens recognizes:

> If there is no parental [notice] requirement many minors will submit to the abortion procedure without even informing their parents. An assumption that the parental reaction will be hostile, disparaging or violent no doubt persuades many children to bypass parental counsel which

[7] Justice Stewart in his concurring opinion in *Danforth* further described the "counselling" exprience at abortion clinics as follows:

> "The counselling . . . occurs entirely on the day the abortion is to be performed . . . it last for two hours and takes place in groups that include both minors and adults who are strangers to one another . . . The physican takes no part in this counselling process. . . . Counselling is typically limited [only] to a description of abortion procedures, possible complications, and birth control techniques . . .

Danforth, 428 U.S. at 91-92 n.2, quoting Brief for Appellants in *Bellotti I*, O.T. 1975, No. 75-78, pp. 43-44.

> would in fact be loving, supportive and indeed, for some, indispensable. It is unrealistic, in my judgment to assume that every parent child relationship is either (a) so perfect that communication and accord will take place routinely; or (b) so imperfect that the absence of communication reflects the child's correct prediction that the parent will . . . [act] arbitrarily to further a selfish interest rather than the child's interest.

Danforth, 428 U.S. at 103-104 (Stevens, J., concurring in part and dissenting in part); *see also Matheson*, 450 U.S. at 419-20 (Powell, J., concurring) and *Matheson*, 450 U.S. at 424 (Stevens, J., concurring).

Research strongly emphasizes that adolescents' decisions regarding abortion or childbirth are significantly affected by counsel they receive from others—if not abortion clinic staff, then teenage peers or boyfriend. *See* E. Hurlock, ADOLESCENT DEVELOPMENT 75-77 (4th Ed. 1973); J. Gallagher, *MEDICAL CARE FOR THE ADOLESCENT* 243 (3rd Ed. 1976); I. Josselyn, *ADOLESCENCE* 42-43 (1971); Brittain, *Adolescent Choices and Parent-Peer Cross Pressures*, 28 AM. SOC. REV. 385 (1963). Peers are not only the most frequent source of sex information to adolescents, but they frequently are the source of misinformation about abortion. Hanson, *Abortion in Teenagers*, 21 CLIN. OBST. AND GYN. 1175, 1180 (1978). The teenager vulnerability is underscored by the studies which reveal that in over 78% of teenager abortion cases, girls reported that they had been strongly influenced by someone who encouraged abortion. Adler & Dolcini at 74.

The bottom line is that vulnerable adolescents are exploited either consciously by abortion providers or unknowingly by the teenage peers who are equally uninformed, misinformed or emotionally and experientially unable to render rational, objective advice on abortion or childbirth. Thus, parental consultation provides the people who are most interested in the ultimate well being of pregnant adolescents the opportunity to protect them against false, misleading, prejudicial or harmful advice from their abortion "counselor" and their equally uninformed peers.

D. Parental Consultation Promotes Legitimate Parental Authority And Family Unity.

1. Parental Control.

The parent-child relationship is generally outside the reach of government regulation. Accordingly, the state can only interfere with parental control of their children in exceptional cases where it is necessary to protect the health or safety of the child. *Prince* v. *Massachusetts*, 321 U.S. 158 (1944) (Prince); *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972). The Court has long recognized the importance of parental control, especially in the teenage abortion context. For example, the plurality in *Bellotti II* recognized:

> [W]e cannot ignore that central to many of these theories, and deeply rooted in our nation's history and tradition, is the belief that the parental role implies a substantial measure of authority over one's children. Indeed, 'constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. *Ginsberg* v. *New York*, 390 U.S. 629 (1968).

Bellotti II, 443 U.S. at 638-639. *Prince* v. *Massachusetts* also recognizes the primacy of parental control over their children:

> "It is cardinal with us that the custody, care and nurture of the child resides first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. The legislature could properly conclude that parents and others . . . who have the primary responsibility for children's well being are entitled to the support of law designed to aid discharge of that responsibility."
>
> *Prince*, 321 U.S. at 166.

An additional and more important justification for state deference to parental control over children is that:

> [T]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with a high duty, to recognize and prepare him for additional obligations. *Pierce* v. *Society of Sisters*, 268 U.S. 510, 535 (1925). 'The duty . . . must be read to include the inculcation of moral standards, religious beliefs and elements of good citizenship.' *Wisconsin* v. *Yoder*, 406 U.S. 205, 233 (1972).

Bellotti II 443 U.S. at 637-638.

Some legal scholars and justices have suggested that there may be a *constitutional right to parental notification and consent*.[8] Whether or not there is such a constitutional right, a state clearly has a legitimate, if not compelling, interest to encourage and promote parental authority. Notification and consent laws foster these parental rights while recognizing the historical, legal limitations of its young citizens:

> Because he may not foresee the consequence of his decisions, a minor may not make an enforceable bargain. He may not lawfully work or travel where he pleases or even attend exhibitions of constitutionallay protected adult motion pictures. Persons below a certain age may not marry without parental consent and they may not vote. . . . But even if it is the most important kind of decision a young person may ever make, that assumption merely enhances the quality of the State's interest in maximizing the probability that the decision be made correctly and with full understanding of the consequences of either alternative.

Danforth, 428 U.S. at 102-103.

Because "the most significant consequences of the abortion decision are not medical in character," *Danforth*, 428 U.S. at 103, the State unquestionably has an interest in ensuring that a teenager receive the best advice and consultation which clearly includes that from her parents. *Bellotti II*, 450 U.S. at 423.

2. Family Involvement.

Unless a family is involved, adolescent pregnancy can contribute to family estrangement and increased parent-child

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[8] The Court's opinions discussed in the text above—*Pierce*, *Yoder*, *Prince*, and *Ginsberg*—all have contributed to a line of decisions suggesting the existence of a *constitutional parental right against undue, adverse interference by the State*. *Bellotti II* 443 U.S. at 639 n.18. *See also Amicus Brief* of Concerned Woman of America in *Ohio* v. *Akron Center For Reproductive Health*, No. 88-805.

schism. *Parental Involvement* at 232. For example, researchers generally list six reasons for family involvement with adolescent pregnancies and the "abortion versus childbirth" decision:

1. The family's need to deal with its pervasive sense of failure precipitated by the pregnancy . . .

2. Family members' needs to clarify their different views about the pregnancy and the unborn baby . . .

3. The need for the adolescent and her parents to resolve any conflict existing prior to the pregnancy, especially those resulting from the pregnancy situation . . .

4. The importance of maintaining and/or improving communication in a crisis situation for the adolescent and her family . . .

5. Parents' need to maintain their relationship while they parent their daughter through the crisis of pregnancy . . .

6. Parents' and adolescent's need to resolve developmental independency-dependency issues.

Parental Involvement at 234 (citations omitted).

Failure to involve her family will exacerbate and hide the root causes for the pregnancy, intensify family disunity and increase the minors' psycho-social problems of isolation, guilt, fear and depression. *Id.* Without parental involvement legislation, those girls who opt for abortions out of a mistaken perception of their parents' reactions deprive themselves of their parents' support during their crisis—the most powerful and permanent social and family support they have—and will either: (a) erect a wall of guilt and secrecy between themselves and their parents; or (b) later reveal to their parents that they not only got pregnant but did not trust or honor their parents and made an unilateral abortion decision. Worthington at 231.

One scholar concluded that adolescent pregnancy can often result in "building family morale, intensifying family exchanges and [if childbirth is chosen] filling the empty nest." Furstenberg, *Burdens and Benefits: The Impact of Early*

Childbearing on the Family, 1980 J. SOCIAL ISSUES 36, (1980). Even if parents and daughter do not end up with the same views towards abortion versus childbirth after consultation, most parents will provide emotional and psychological support during and after their daughter's decision pertaining to the crisis pregnancy. *Parental Involvement* at 230.

In an era when the family has been rendered increasingly vulnerable to dissolution, we should not gratuitously add to the stress by enshrining in law the starkly individualistic view that a child in the making, which can be a future shared relationship of the family, is wholly and completely a 'private' matter for the teenage girl to determine. Etozioni, *The Husband's Rights in Abortion*, 12 TRIAL 56, 58 (1976).

Family involvement in decisions about abortion or bearing a child to term thus promotes increased family unity in at least four ways. First, it will permit the family to deal with some of the underlying issues to adolescent pregnancy, i.e., power struggle, rebellion, substance abuse, depression, and immaturity. Second, in families where the girl might have opted for a secret abortion, the compounding of problems (broken relationship with parents, lack of communication, distrust, alienation and isolation) can be avoided. Third, shared experiences where a mutual, well thought out decision is made by both the daughter and parents promote emotional and psychological support for whatever decision is made, whether abortion, adoption or childbirth. Finally, the parents' knowledge of an impending abortion allows the parents to communicate important medical information about the adolescent to the abortion doctor during the required waiting period, or in the case of later complications from the abortion, to the subsequent treating physician.

II. STATE NOTIFICATION AND CONSENT LAWS ARE RATIONALLY RELATED TO LEGITIMATE INTERESTS AND DO NOT "UNDLY BURDEN" A MINOR'S RIGHT TO HAVE AN ABORTION.

The federal courts' deference to state legislatures on the parental consultation question is a function of the standard of

review adopted: strict scrutiny, rational basis or some intermediate standard. "A woman's ability to choose an abortion is a species of 'liberty.'" *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U.S. 747, 790 (1986) (White, J., dissenting) ("*Thornburgh*") *see also Roe* v. *Wade*, 410 U.S. at 113 (Rehnquest, J., disssenting). The presence of such a liberty interest, however, ordinarily means only that state regulation affecting that liberty interest must be procedurally fair and must bear a *rational relation* to valid state objectives. *See Williamson* v. *Lee Optial Co.*, 348 U.S. 483, 486 (1955).

State regulation will only be subjected to the higher standard of strict scrutiny, if it *substantially interferes* with a fundamental constitutional right. *City of Akron* v. *Akron Center for Reproductive Health*, 462 U.S. 416, 462 (O'Connor, J., dissenting) ("*Akron I*").

Numerous other cases have adjudicated state abortion laws on the *rational basis* standard. In *Carey* v. *Population Services International*, 431 U.S. 678, 693, 696 (1977) for example, the statute was measured by whether it provided "a *rational means* for accomplishment of some *significant state policy*." In *Maher* v. *Roe*, 432 U.S. 474 (1977), *Poekler* v. *Doe*, 432 U.S. 519, 421 (1977); and *Harris* v. *McRae*, 448 U.S. 297, 325 (1980), the Court again required only a showing that Congress' authorization of "reimbursement for generally, medically necessary services generally but not for certain medically necessary abortions was *rationally* related to the legitimate government goal of encouraging childbirth." *Webster* v. *Reproductive Health Services*, 57 U.S.L.W. 5023, 5028 (U.S. June 27, 1989) (emphasis added).

Three members of the *Webster* plurality referred to the "rational basis test" and "promotion of States' interest standard" throughout the opinion, and concluded:

> It is true that the tests in question increase the expense of abortion and regulate the discretion of the physician . . . But we are satisfied that the requirement of these tests *permissibly furthers* State's interest in protecting human life and we therefore believe the statutes to be constitutional . . . The Missouri testing requirement here is *reasonably designed* to ensure . . . an end which all concede is *legitimate* . . .

Webster, 57 U.S.L.W. at 5031 (emphasis added).

While strict scrutiny and rational basis tests have generally been judicial reference points in review of state laws, the intermediate standard of "undue burden" has also arisen in the abortion context. *Akron I*, 462 U.S. at 461 and 461 n.8 (O'Connor, J., dissenting). Justice O'Connor's two-tier approach to reviewing state abortion laws acknowledges that even if the state provisions do burden the right to seek an abortion, the Court must then consider "whether this burden *reasonably relates* to legitimate state interests." *Id.* at 471 n.15 (O'Connor, J., dissenting); *see Thornburgh*, 476 U.S. at 828 (O'Connor, J., dissenting). If the regulation "unduly burdens" the protected interest, Justice O'Connor would require states to demonstrate a compelling interest in the legislation. This "second tier" undue burden has only been found in situations involving "absolute obstacles or severe limitations" on the abortion decision such, as in *Danforth*, 428 U.S. at 79, where prohibition of saline amniocentesis was completely prohibited for abortions after twelve weeks; and *Bellotti II*, 443 U.S. at 622 where parental consent without a judicial bypass procedure was considered an arbitrary, total parental veto over the minor's abortion decision. *See Akron I*, 462 U.S. at 464 (O'Connor, J. dissenting). According to this test, if an *undue burden* is found in the threshold inquiry, the Court should then decide whether a *compelling state interest* justifies the undue burden. *Id.* at 463.

The appropriate standard to review state notification and consent laws should be whether the laws are *reasonably related* to promote or further *legitimate state interests*. The countervailing protected right to abortion is "qualified," *Roe*, 410 U.S. at 154, and thus, where the state interests directly impact its ability to protects its citizens, this Court should defer to state legislative authority. In the parental consultation context, the Court has recognized many legitimate and compelling state interests: (1) to protect the mental and physical

well being of pregnant minors; (2) to promote informed, rational decision making and family unit; and (3) to protect potential human life—all of which notification and consent laws promote and permissibly further.

Even if the undue burden test is applied, notification laws with a judicial bypass procedure as in the present case should still be upheld. Unlike *Akron I*, *Danforth* or *Bellotti II*, the parental notifications here do not place "a complete prohibition on abortion in certain circumstances," *Akron I*, 462 U.s. at 429 n.11. Nor does it place an absolute and possibly arbitrary parental veto over the abortion decision. *Danforth* 428 U.S. at 74 and *Bellotti II*, 43 U.S. at 642-644. Since the laws do not unduly burden the minors' right to have an abortion, the compelling interests of the state do not have to be examined.

III. FEDERAL COURTS MUST GIVE GREAT JUDICIAL DEFERENCE TO STATE ABORTION LEGISLATION, PARTICULARLY IN MATTERS INVOLVING PARENT-CHILD RELATIONS.

In the last three abortion cases, the Court appears to recognize the dangers of judicial law making:

> The rigid *Roe* framework is hardly consistent with the notion of a Constitution cast in general terms, as ours is, and usually speaking in general principles, as our does. The key elements of the *Roe* framework—trimesters and viability—are not found in the text of the Constitution or in any place else one would expect to find a constitutional principle. Since the bounds of the inquiry are essentially indeterminate, the result has been *a web of legal rules that have become increasingly intricate, resembling a code of regulation rather than a body of constitutional doctrine* . . .

Webster, 57 U.S.L.W. at 5023 (Rehnquist, C.J. joined by White, J. and Kennedy, J.); *See Akron I*, 462 U.S. at 468-472 (O'Connor, J., dissenting); *Thornburgh*, 476 U.S. at 782-833 (Burger, C.J., White, J., and O'Connor, J., dissenting).

This Court has sailed from *Roe* into uncharted waters for sixteen years by constantly superseding legislative judgment

and "making Constitutional law in this area a virtual Procrustean bed." *Webster*, 57 U.S.L.W. at 5030.

The Court must keep in mind that:

> the appropriate forum for . . . resolution [of extremely sensitive issues like abortion] in a democracy is the legislature. We should not forget that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.

Akron I, 462 U.S. at 465 (O'Connor, J., dissenting). (citations omitted). *See Maher*, 432 U.S. at 479-480.

Dissenters in *Thornburgh*, *Akron I* and at least three justices in *Webster* appear poised to return this Court to adjudicating state abortion laws and regulations based on the correct judicial review standard of "rational basis" and to giving state legislatures greater leeway to effectuate legitimate state interests. *Thornburgh*, 476 U.S. at 796-797 (White, J., dissenting); *see Oregon* v. *Michell*, 400 U.S. 112, 206-207 (1970) (Harlan, J., concurring); *id.* at 247-48 (Brennan, J., concurring). If accomplished, state laws routinely struck down by this Court, "would be sustained." *Webster*, 57 U.S.L.W. at 5030; *Thornburgh* at 802 (White, J., dissenting); *id.* at 783 (Burger, C.J., dissenting).

Withour reference to the constitutional right to parental notification implied in *Pierce*, *Yoder*, *Prince* and *Hinsberg*, and suggested in *Bellotti II*, 443 U.S. at 639 n.18, it is clear that judicial authorities should give greater deference to state legislatures to effectuate important state interests such as *parental prerogatives* to raise their children, to participate in their medical, moral and religious decisions and to unify their families. These are not issues in which federal courts have any particular expertise or historical authority:

> Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children . . . [H]istorically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.

Parham v. *J.R.*, 442 U.S. 584, 602 (1979). *See further, Moore* v. *City of East Cleveland*, 431 U.S. 494 (1974); *Prince* v. *Massachusetts*, 321 U.S. 158 (1944).

In parental notification and consent cases, the Court has recognized these principles. In *Matheson*, the Court upheld parental notification because "the Constitution does not compel a state to fine tune its statutes so as to encourage or facilitate abortions. 450 U.S. at 413; *see also Akron I*, 462 U.S. at 469 (O'Connor, J., dissenting).

Bellotti I and II, *Danforth*, *Matheson* and *Ashcroft* demonstrate the legitimacy of parental consultation and waiting periods to protect immature, unemancipated teenagers having abortions. Non-abortion surgical procedures involving minors require no less. *Thornburgh*, 476 U.S. at 785 (Burger, J., dissenting) (no surgeon would perform an amputation or even an appendectomy on a fourteen old girl without the consent of a parent).

The Court in this case should exercise traditional judicial deference in the parental rights and abortion context and steer this misguided ship back into port by following channel lights which flash broad, constitutional principles for parental notification. Enunciating more intricate and complex rules for parental consultation will only continue this ill-fated voyage. The Court should return to *traditional* constitutional principles where *judicial deference* to state legislatures is practiced and state abortion laws are appropriately reviewed by their *rational relationship to legitimate state interests.*

CONCLUSION

The Court should apply the rational basis test to the state parental notification and consent law in this case and the state law should be upheld.

Respectfully submitted,

H. ROBERT SHOWERS
(Counsel of Record)
RICHARD M. CAMPANELLI
GAMMON & GRANGE
1925 K Street, N.W.
Suite 300
Washington, D.C. 20006
(202) 862-2000
Attorneys for Amici Curiae

APPENDIX

APPENDIX A

DESCRIPTION OF *AMICI*

Amicus **Focus on the Family** is a Christian, nonprofit organization that is committed to strengthening the emotional, psychological and spiritual health of families in the United States and throughout the world. Its daily radio broadcasts dealing with family concerns and interests are heard by more than one million people daily over 1300 stations. Its monthly magazine has a circulation of 1.7 million. It receives an average of more than 8000 letters daily, many of which describe the causes and results of past trauma, including the abortion experience.

Amicus **Family Research Council,** a division of Focus on the Family, is a voice for the pro-family movement in Washington, D.C., and provides policy analysis and research support for pro-family and religious groups across America. As such, it studies matters affecting the family, including the effects of abortion.

The central issue in this case—parental notification and consent for minors undergoing abortions—represents a unique intersection of the concerns of Focus on the Family and the Family Research Council. The issue of parental consultation goes to the heart of the parent-child relationship, and the proper involvement of the state in protecting that relationship from undue interference or preemption. Both Focus on the Family and the Family Research Council have significant and substantial knowledge and experience in this area that can assist this Court.

Amicus **Rachel Ely** was a seventeen year old unmarried high school student when she learned that she was pregnant. Her high school counselor recommended that she have an abortion, arranged for State funding for the abortion, and recommended a particular abortion clinic. No other alternatives were discussed. Rachel was afraid to tell her parents that she had become pregnant. Because Rachel was not aware

of any alternatives, she consented to the abortion. Had Rachel's parents known their daughter was pregnant, they would have provided her with the alternatives of keeping her child or placing the child for adoption.

After her abortion, Rachel received no discharge instructions from her physician. Several days later she developed some flu-like symptoms in her chest, which she did not associate with her abortion because she believed that any symptoms she might have as a result of a complication from an abortion would be in her pelvic area. She went to her family doctor when these symptoms became worse. She did not tell the doctor about the abortion because she did not think the symptoms were related.

Sometime later, Rachel became very sick, and her father took her to a local hospital because of her persistent flu-like symptoms. The next morning Rachel was found in her hospital bed in a comatose condition. Subsequently, it was discovered that she had developed bacterial endocarditis—a condition directly attributable to a post-abortion surgical infection. The bacterial endocarditis had caused blood clots to develop and become lodged in the vascular system of her brain, causing a stroke. When Rachel recovered from her coma, she was left a permanently wheelchair-bound hemiplegic.

Had Rachel's parents been notified of the abortion, they would have questioned the possible relationship between the abortion and Rachel's symptoms. With simple antibiotic therapy, her devastating life-long disabilities would not have occurred.

Amicus **Myoshi Callahan** was fifteen when she had an abortion without her parents' consent. To use Myoshi's words, deciding to have an abortion was like a skydiver's "free fall." Her boyfriend and she decided—in view of the fact that they'd planned on getting maried anyway—that the "solution" to the situation was to get marrried "now instead of later." However, when his parents learned of her condition their reaction was

one of total, incensed rejection. They insisted that the only way the situation could be resolved was for her to have an abortion.

Earlier, when Myoshi had informed her mother that she was pregnant, she was aware that her mother was terribly disappointed in her. She wasn't angry, she didn't reject her, but Myoshi knew that the overriding reaction was disappointment. To her young mind, having the baby would only add to her mother's disappointment, and in view of her boyfriend's parents' reaction to her pregnancy, she "free fell" into deciding on an abortion without notifying her parents.

At the clinic, she received no counselling whatsoever. As she says, what does one know at fifteen? Her "choice," according to them, was abortion. Unfamiliar with the strategy of the clinic, afraid, and to her mind, alone, she had the abortion.

As a result of the procedure, Myoshi's periods became (and continued to be) abnormally severe, and she eventually had to have a hysterectomy. Emotionally and physically, she has suffered and continues to suffer. She has since told both parents, who grieved with her—grieved not only at the lost life, but because Myoshi went through the ordeal alone, an ordeal that would have been prevented had their consent been mandatory.

Myoshi is convinced that lack of parental notification and consent abrogates a parent's rights. "After all," she says, "how better to demonstrate responsibility and love than by giving them the benefit of their (mature) advice, and in my case, withholding their consent." She has no doubt whatsoever that had their consultation for an abortion been mandatory, she would never have had an abortion.

Amici **Teresa Wibblesman Fangman, Holly Trimble,** and **Linda Roselli** are women who procured abortions as minors without their parents' knowledge. To a large extent, their abortion decisions were uninformed. In retrospect, they believe that prior notice of their abortions to their parents would have significantly altered their experiences dealing with

their problem pregnancies. The *amici* are aware of the parental notice requirement at issue in this case, and they offer their experiences to the Court to illustrate the need many young girls have for that protection in making abortion decision.

Teresa Wibblesman was sixteen years old when she learned she was pregnant. She had been raised in a Catholic home and attended parochial schools. All she knew about abortion was that it would "take care of" the problem. No one at the family planning center, where her pregnancy was diagnosed, offered her any counseling except a referral to an abortion clinic. She made her decision to abort primarily because she was afraid to tell her parents of her pregnancy; she did not want them to know she had disappointed them. Her boyfriend took her from her Ohio home to a Louisville, Kentucky abortion clinic. At the clinic she signed consent forms which were placed in front of her without explanation. She does not remember reading the forms. The only counseling she received at the clinic was a brief description of the abortion procedure using a plastic anatomy model, given to a group of seventeen girls at once.

Teresa's abortion proceeded smoothly and she suffered no known physical complications. The abortion exacted an emotional toll, however. Teresa blocked the abortion from her mind but her self-worth had plummeted. She slipped into promiscuity and drug and alcohol abuse. She began to play what she calls "car games"—closing her eyes while driving over bridges, or accelerating on the freeway and closing her eyes until fear forced her to open them again.

Five years after Teresa's abortion, her fifteen-year old sister was impregnated on a "date rape." Teresa's sister, rather than obtaining a secret abortion, went to her parents with her problem. Together, they decided that the child would be carried to term and placed for adoption. Seeing her sister's trust in her parents and their warm support for her in her crisis produced feelings of jealousy in Teresa, causing her to wish she had handled her pregnancy the same way.

Nearly six years after her abortion, Teresa consciously acknowledged that she felt tremendous guilt over the abortion. Although she was still unmarried, she determined a time when she would be fertile and deliberately became pregnant on a "one-night stand." She made adoption arrangements in Louisville. Her little girl was born on the anniversary of her abortion. Teresa took her to Louisville for adoption to "replace" the child she had aborted there.

Teresa is convinced that if she had known at the time of her abortion decision what she now knows about her parents' supportive reaction to a problem pregnancy, she would not have chosen to abort. Thus, a parental notice requirement would, in Teresa's case, have saved her from the anguish which followed a decision that turned out to have been wrong for her.

Holly Trimble was also sixteen years old when she became pregnant. She was personally opposed to abortion, but she was afraid her parents would be hurt if they knew of her pregnancy. Her boyfriend's older brother and his girlfriend persuaded her that obtaining a secret abortion was the best thing for her to do. Holly recalls that she was not in good condition to make a decision; the pregnancy made her feel ill, and she was vomiting every day. Although she was ten weeks pregnant, she believed at the time that her fetus was just a "little egg." Prior to her abortion, she asked a matronly counselor at a state family planning office if women felt badly after abortions. "No, they're usually relieved because they can go on with their lives," she was told. "Sometimes a woman is bothered if she feels the fetus move before her abortion and she thinks it's alive; but she shouldn't because it's really not." She asked the physician about possible physical complications and was told by him that an abortion was much safer than carrying the child to term.

Within a week of her abortion, Holly did begin to feel badly about it. Because the main purpose of her abortion was to hide her pregnancy from her parents, she could not talk to them about her turmoil. When *Life* magazine ran pictures of ten--

week-old fetuses, Holly saw them and became horrified at what she had done. She felt intense guilt whenever she saw a baby. Eventually she sought help from a priest and her conscience was temporarily assauged. However, she abused drugs for several years and developed an eating disorder which lasted a decade.

Nine years later, Holly had married and become pregnant. She had learned more about fetal development and was acutely aware of the new life she was carrying within her body. That awareness stirred up memories and remorse over her earlier. Her depression became so severe that she sought professional help. Her psychiatrist finally hospitalized her in the psychiatric ward of a local hospital three months after the birth of her son. Eventually she was referred to another psychiatrist who placed her on anti-depressant medication for several months. Only after careful counseling did she improve to the point where she was able to go through another pregnancy and post-partum period without debilitating depression.

Holly still looks back at her abortion decision with great regret. She believes that if she had not felt it necessary to shield her parents from knowledge of her pregnancy, she would not have obtained her bortion. She also is certain that, if she had been exposed to information about fetal development at the time of her decision, she would have chosen to carry her child to term.

Linda Roselli was fifteen when she had an abortion without the consent of her parents. She went to a Planned Parenthood clinic to have a pregnancy test. With hindsight, she says now that she was a very "unenlightened" fifteen-year-old and, based on what she had watched on television, "suspected" that she might be pregnant. The people at Planned Parenthood told her she was losing her baby and arranged her next appointment. Linda returned thinking that they were going to help her through what she thought was to be a premature birth. She felt sure her mother would help her look after the baby, once it was born.

On the morning of the abortion they dilated her, put in a "seaweed," and told her to come back in the afternoon. When she returned to the clinic in the afternoon, Linda told them that "something was wrong." She was still under the impression that what was happening was all part of having a premature baby. She refused to take the drug (she believes it was Valium) they gave her. They ignored her tears and pleas for her mother. She was then strapped to the table, a needle was inserted into her stomach, and they hooked her up to a machine that, she recalls, made a noise like a vacuum cleaner. While this was happening, the nurse held her head down, telling her "not to look." When the noise stopped, she did look. She saw the large jar, and realized that they had performed an abortion, and that her baby was dead.

Yet the fact that her baby had been aborted did not "register" in her mind, and she kept crying and screaming and asking what they had done to her baby. When she insisted that all she had wanted was a pregnancy test and (on being told that she was losing her baby) help in delivering a "premature" baby, they produced the papers she had signed—unfortunately without questioning the people at the clinic, or reading the papers for herself.

Linda's mother did not know of her abortion at the time. Linda has since learned that if she had sought her mother's permission, it would not have been given and the abortion would not have been done. She knows now that her mother would instead have helped her raise her baby.

Emotionally, Linda has suffered greatly. It took her several years to learn to live with the guilt she felt. She says she "felt unclean." It seemed to her as though she would always be sad, and that the whole world knew, and considered her to be "a pig." For many years, she would not go out with boys; she says she was afraid of men. For many years—in fact, until approximately five or six months ago—Linda would go to a Planned Parenthood clinic rather than go to their family doctor because she felt ashamed and embarrassed.

To use Linda's words, "These people at the clinics don't really care. Never once did they offer any counselling, and never once did they suggest helping me to keep the baby. Parents *must* give their consent.

Ann Maire Lozinski, Debra's mother, had absolutely no idea that her daughter was pregnant, and therefore no knowledge that Debra had decided to have an abortion. On April 11, 1985, while Debra was on Easter vacation, she went to the clinic, accompanied by her girlfriend. There, the abortion was performed without adequate care. They did not monitor Debra during the procedure. No airway was inserted, and during the surgery Debra swallowed her tongue. The attendants at the clinic were unable to restore her breathing and consciousness to normal. Debra's mother was called at work by the Director of the clinic, who informed her that her daughter was at the clinic for "minor surgery," and that she (Debra) was having "respiratory problems." They rushed Debra to the hospital, where she lay in a coma for two-and-a-half months. Debra died on June 21, 1985.

The emotional toll on the family has been immeasurable. Since that time, Mrs. Lozinski has gone downhill emotionally. She has had professional counselling, but is still depressed. She and Debra had an extremely close relationship, and she is convined that Debra's reason for deciding on an abortion was to avoid hurting her mother. Had it been mandatory for Debra to obtain parental consultation in order to have an abortion, Mrs. Lozinski is certain they would have worked it out and that neither Debra nor the baby would have been lost. The trauma of Debra's abortion and death have been, if not insurmountable, then unforgettable. Debra's nineteen-year-old brother is "very bitter." And as Debra's mother says, "the law will not allow children at school to be given an aspirin without parental consent, yet a clinic is allowed to perform an abortion on a minor without even letting the parents know, leave alone getting their consent." She is positive that had she known Debra had gone to the clinic for an abortion, they would never have

given their consent and Debra and the baby would be alive today.

Mrs. Lozinski unequivocally believes that this should be made the law of the land. Primarily it would save lives, but it would avoid, in her words "the heartaches that never goes away."

Amicus **Robert C. Wibblesman** is the father of *amicus* Teresa Wibblesman Fangman. He recalls, with deep regret, the "terrible guilt she had to carry all by herself," for the six years from the time of her abortion until he eventually learned what had happened. Recalling that period, Mr. Wibblesman says:

> I knew that she was having psychological problems . . . [b]ut I thought this was a carry over from the early death of her Mother. How wrong I was. How tough it was for her to carry the inevitable guilt of finally realizing that "I killed my baby." She carried that guilt all by herself.

Mr. Wibblesman is convined that if his consultation with his daughter had been required, "all of this could have been avoided." His experience supports that conclusion. As related in Teresa's story, Mr. Wibblesman had a second daughter who also became pregnant. Fortunately, she confided in her father and stepmother, and they provided care and support for her throughout the pregnancy. This second daughter's experience was not without pain. As Mr. Wibblesman describes it, he is "sure she still has the hurt of knowing that there is a child out there somewhere whom she loves. But she certainly doesn't have the guilt trip that Terri had to carry by herself all these years." Thus, Mr. Wibblesman can testify to the drastically different results that can occur, depending on whether or not parents are involved in this most critical decision for adolescent women.

Amicus **American Victims of Abortion** (AVA) is a national organization of persons whose lives have been adversely affected by abortions—their own or a family member's. The

objective of AVA is to provide a forum for these individuals to educate legislatures and the public about the tragic consequences of abortion for some women. Based on the experiences of AVA members who obtained abortions as minors, AVA supports legislation, such as the parental consultation statutes at issue in this case, which may protect young women from making uninformed abortion decisions.

APPENDIX B

THE CONFUSED STATE OF PARENTAL CONSULTATION LAW

1. The following twenty one states require parental consent before a minor can obtain an abortion: Alabama, Ala. Code § 26-21-3 (Supp. 1988); Alaska, Alaska Stat. § 18.16.010 (1987); Arizona, Ariz. Rev. Stat. Ann. § 36-2151 (Supp. 1987; Arkansas, Ark. Stat. Ann. § 41-2555 (Supp. 1985); California, Cal. Health & Safety Code § 25958 (Supp. 1988); Delaware, Del. Code Ann. tit. 13, § 708 (1981); Florida, Fla. Stat. Ann. § 390.001(4)(a) (West Supp. 1985); Indiana, Ind. Code Ann. § 35-1-58.5-2.5 (Burns, Supp. 1988); Kentucky, Ky. Rev. Stat. Ann. § 311-732 (1983); Louisiana, La. Rev. Stat. Ann. § 40.1299.35.5 (West, Supp. 1988); Massachusetts, Mass. Ann. Laws. Ch. 12 § 125 (Law Co-op. 1985); Mississippi, Miss. Code Ann. § 41-41-53 (1988); Missouri, Mo. Stat. § 188.028 (Vernon, Supp. 1988); North Dakota, N.D. Cent. Code § 14.02.1-03.1 (Supp. 1987); Oklahoma, Okla. Stat. Ann. tit. 63, § 1-738 (West 1984); Pennsylvania, Pa. Stat. Ann. tit 1, § 3206 (Purdon1983); Rhode Island, R.I. Gen. Laws § 23-47-6 (1985); South Dakota, S.D. Codified Laws Ann. § 34-223A-7 (1986); South Carolina S.C. Code Ann. § 44-41-30 (Law Co-op. 1985); Tennessee, Tenn. Code Ann. § 39-4-202 (1982); Washington, Wash. Rev. Code § 9.02.070 (1985). *See* Appellant's Jurisdictional Statement (J.S.) at 14, in *Ohio* v. *Akron Center For Reproductive Health*, No. 88-805 (U.S.) (Akron II).

2. The following twelve states require parental notification in the event a minor chooses to have an abortion: Georgia, Ga. Code Ann. § 24A-4401 (Supp. 1988); Idaho, Idaho Code § 18-609(6) (1988); Illinois, Ill. Ann. Stat. ch. 38, § 81-64 (Smith-Hurd Supp. 1988); Maine, Me. Rev. Stat. Ann. tit. 22 § 1595 (1980 & Supp. 1988); Maryland, Md. Health-Gen. Code Ann. § 20-103 (1987); Minnesota, Minn. Stat. Ann. § 144.343(3) (Supp. 1988); Montana, Mont. Code. Ann. § 50-20-105 (1987); Nebraska, Neb. Rev. Stat. § 28-347 (1985); Nevada, Nev. Rev. Stat. § 442.255 (1986 & Supp.

1988); Ohio, Ohio Rev. Code. Ann. § 2919.12 (Page Supp. 1985); Utah, Utah Code Ann. § 76-7-304 (1978); West Virginia, W. Va. Code § 16-2F-3 (1985). *See Akon* II, Appellant's J.S. at 14.

3. Sixteen states have had their parental consultation law stayed or enjoined. Arkansas (*Smith* v. *Bentley*, 493 F. Supp. 916 (E.D. Ark. 1980); Florida (*Scheinberg* v. *Smith*, 659 F.2d 476 (5th Cir. 1981), and *Jacksonville Clergy Consultation Serv.* v. *Martinez*, No. 88-809—CIV-J-16, 1988. U.S. Dis. Lexis 11088 (M.D. Fla., October 6, 1988); Georgia (*Planned Parenthood Ass'n of Atlanta Area, Inc.* v. *Harris*, 691 F. Supp. 1419 (N.D. Ga. 1988); Illinois, (*Zbaraz* v. *Hartigan*, 763 F.2d 1532 (7th Cir. 1985) *aff'd* mem. 108 S. Ct. 479 (1987); Indiana (*Gary-Northwest Women's Serv. Inc.* v. *Bowen*, 421 F. Supp. 734 (N.D. Ind. 1976, *aff'd*, 429 U.S. 1067 (1977); Kentucky (*Eubanks* v. *Collins*, 604 F. Supp. 141 (W.D. Ky. 1984); Maine (*Women's Community Health Center* v. *Cohen*, 477 F. Supp. 542 (D. Me. 1979); Mississippi (*Barnes* v. *Mississippi, No. J86-0458W* (stayed)); Nebraska (*Orr* v. *Knowles*, No. C.V.-81-0-301 1983 WL. 1570 (D. Neb. Sept. 19, 1983)); Nevada (*Glick* v. *McKay*, 616 F. Supp. 322 (Nev. 1985)); Ohio (*Akron Center for Reproductive Health* v. *Slaby*, 854 F.2d 852 (6th Cir. 1988) (*Akron* II)); Pennsylvania (*Planned Parenthood of Southeastern Pennsylvania* v. *Case*, 686 F. Supp. 1089 (D. S.C. 1977)); South Carolina (*Floyd* v. *Aders*, 440 F. Supp. 535 (D.S.C. 1977)); Tennessee (*Planned Parenthood of Nashville* v. *Alexander* No. 79-843-II (Tenn. Chauncery Ct. Oct. 24, 1979)); Utah (*L. R.* v. *Hanson*, No. C80-0078 J (D. Utah Feb. 8, 1980) (Utah statute unconstitutional as it applies to mature emancipated minors)); and Washington (*State* v. *Koome*, 84 Wash.2d 901, 530 F.2d 260 (1975). *See Akron II*, Appellant's J.S. at 15.

4. Only five state's parental consultation laws have passed constitutional muster. Louisiana consent state (*Margaret S.* v. *Treen*, 597 F. Supp. 636 (T.D. La. 1984); Massachusetts consent statute (*Planned Parenthood League* v. *Bellotti*, 641 F.2d 1006 (1st Cir. 1981); Missouri consent statute

(*Planned Parenthood Ass'n of Kansas City* v. *Ashcroft*, 462 U.S. 476 (1983); Minnesota notice statute (*Hodgson* v. *Minnesota*, 853 F.2d 1452 (8th Cir. 1988) *(en banc);* Utah notice statute (*H. L.* v. *Matheson, 450 U.S. 398 (1981) (constitutional as it applied to "immature" minors). See* Akron II, Appellant's J.S. at 15.

5. The following eight decisions on parental consultation have been rendereed by the U.S. Supreme Court with conflicting results. *Planned Parenthood* v. *Danforth*, 428 U.S. 82 (1976) (no blanket parental consent requirement); *Bellotti* v. *Baird I*, 428 U.S. 132 (1976) (Abstained and certified nine questions to State Supreme Court); *Bellotti* v. *Baird II*, 443 U.S. 622 (1979) (declined to equate notification requirements with consent requirements, but required a judicial bypass alternative in parental consent laws); *H. L.* v. *Matheson*, 450 U.S. 398 (1981) (Utah notification law upheld without judicial bypass procedure); *Planned Parenthood Ass'n* v. *Ashcroft*, 462 U.S. 476 (1983) (Missouri consent law upheld with judicial bypass procedure); *City of Akron* v. *Akron Center for Reproductive Health*, 462 U.S. 416 (1983) (*Akron* I—Ohio consent law with limited judicial bypass procedure held unconstitutional); *Thornburgh* v. *American College of Obsetetricians and Gynecologists*, 476 U.S. 747 (1986) (Pennsylvania consent law with judicial bypass procedure remanded); *Hartigan* v. *Zbaraz*, 763 F.2d 1532 (7th Cir. 1985) *aff'd mem 108 S. Ct. 479 (1987) (aff'd* without opinion *per curiam*) (Illinois notification law with judicial bypass procedure held unconstitutional by Court's split decision)

Nos. 88-805, 88-1125 and 88-1309

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF OHIO,

Appellant,

v.

AKRON CENTER FOR REPRODUCTIVE HEALTH, *et al.*,

Appellees.

On Appeal from the United States Court of Appeals for the Sixth Circuit

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JANET HODGSON, MD., *et al.*,

Petitioners and *Cross Respondents,*

v.

THE STATE OF MINNESOTA, *et al.*,

Respondents and *Cross Petitioners.*

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR *AMICI CURIAE* AMERICAN PSYCHOLOGICAL ASSOCIATION, NATIONAL ASSOCIATION OF SOCIAL WORKERS, INC., AND THE AMERICAN JEWISH COMMITTEE IN SUPPORT OF PETITIONERS/CROSS-RESPONDENTS IN NOS. 88-1125, 88-1309 AND IN SUPPORT OF APPELLEES IN NO. 88-805

MARK D. SCHNEIDER
1300 Connecticut Ave., N.W.
Room 810
Washington, D.C. 20036
(202) 857-5250

DONALD N. BERSOFF
(Counsel of Record)
SUSAN R. PODOLSKY
JENNER & BLOCK
21 Dupont Circle, N.W.
Washington, D.C. 20036
(202) 223-4400
Attorneys for Amici Curiae

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BRIEF FOR *AMICI CURIAE* AMERICAN PSYCHOLOGICAL ASSOCIATION, NATIONAL ASSOCIATION OF SOCIAL WORKERS, INC., AND THE AMERICAN JEWISH COMMITTEE IN SUPPORT OF PETITIONERS/CROSS-RESPONDENTS IN NOS. 88-1125, 88-1309 AND IN SUPPORT OF APPELLEES IN NO. 88-805

INTEREST OF *AMICI CURIAE*[1]

The American Psychological Association (APA), a nonprofit scientific and professional organization founded in 1892, is the major association of psychologists in the United States. APA has more than 75,000 members, including the vast majority of United States psychologists holding doctoral degrees. APA's purposes are to advance psychology as a science and profession, and to promote human welfare.

The National Association of Social Workers, Inc. (NASW), a non-profit professional association with over 120,000 members, is the largest association of social workers in the United States. NASW is devoted to promoting the quality and effectiveness of social work practice, to advancing the knowledge base of the social work profession and to improving the quality of life through utilization of social work knowledge and skills.

The American Jewish Committee (AJC) is a national organization founded in 1906 for the purpose of protecting the civil and religious rights of Jews. The AJC believes that this goal can best be accomplished by helping to preserve the constitutional rights of all Americans, including access to abortion on a voluntary basis.

The parental notice and waiting period requirements at issue in these cases are premised upon the States' as-

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[1] The parties have consented to the submission of this brief. Their letters of consent are on file with the Clerk of this Court.

sumptions that, in relevant ways, minors are more psychologically vulnerable than adults, that they are immature and unable to make competent choices concerning abortion, and that such requirements will foster intrafamily communication and cooperation while not harming the adolescents affected. The validity of these legislative assumptions has been tested through empirical research conducted by social scientists. Social science research is also relevant to the arguments of the professionals, pregnant minors, and parents who challenge these requirements that the laws unduly burden minors' rights to choose whether to carry a pregnancy to term or abort. Much of the relevant research has been conducted by members of *amicus* APA; that research is presented in this brief.[2]

SUMMARY OF ARGUMENT

Most younger adolescents and many older adolescents voluntarily inform one or both parents about their pregnancies, and seek their counsel about the abortion decision. Where such consultation is voluntarily sought, adolescents are often benefitted. Mandatory parental notification laws have no effect on this group of pregnant minors, however; only those minors who otherwise would *not* involve their parents in the abortion decision are directly affected by these laws.

The empirical research suggests that such adolescents typically have good reasons not to involve their parents in the abortion decision. They may fear a hostile, even violent, reaction to the news that they have been sexually active and are now pregnant. In many cases, they may be from dysfunctional families in which one or both parents

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[2] Counsel gratefully acknowledge the assistance of APA members Bruce Ambuel, Ph.D., William Gardner, Ph.D., Julian Rappaport, Ph.D., and Lenore Walker, Ed.D., and APA staff members Brian Wilcox, Ph.D., and Janet O'Keeffe, Dr. P.H., in the preparation of this brief.

may be absent, or in which child abuse, including sexual abuse, has taken place. For such reasons, or simply wishing to protect their own informational privacy—an appropriate concern for adolescent females—pregnant minors in a State with a parental notification law may delay making the abortion decision, increasing the risk to their health of undergoing the procedure or leading to *de facto* decisions to carry to term. Point I.

Mandatory parental notification may actually undermine the very state interests it is meant to advance. In those families in which the minor daughter has chosen not to inform her parents, state-mandated notification is unlikely to produce greater intrafamily understanding or communication, and may well precipitate a family crisis or exacerbate existing family problems. Moreover, there are no data to suggest that adolescents are less capable than adults of making the abortion decision on their own. Furthermore, abortion itself, as a rule, relieves the stress associated with unwanted pregnancy rather than generates distress a parent (particularly one a minor would prefer to exclude from the process) could ameliorate. Point II.

Even with a bypass procedure, which in virtually every case results in affirmation of the minor's abortion decision but which itself deters some adolescents from seeking an abortion, parental notification laws unduly burden an adolescent's right to choose. *Without* a bypass procedure, the majority of pregnant adolescents who are competent to choose for themselves, and the significant number who would be placed at increased risk by notifying one or both parents, are faced with an intolerable choice: foregoing their right to abortion and becoming adolescent parents, on the one hand, or risking their physical or psychological health by complying with the notification statute, on the other. For these reasons, the Ohio and Minnesota statutes are both unconstitutional.

INTRODUCTION

These cases concern the constitutionality of Minnesota Statutes § 144.343 (1)-(7) ("the Minnesota statute") and Ohio Amended Substitute House Bill 319 ("the Ohio statute").[3] With certain exceptions, both statutory schemes prohibit a physician from performing an abortion upon a minor unless notice has been provided to the minor's parents. The Minnesota statute requires that the minor notify *both* parents 48 hours in advance of the procedure (whether or not her parents are living together or are or ever were married); unless judicially mandated, the scheme does *not* provide a judicial bypass through which mature minors or minors whose best interests would not be served by notification may be relieved of this obligation.[4] The Ohio statute requires notification of one parent, and establishes a bypass procedure that has been found unduly burdensome by the lower courts.

With or without a judicial bypass procedure, government certainly could not compel an *adult* to notify her parents or other third parties 24 or 48 hours before undergoing an abortion, because the burdens thereby imposed on the right to choose whether to abort or carry to term would not be justified by sufficiently weighty countervailing state interests. *See Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 67-72 (1976) (*Danforth*) (spousal veto of abortion decision ruled unconstitutional); *Doe v. Bolton*, 410 U.S. 179, 201 (1973) (third party veto of abortion decision ruled unconstitutional); *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 449-450 (1983) (*Akron I*) (24-hour waiting period unconstitutional). The validity of imposing such burdens on adolescents depends

[3] The key provisions of the Ohio statute are codified at Ohio Rev. Code Ann. §§ 2151, 2912.12, and 2505.073 (Page Supp. 1985).

[4] In the event a court invalidates the no-bypass provision, the statute provides that a bypass procedure will go into effect. This "backstop" provision was in effect for several years prior to the district court's final ruling.

upon whether doing so furthers state interests sufficiently to alter the balance.

This Court has recognized that "[t]he need to preserve the constitutional right and the unique nature of the abortion decision, especially when made by a minor, require a State to act with particular sensitivity when it legislates to foster parental involvement." *Bellotti v. Baird*, 443 U.S. 622, 642 (1979) (*Bellotti II*). Thus, although it has asserted that "during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them," *id.* at 635, the Court has been careful to reject a State's *per se* claim that *all* adolescents are incompetent and immature. Both in the abortion context and in other cases dealing with minors, the Court has taken a more individualized approach in assessing the competency and maturity of minors to make important decisions.[5]

Specifically, this Court has never suggested that all adolescents are incompetent to decide whether to have an abortion. To the contrary, the Court has recognized that

[5] Outside the abortion context, see *Fare v. Michael C.*, 442 U.S. 707, 727 (1979) (Court applied such factors as adolescent's age, experience, education, background, and intelligence, in concluding that a 16-year old "voluntarily and knowingly waived his Fifth Amendment rights."); *id.* at 734 n.4 (Powell, J., dissenting) (recognizing that each case must be judged on its own merits, including an evaluation of the "minor's age" and "actual maturity."); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 608 (1982) (it violated first amendment to statutorily exclude press and public from courtroom during testimony of all victims of sexual offenses under age 18; the Court opted for case-by-case determination, including an analysis of the "minor victim's age, psychological maturity and understanding, [and] the desires of the victim."); *cf. Stanford v. Kentucky*, 109 S. Ct. 2969, 2979 (1989) (plurality opinion) (permissible for State to execute 16-year-old in cases in which adolescent has a developed moral sense).

the legal status of "minority" encompasses wide ranges of age and maturity levels. *See Danforth*, 428 U.S. at 75. It is only "immature minors" whom the Court perceives as sometimes lacking "the ability to make fully informed choices." *Bellotti II*, 443 U.S. at 640.[6] Thus, a mature minor's decision to have an abortion may not be made subject to her parent's veto. *Akron I*, 462 U.S. at 440; *Bellotti II*, 443 U.S. at 642-643; *Danforth*, 428 U.S. at 74-75. Indeed, the Court has held that "a blanket determination that all minors under the age of 15 are too immature" to make a decision related to procreation is unconstitutional. *Akron I*, 462 U.S. at 440.

The constitutionally recognized difference between immature and mature minors, *see Bellotti II*, 443 U.S. at 643-644 and n.23, is relevant in evaluating the relative benefits and burdens of a statute that requires all adolescents to consult with their parents before obtaining an abortion.[7] As discussed below, *see* Point II, *infra*, there is no empirical evidence to suggest that adolescents by about age 14 are less competent to consent to abortion than adults, or that at least some younger adolescents do not possess similar competence.[8]

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[6] *See Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476, 490-491 (1983) (the State's interest is limited to "protecting immature minors").

[7] In related contexts, the "mature minor" doctrine permits a child to consent to medical treatment if he or she is capable of appreciating its nature and consequences. *See* Wadlington, *Minors and Health Care: The Age of Consent*, 11 OSGOODE HALL L.J. 115, 117-120 (1973); *see also H.L. v. Matheson*, 450 U.S. 398, 450 n.49, 453 (1981) (Marshall, J., dissenting), and cases cited therein.

[8] Indeed, it is difficult to reconcile the idea that minors are less competent than adults to consent to abortion with the fact that state law typically allows a minor parent—whatever her age—to consent not only to the health care of her child, but to her own health care as well, including abortion. *See* J. MORRISSEY, A. HOFFMAN, and J. THROPE, CONSENT AND CONFIDENTIALITY IN THE

ARGUMENT

I. COMPELLING DISCLOSURE TO HER PARENTS OF A MINOR'S PREGNANCY AND DECISION TO HAVE AN ABORTION IMPOSES A SUBSTANTIAL BURDEN ON THE MINOR'S RIGHT TO CHOOSE.

A. Parental Notice Provisions Most Directly Affect Those Adolescents Who—For A Variety Of Compelling Reasons—Believe They Cannot Consult With Their Parents About The Abortion Decision, And Unduly Burden Their Right To Obtain An Abortion.

Most adolescents, and younger adolescents in particular, can profit from *sympathetic* guidance from a parent or other adult concerning important choices, such as decisions concerning pregnancy. Research demonstrates that most minors—especially young adolescents aged 11-14—generally do consult their parents about their pregnancies, regardless of legal mandates.

Thus, one study found that approximately three-fourths of minors aged 15 or younger voluntarily informed their parents before they obtained an abortion,[9] and 25% of this group reported that their parents suggested the abortion.[10] In States requiring that minors either inform parents or obtain their consent prior to obtaining an abor-

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HEALTH CARE OF CHILDREN AND ADOLESCENTS 43 (1986) [hereinafter MORRISSEY, HOFFMAN and THROPE].

[9] Torres, Forrest & Eismann, *Telling Parents: Clinic Policies and Adolescents' Use of Family Planning and Abortion Services*, 12 Fam. Plan. Persp. 284, 287-290 (1980) [hereinafter *Telling Parents*]. *See generally* Mnookin, Bellotti v. Baird: *A Hard Case in* IN THE INTEREST OF CHILDREN: ADVOCACY, LAW REFORM, AND PUBLIC POLICY 149, 240-241 (R. Mnookin ed. 1985) [hereinafter Mnookin]; Clary, *Minor Women Obtaining Abortions: A Study of Parental Notification in a Metropolitan Area*, 72 Am. J. Pub. Health 283, 284 (1982) [hereinafter *Clary*]; Rosen, *Adolescent Pregnancy Decision-making: Are Parents Important?* 15 Adolescence 44 (1980) [hereinafter Rosen].

[10] *Telling Parents, supra* note 9, at 290; NATIONAL ACADEMY OF SCIENCES, RISKING THE FUTURE: ADOLESCENT SEXUALITY, PREG-

tion, young adolescents rarely use judicial bypass procedures.[11] Older adolescents who are unusually ambivalent about the abortion decision and who perceive themselves as relatively incompetent decisionmakers also are likely to voluntarily involve their parents in the decision.[12] In general, however, older adolescents fully competent to decide medical questions for themselves do not consult their parents about abortion as frequently as do young adolescents.[13]

Parental notice laws result in later, more hazardous, and more expensive abortions, and in minors carrying to term. In Minnesota, the district court found that the burdens of parental notification—even with bypass procedures available—cause "[s]ome mature minors and some minors in whose best interests it is to proceed without notifying their parents . . .to carry to term." *Hodgson v. Minnesota*, 648 F. Supp. 756, 763 (D. Minn. 1986). In Massachusetts, a smaller jurisdiction where it is less difficult to travel out-of-State to obtain an abortion, mandatory parental notification did not change the number of women who became pregnant, gave birth, or obtained abortions.[14] But the law did force approximately one-

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NANCY, AND CHILDBEARING 113 (1987) [hereinafter NAS REPORT]. Only 8% of 17-year-olds who obtain abortions report that they did so at their parents' suggestion. *Telling Parents, supra* note 9, at 290.

[11] Nearly 90% of minors who use judicial bypass procedures are aged 16-17. Donovan, *Judging Teenagers: How Minors Fare When They Seek Court-authorized Abortions*, 15 Fam. Plan. Persp. 259, 261 (1983) [hereinafter *Judging Teenagers*].

[12] *Rosen, supra* note 9, at 48.

[13] In a large, multi-state study, the proportion of minors who decided, without parental consultation, to carry to term was similar to the proportion who decided to seek an abortion without parental consultation. *Rosen, supra* note 9, at 46. *See, e.g.*, Brittain, *Adolescent Choices and Parent-Peer Cross-Pressures*, 28 Am. Soc. Rev. 385 (1963) [hereinafter Brittain].

[14] *See* Cartoof & Klerman, *Parental Consent for Abortion: Impact of the Massachusetts Law*, 76 Am. J. Pub. Health 397, 400 (1986).

third of the minors in the State seeking an abortion to leave the State and obtain the abortion in a jurisdiction without a parental consent statute. *Id.* [15]

Thus, mandatory parental notification creates substantial obstacles for many adolescents choosing to abort their pregnancies: they may have fewer, later, or more expensive abortions because they wish to avoid notifying one or both of their parents.

B. Mandatory Parental Notification Harms Some Adolescents Who Otherwise Would Not Involve Their Parents In The Abortion Decision.

Both courts and social scientists have identified the reasons mandatory notification has these deleterious effects. On the basis of a detailed record, the *Hodgson* court found that after five years of operation the compelled notice required by the Minnesota statute almost always had a negative impact, frequently harming the child's welfare. 648 F. Supp. at 764, 768-769. The court found as a matter of fact that compelled two-parent notification in families with a non-custodial or absent parent was typically disruptive, and led to violence and abuse in dysfunctional families. *Id.* at 769.[16]

Data support the district court's findings. One study of parental reaction to adolescent daughters' pregnancies showed that such an announcement typically evoked an initial response of anger and disappointment, and triggered a crisis in the family.[17] And anger is not the only response an adolescent need fear. A major government study has estimated that in 1986, more than one million

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[15] Approximately twice as many women chose to leave the State to obtain their abortions as chose to utilize the judicial bypass. *Id.* at 398, 399.

[16] Appendix to Petition for a Writ of Certiorari in *Hodgson v. Minnesota*, No. 88-1125, filed January 4, 1989 at 141a (testimony of Dr. Lenore Walker).

[17] *See, e.g.*, Osofsky & Osofsky, *Teenage Pregnancy: Psychosocial Considerations*, 21 Clinical Obstetrics & Gynecology 1161 (1978).

children and adolescents nationwide had already experienced demonstrable harm as a result of abuse or neglect.[18]

In light of the relatively widespread nature of intrafamily abuse, it is not surprising that in about one-third of cases in which adolescents do not inform their parents about their pregnancy and planned abortion, they are motivated by fear of physical punishment or some other severe reaction.[19] Research on domestic violence has demonstrated that pregnancy does not deter and may even precipitate physical attacks by batterers.[20] Adolescents may particularly fear telling their parents about a pregnancy if it is the result of sexual abuse. Research indicates that such abuse—both extrafamilial and intrafamilial—is disturbingly common.[21] Compelling parental in-

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[18] NATIONAL CENTER ON CHILD ABUSE AND NEGLECT, U.S. DEP'T HEALTH AND HUMAN SERVICES, STUDY OF NATIONAL INCIDENCE AND PREVALENCE OF CHILD ABUSE AND NEGLECT: 1988 at xx (1989) [hereinafter HHS STUDY]. This figure is considered to be a minimum estimate because the incidence of abuse is substantially underreported. *Id.* at 7-2. *See generally* Gelles & Strauss, *Behind Closed Doors—Violence in the American Family*, 35(2) J. Soc. Issues 15, 24 (1979) [hereinafter Gelles & Strauss].

[19] Clary, *supra* note 9, at 284. Even if an adolescent misjudged her parents' response, the perception may be more important than the reality in causing adolescents to delay seeking medical assistance or making a decision whether to abort.

[20] Gelles, *Violence and Pregnancy: A Note On The Extent Of The Problem And Needed Services*, 24 Fam. Coordinator 81 (1975).

[21] *See generally* D. FINKELHOR & ASSOC., A SOURCEBOOK ON CHILD SEXUAL ABUSE (1986); HHS STUDY, *supra* note 18, at xx-xxi. *See also* Moore, Nord & Peterson, *Nonvoluntary Sexual Activity Among Adolescents*, 21 Fam. Plan. Persp. 110, 111 (1989) (data from the 1987 National Survey of Children indicate that 9 percent of 17-year olds, 7.5 percent of 16-year olds, 6.3 percent of 15-year olds and 5.8 percent of girls 14 and under have experienced nonvoluntary sexual intercourse; adolescent girls with parents who abuse alcohol and drugs were two to three times more likely to have experienced nonvoluntary sexual intercourse; sixty-eight percent of white females with three or more risk factors had been sexually abused before or during adolescence); Russell, *The Incidence and Prevalence of Intrafamilial and Extrafamilial Sexual Abuse of Female Children in* HANDBOOK ON SEXUAL ABUSE OF CHILDREN 19, 25 (L. Walker, ed. 1987) (research on a probability sample of 930 women found that 16 percent reported at least one experience of intrafamilial sexual abuse before the age of 18 and 12 percent had been sexually abused by a relative before 14 years of age; 31 percent reported at least one experience of sexual abuse by a non-relative before the age of 18).

volvement in such instances, particularly if the pregnancy is the result of incest, is likely to intensify or exacerbate an already traumatic and emotionally volatile situation.

Moreover, in many cases involving older adolescents, compelled disclosure will burden a young woman's interest in informational privacy.[22] The protection of privacy and the maintenance of control over personal information in sexual matters is an especially vital concern of adolescent females.[23] As the *Hodgson* district court found, based upon presentation of empirical research and clinical experience, assertion of privacy is a mark of maturity and psychological adaptation among adolescents. *Hodgson v. Minnesota*, 648 F.Supp. at 767, 775. Depriving an adolescent female of autonomy in making the abortion decision often imposes far more stress on her than does making the decision itself or undergoing the medical procedure. *Id.* at 763-764.

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[22] This interest is partially responsible for the rarity of parent-daughter discussions about sexual matters. Adolescents' discomfort in initiating or participating in such discussions, *see* Dubbe, *What Parents Are Not Told May Hurt: A Study Of Communication Between Teenagers And Parents*, 14 Fam. Life Coordinator 96, 97, 98 (1965); *see generally* Fox & Inazu, *Mother-Daughter Communication About Sex*, 29 Fam. Rel. 347 (1980), reflects, in part, a developmentally appropriate concern with privacy.

[23] *See* Melton, *Decision Making by Children: Psychological Risks and Benefits in* CHILDREN'S COMPETENCE TO CONSENT 21 (G. Melton, G. Koocher & M. Saks eds. 1983); Parke & Swain, *Children's Privacy in the Home: Developmental, Ecological, and Child-Rearing Determinants*, 11 ENV'T & BEHAV. 87 (1979); Wolfe, *Childhood and Privacy in* CHILDREN AND ENV'T 175 (I. Altman & J. Wohlwill eds. 1978); Laufer & Wolfe, *Privacy as a Concept and a Social Issue*, 33(3) J. Soc. Issues 22 (1977).

Many States recognize the need to respect minors' privacy—and their competence—in making sensitive and important decisions concerning their health and future. Most States presume a minor competent to consent without parental notification to treatment for sexually transmitted diseases, mental health treatment, and medical treatment related to pregnancy, and recognize the crucial role confidentiality plays in permitting minors to obtain access to vitally necessary health services.[24] Minnesota singles out abortion as requiring parental notification. Minn. Stat. § 144.343(1). Additionally, States typically allow minors, whatever their age, to consent to their own health care once they become parents.[25]

Thus, parental consent laws risk causing harm to many of the adolescents they are intended to protect. For a variety of legitimate reasons—fear of domestic physical or psychological violence or appropriate concern for personal privacy—many adolescents will delay or avoid their decision to abort or carry to term, or go out of State to obtain the abortion if feasible, rather than comply with the notification requirement.

C. Minnesota's Two-Parent Notification Requirement Places Extraordinary Burdens On Many Adolescents.

Minnesota's requirement that *both* parents be notified is directed at those adolescents who would voluntarily consult one parent, but would not voluntarily speak with both parents before obtaining an abortion.[26] It imposes often insurmountable barriers. Due to high levels of marital dissolution and the high incidence of out-of-wedlock childbearing, the great majority of adolescents have lived at least for a time in single parent families. It is estimated

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[24] *See generally* MORRISSEY, HOFFMAN & THROPE, *supra* note 8.

[25] *Id.* at 43.

[26] In many cases, *two* parent notification may override the judgment, not only of the adolescent, but of one of her parents, that one parent should not be notified.

that by age 17, 70 percent of white children born in 1980 will have spent at least some time with only one parent, and 94 percent of black children will have lived in one-parent homes.[27] Moreover, data obtained from the 1981 Current Population Report indicated that in 1980, 2.3 million or 3.7 percent of all unmarried noninstitutionalized children under the age of 18 were not living with either of their parents.[28]

Data from a nationally representative sample of children aged 11-16 indicates that when an adolescent lives apart from one of her parents, she frequently has little contact with the absent parent.[29] Over one-third of the children living with their mothers in one-parent homes have had no contact at all with their absent father during the previous five years, or are unaware if their father is alive or dead.[30] Over half have had no contact in the previous year.[31] And the little contact that occurs tends to be purely social, not involving counseling about life decisions.[32] "Coparenting among formerly married couples is more of a myth than a reality in all but a tiny fraction of families. [Nonresident parents] typically give up decision-making authority and exercise little direct in-

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[27] Hofferth, *Updating Children's Life Course*, 47 J. Marriage and Fam. 93, 93 (1985).

[28] Montemayor and Leigh, *Parent-Absent Children: A Demographic Analysis of Children and Adolescents Living Apart from their Parents*, 31 Fam. Relations 567, 567 (1982).

[29] Furstenberg, Nord, Peterson and Zill, *The Life Course of Children of Divorce*, 48 Am. Sociological Rev. 656, 663 (1983).

[30] *Id.*

[31] *Id. See also* Seltzer & Bianchi, *Children's Contact with Absent Parents*, 50 J. Marriage and Fam. 663 (1988).

[32] Furstenberg & Nord, *Parenting Apart: Patterns of Childrearing After Marital Disruption*, 47 J. Marriage and Fam. 893, 902 (1985) [hereinafter Furstenberg & Nord]. Lack of involvement by the non-custodial parent is also evidenced by the small proportion of absent fathers who contribute to their children's support. *See* U.S. DEPT. OF COMMERCE, CURRENT POPULATION REPORTS, SPECIAL STUDIES, CHILD SUPPORT AND ALIMONY: 1985 (Series P-23, No. 154, 1989) at 1.

fluence over their children's upbringing." [33] Thus, in many instances, mandating parental disclosure would force the involvement of a disinterested parent in potentially disruptive ways. Most troubling is the potential for serious harm to both the mother and the adolescent if an absent father with a history of abusive behavior is notified.[34] In such families, mandatory two-parent notification may be particularly damaging.

Moreover, even in two-parent homes, it is very common for fathers to be completely uninvolved in providing information or giving advice about sexual matters to their daughters. Research has shown that the limited sex education that occurs in the home is usually done by the mother.[35] Moreover, the district court in *Hodgson* found that in many cases compelled two-parent notification had inhibited rather than advanced voluntarily initiated intrafamily communication. 648 F. Supp. at 777-778.[36] Thus, there is no reason to believe that requiring adolescents who would not otherwise do so to speak with their fathers about their abortion decision would promote any kind of beneficial family interaction, and reason in many cases to fear that harm may ensue.

D. An "Arbitrary And Inflexible" Waiting Period—Whether 24 Or 48 Hours—Places Greater Burdens On Adolescents Than It Does On Adults.

The 24-hour and 48-hour waiting periods here at issue impose even greater burdens on adolescents' right to ob-

[33] Furstenberg & Nord, *supra* note 32, at 903.

[34] Domestic violence—both wife battering and child abuse—is not uncommon in American homes. Gelles & Strauss, *supra* note 18. In Minnesota alone, there are an average of 31,200 assaults on women by their partners each year. DEPT. OF CORRECTIONS, MINNESOTA PROGRAMS FOR BATTERED WOMEN (January 1985).

[35] Rozema, *Defensive Communication Climate as a Barrier to Sex Education in the Home*, 35 Fam. Relations 533 (1986).

[36] The court found that some adolescents were dissuaded from contacting one parent because only the consent of both parents would eliminate the need for judicial proceedings.

tain an abortion than do similar provisions this Court has struck down as applied to all women. In *Akron I*, this Court concluded that the State "failed to demonstrate that any legitimate state interest is furthered by an arbitrary and inflexible [24-hour] waiting period," and held that such a waiting period was unconstitutional. 462 U.S. at 450. The Court noted that the waiting period increased the cost and risk of obtaining an abortion, *inter alia*, because scheduling difficulties effectively delayed the planned abortion more than 24 hours. *Id.*

Such burdens on the right to obtain an abortion are particularly onerous for adolescents.[37] Adolescents already obtain abortions later in pregnancy than older women, and the risk of complications increases with each week of delay.[38] Thus, the additional state-imposed delay needlessly compounds the health risks adolescents already encounter.

II. THE SUBSTANTIAL BURDENS IMPOSED BY COMPELLED NOTIFICATION AND WAITING PERIOD PROVISIONS ARE UNCONSTITUTIONAL.

This Court has asserted, as a guiding principle, that:

> [W]hen a State, as here, burdens the exercise of a fundamental right, its attempt to justify that burden as a rational means for the accomplishment of some significant state policy requires more than a bare assertion, based on a conceded complete absence of supporting evidence, that the burden is connected to such a policy.

[37] *See Indiana Planned Parenthood v. Pearson*, 716 F.2d 1127, 1143 (7th Cir. 1983) ("the same objections to the waiting period for adults listed in *City of Akron* apply to waiting periods for minors"); *Hodgson*, 648 F. Supp. at 765 ("[t]his statutorily imposed delay frequently is compounded by scheduling factors such as clinic hours, transportation requirements, weather, a minor's school and work commitments").

[38] *See* Russo, *Adolescent Abortion: The Epidemiological Context in* ADOLESCENT ABORTION: PSYCHOLOGICAL & LEGAL ISSUES 40, 55-67 (G. Melton ed. 1986) [hereinafter Russo]; NAS REPORT, *supra* note 10, at 114, 277.

Carey v. Population Services Int'l, 431 U.S. 678, 696 (1977). The right to secure an abortion is fundamental, *Roe v. Wade*, 410 U.S. 113 (1973), protected at a minimum against imposition of "undue burdens," *Webster v. Reproductive Health Services*, 109 S. Ct. 3040, 3063 (1989) (O'Connor, J., concurring). There can be no serious question, for the reasons set forth above, that the statutes at issue impose a substantial burden on all minors that would be unconstitutional if imposed on adults. *See* p. 4, *supra*.

The States have asserted three general purposes in defense of mandatory notification statutes, which in other contexts have been recognized by this Court:[39] promoting a family role in the child-rearing process, Cross-Petition for Writ of Certiorari in No. 88-1309 at 3; assuring that the decision to abort is an informed one, *id.*; and promoting the adolescent's emotional stability, particularly as it relates to "the minor's psychological sequelae that may attend the abortion procedure," *Hodgson*, 648 F. Supp. at 766. In *Hodgson*, after hearing evidence about the manner in which the Minnesota law operated for five years, the trial court found as a matter of fact that none of these interests was promoted. The scientific evidence supports the district court's findings.

A. The Evidence Suggests That Mandatory Parental Notification Statutes Do Not Foster Productive Intrafamily Communication.

As demonstrated in Point I, *supra*, the scientific and record evidence suggests that mandatory parental notification statutes are actually *destructive* of the family role in child-rearing. The productive communication patterns of a normal family that these laws purport to promote are based upon trust and the voluntary desire to

[39] *See Danforth*, 428 U.S. at 75 (family role in decisionmaking); *Bellotti II*, 443 U.S. at 635 (decisionmaking competence); *H.L. v. Matheson*, 450 U.S. 398, 412 (1980) (psychological consequences of abortion).

share or to know; compelled or coerced communication lacks these qualities.[40]

B. There Is No Empirical Support For The Proposition That Compelled Parental Disclosure Will Help Ensure That The Minor's Decision To Obtain An Abortion Is A Capable One.

These burdensome regulations also might be defended as needed to ensure that the pregnant woman is making an informed choice. Whether the laws' burdens are justified in light of this purpose should turn in substantial part on whether the scientific evidence supports the State's assumptions about the competence of minors to make decisions about pregnancy.

The Court has yet to define precisely what the capacity to make informed choices means.[41] It has, however, never relied upon a definition of capacity to consent that focuses on the choice made,[42] focusing instead on the individual's cognitive capacity to make the decision to abort, *i.e.*, the ability to understand the nature of the procedure, its risks, benefits, consequences, and possible alternatives. Perhaps the most complete statement of this Court's position on competency appears in *Danforth*, 428 U.S. at 104 (Stevens, J., concurring in part and dissenting in part): "The Court assumes that parental consent

[40] *See generally* D. CURRAN, TRAITS OF A HEALTHY FAMILY (1983).

[41] *But see* 45 C.F.R. Part 46 (DHHS rules regarding consent to biomedical and behavioral research including consent to research with children); Weithorn & Campbell, *The Competency of Children and Adolescents to Make Informed Treatment Decisions*, 53 Child Dev. 1589 (1982) [hereinafter Weithorn & Campbell]; Bersoff, *Children as Research Subjects: Problems of Competency and Consent in* THE RIGHTS OF CHILDREN 186 (J. Henning ed. 1982).

[42] Of approximately 1.1 million teenage pregnancies annually, about 40% are terminated by abortion. By any objective standard the decision to abort is one that a reasonable person, including a reasonable adolescent, could make. NAS REPORT, *supra* note 10, at 1, 15, 261; Alan Guttmacher Institute, *School Sex Education in Policy and Practice*, 3 Issues in Brief 1 (1983) [hereinafter AGI].

is an appropriate requirement if the minor is not capable of understanding the procedure and of appreciating its consequences and those of available alternatives." [43] Both psychological theory and significant and substantial evidence developed by social scientists bear on the empirical question whether adolescents possess the requisite capacity to consent under this formulation.

1. ***Psychological theory and research about cognitive, social and moral development strongly supports the conclusion that most adolescents are competent to make informed decisions about important life situations.***

Developmental psychologists [44] have built a rich body of research examining adolescents' capacities for understanding, reasoning, solving problems and making decisions, especially in comparison to the same capacities in adults. Research consistently supports the conclusion that there is a predictable development during late childhood and early adolescence of the capacity to think rationally about increasingly complex problems and decisions. Although there are several competing theories of cognitive development, these theories each recognize that a revolution in rationality occurs during early adolescence.

The specific reasoning abilities that develop during early adolescence are closely akin to the capacity to consent, and include the capacity to reason abstractly about

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[43] *See also Bellotti II*, 443 U.S. at 640 ("ability to . . . take account of both immediate and long-range consequences"). The concern that a minor have adequate *information* about her decision, as opposed to the capacity to choose based upon such information, *see Bellotti II*, 443 U.S. at 643, is less a component of the adolescent's competency than of the physician's legal and ethical duty to provide all material information to the patient. *See* Wadlington, *Consent to Medical Care for Minors: The Legal Framework in* CHILDREN'S COMPETENCE TO CONSENT 57 (G. Melton, G. Koocher & M. Saks eds. 1983).

[44] Developmental psychologists are scientists who study cognitive, perceptual, personality, social and emotional development along the life span of individuals.

hypothetical situations; the capacity to reason about multiple alternatives and consequences; the capacity to consider more variables and combine variables in more complex ways; and the capacity for systematic, exhaustive use of information.[45]

Competent decisionmaking is also dependent on social and personality development including the development of personal values, identity, autonomy, and the ability to resolve social dilemmas. Research in social and personality development contradicts the stereotype of adolescence as a period when young people are paralyzed by a struggle for identity, social confusion and rebellion against parents. In fact, by middle adolescence (age 14-15) young people develop abilities similar to adults in reasoning about moral dilemmas,[46] understanding social rules and laws,[47] reasoning about interpersonal relationships [48] and interpersonal problems,[49] and reasoning about

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[45] For a discussion of these changes from three theoretical perspectives, see B. INHELDER & J. PIAGET, THE GROWTH OF LOGICAL THINKING FROM CHILDHOOD TO ADOLESCENCE (1958); Braine & Rumain, *Logical Reasoning in* HANDBOOK OF CHILD PSYCHOLOGY, VOLUME III: COGNITIVE DEVELOPMENT 263 (P.H. Mussen ed., J.H. Flavell & E.M. Markman vol. eds. 1983); Sternberg & Powell, *The Development of Intelligence in* HANDBOOK OF CHILD PSYCHOLOGY, VOLUME III: COGNITIVE DEVELOPMENT 341 (P.H. Mussen ed., J.H. Flavell & E.M. Markman vol. eds. 1983).

[46] Rest, *Morality in* HANDBOOK OF CHILD PSYCHOLOGY, VOLUME III: COGNITIVE DEVELOPMENT 556 (P.H. Mussen ed., J.H. Flavell & E.M. Markman vol. eds. 1983); Kohlberg, *Moral Stages and Mortalization: The Cognitive-Developmental Approach in* MORAL DEVELOPMENT AND BEHAVIOR: THEORY, RESEARCH AND SOCIAL ISSUES (Lickona ed. 1976); Kohlberg & Hersch, *Moral Development: A Review of the Theory*, 16 Theory into Practice 53 (1977).

[47] Tapp & Kohlberg, *Developing Senses of Law and Legal Justice in* LAW, JUSTICE AND THE INDIVIDUAL IN SOCIETY: PSYCHOLOGICAL AND LEGAL ISSUES 89 (J. Tapp. & F. Levine, eds. 1977).

[48] R. SELMAN, THE GROWTH OF INTERPERSONAL UNDERSTANDING: DEVELOPMENTAL AND CLINICAL STUDIES (1980).

[49] Marsh, Serafica & Barenboim, *Effect of Perspective-taking Training on Interpersonal Problem Solving*, 51 Child Development

custody preference during parental divorce.[50] By middle adolescence most young people develop an adult-like identity and understanding of self.[51] Furthermore, the majority of adolescents do not repudiate parental values, but incorporate them, during their search for autonomy.[52] Thus, by age 14 most adolescents have developed adult-like intellectual and social capacities including specific abilities outlined in the law as necessary for understanding treatment alternatives, considering risks and benefits, and giving legally competent consent.

There is not as much information about the practical decisionmaking competence of younger adolescents—those aged 11 to 13.[53] Research has indicated that there is considerable variability in cognitive development and decisionmaking competence among adolescents, and there are some 11-to-13-year-olds who possess adult-like capabilities in these areas.[54] It is instructive that young adolescents are deemed capable in many state statutes of giving informed consent to various medical procedures, including mental health services, treatment for sexually transmitted diseases, and surgery related to childbirth. Should they have a child, young adolescents are typically deemed competent to make health care decisions both for themselves

140 (1980); Marsh, Serafica & Barenboim, *Interrelationships Among Perspective Taking, Interpersonal Problem Solving, and Interpersonal Functioning*, 138 J. Genetic Psychology 37 (1981).

[50] Greenberg, An Empirical Determination of the Competence of Children to Participate in Child Custody Decision-Making (1983) (Dissertation Abstracts Int'l).

[51] Harter, *Developmental Perspectives On the Self System in* HANDBOOK OF CHILD PSYCHOLOGY, VOLUME IV: SOCIALIZATION, PERSONALITY & SOCIAL DEVELOPMENT 275 (Heatherington, ed. 1983).

[52] *See* Conger, *A World They Never Knew: The Family and Social Change in* TWELVE TO SIXTEEN 197 (J. Kagan & R. Coles eds. 1972); Brittain, *supra* note 13.

[53] Because few young adolescents become pregnant, it is difficult for researchers to obtain a sample large enough to study the abortion decisionmaking competence of this group.

[54] See sources cited *supra* notes 46-51.

and their child.[55] At a minimum, therefore, a case-by-case approach to assessing decisionmaking competence among young adolescents is essential.

For all the reasons set forth in this section, the assumption that adolescents as a group are less able than adults to understand, reason and make decisions about intellectual and social dilemmas is not supported by contemporary psychological theory and research.

2. Research does not support the States' assumption that adolescents typically lack the capacity to make sound health care decisions, including decisions about abortion.

There has been substantial empirical research testing adolescents' decisionmaking performance when faced with various types of practical problems involving treatment and non-treatment decisions. Some of these studies specifically compare the performance of adolescents to that of adults in making such decisions.[56] The evidence does not support the assumption underlying notification laws that adolescents lack an adult's capacity to understand and reason about problems and decisions, including medical and psychological treatment alternatives, or the ability to comprehend and consider risks and benefits regarding treatment alternatives.[57]

[55] MORRISSEY, HOFFMAN & THROPE, *supra* note 8, at 43.

[56] Studies comparing adolescents and adults include Belter & Grisso, *Children's Recogniton of Rights Violations in Counseling*, 15 Prof. Psychology 899 (1984) [hereinafter Belter & Grisso]; Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 Calif. L. Rev. 1134 (1980) [hereinafter Grisso]; Lewis, *A Comparison of Minors' and Adults' Pregnancy Decisions*, 50 Am. J. Orthopsychiatry 446 (1980); Weithorn & Campbell, *supra* note 41; Ambuel, Developmental Change in Adolescents' Psychological and Legal Competence to Consent to Abortion: An Empirical Study and Quantitative Model of Social Policy (1989) (Dissertation Abstracts Int'l) [hereinafter Ambuel].

[57] *See, e.g.*, Melton & Pliner, *Adolescent Abortion: A Psycholegal Analysis in* ADOLESCENT ABORTION: PSYCHOLOGICAL & LEGAL ISSUES 1 (G. Melton ed. 1986) [hereinafter Melton & Pliner]; Weithorn,

The two most directly relevant studies compared abortion decisionmaking by adolescents and adults at the time they received pregnancy tests in actual treatment settings. Results of both are consistent with the research and theory reviewed above showing that "adolescents are as able to conceptualize and reason about treatment alternatives as adults are."[58] In one study,[59] 16 unmarried adolescents, aged 13-17, and 26 unmarried adult women, aged 18-25, were asked to consider their options for responding to their own pregnancies at the time of their pregnancy tests. Standardized questions were used to determine their knowledge of pregnancy-related laws, sources of advice they had received or expected to seek, the range of factors one could consider in making choices about one's pregnancy, and the reasons for their own

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Children's Capacities in Legal Contexts in CHILDREN, MENTAL HEALTH, AND THE LAW 25 (N. Reppucci & Assoc. eds. 1984); Melton, *Developmental Psychology and the Law: The State of the Art*, 22 J. Fam. L. 445 (1984); Grodin & Alpert, *Informed Consent and Pediatric Care in* CHILDREN'S COMPETENCE TO CONSENT 93 (G. Melton, G. Koocher & M. Saks eds. 1983); Weithorn, *Developmental Factors and Competence to Make Informed Treatment Decisions in* LEGAL REFORMS AFFECTING CHILD AND YOUTH SERVICES 85 (G. Melton ed. 1982); Wald, *Children's Rights: A Framework for Analysis*, 12 U.C. Davis L. Rev. 255 (1979); Ferguson, *The Competence and Freedom of Children to Make Choices Regarding Participation in Research: A Statement*, 34 J. Soc. Issues 114 (1978); Grisso & Vierling, *Minors' Consent to Treatment: A Developmental Perspective*, 9 Prof. Psychology 412 (1978); Schowalter, *The Minor's Role in Consent for Mental Health Treatment*, 17 J. Am. Acad. Child Psychiatry 505 (1978).

Not all older adolescents and not all adults reach the highest levels of competence to consent to treatment, *see* Roth, Meisel, & Lidz, *Tests of Competence to Consent to Treatment*, 135 Am. J. Psychiatry 279 (1977), but there is no substantial support for the proposition that cognitive abilities of the two groups are different.

[58] APA Interdivisional Committee on Adolescent Abortion, *Adolescent Abortion, Psychological and Legal Issues*, 42 Am. Psychologist 73, 73 (1987) [hereinafter Interdivisional Committee Study].

[59] Lewis, *A Comparison of Minors' and Adults' Pregnancy Decisions*, 50 Am. J. Orthopsychiatry 446 (1980).

choices. The study revealed no differences between the unmarried minors and adults in the decisions they made or in their knowledge of pregnancy-related laws. Further, when asked to describe factors that could affect one's choice of abortion or motherhood, minors differed very little from adults in the frequency with which they mentioned various considerations and consequences. There were no differences on such factors as the positive emotions associated with mothering, financial concerns, the effect of given choices on one's goals or present lifestyle, or social stigma.

The second highly relevant study examined pregnancy decisionmaking in 15 adolescents aged 14-15, 19 adolescents aged 16-17, and 40 adults aged 18-21, at the time they sought a pregnancy test at a women's health clinic.[60] The sample was representative of various economic, racial and religious backgrounds. Each person participated in an extensive decisionmaking interview conducted by a counselor, which was audio-taped and later rated by trained, independent raters. The four measures used to evaluate decisionmaking competence were suggested by this Court's understanding of competency,[61] and focused on the individual's cognitive and volitional capacity: consideration of risks and benefits including immediate and future consequences; quality and clarity of reasoning; number and types of factors considered; and volition, *i.e.*, making a decision without being coerced by or acquiescing to others. Results showed that minors aged 14 to 17, who considered abortion as an option, equaled adults in all

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[60] Ambuel, *supra* note 56; Ambuel & Rappaport, Developmental Change in Adolescents' Psychological and Legal Competence to Consent to Abortion (1989) (Paper Presented at American Psychological Association Convention, available from *amicus* counsel of record).

[61] *See Danforth*, 428 U.S. at 104 (Stevens, J., concurring in part and dissenting in part). *See also* Wadlington, *Consent to Medical Care for Minors: The Legal Framework in* CHILDREN'S COMPETENCE TO CONSENT 57 (G.P. Melton, G. Koocher & M. Saks eds. 1983).

four measures of competence. Taken together these two studies suggest that minors equal adults "in their 'competence' to imagine the various ramifications of the pregnancy decision," [62] and their capacity to make a reasoned choice when facing unplanned pregnancy.[63]

Indeed, the National Academy of Sciences, in a major review of the research, observed that almost all minors who employ judicial bypass procedures to avoid parental involvement are held to be mature, and their decisions to have an abortion are held to be in their best interests.[64] This evidence strongly suggests that many adolescents who choose not to consult with their parents are competent to make the abortion decision.[65]

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[62] *Id. See* Lewis, *Minors' Competence to Consent to Abortion*, 42 Am. Psychologist 84 (1987).

[63] In another relevant study, 14-year old minors and adults were presented with four vignettes about individuals suffering from particular medical or psychological disorders. They were given detailed information about the nature, purpose, risks and benefits of the alternative treatments, and were asked to choose among them. The participants were then asked a series of standardized questions about their decisions. In most instances, the responses showed no difference between the adults and the 14-year-olds on any of the scales of competency used in the study—factual understanding, inferential understanding (appreciation), reasoning, choice of reasonable option, and evidence of choice. Weithorn & Campbell, *supra* note 41. For a confirming study, *see* Belter & Grisso, *supra* note 56; Grisso, *supra* note 56.

[64] *See* NAS REPORT, *supra* note 10, at 194-195. For supporting research *see* Melton & Pliner, *supra* note 57, at 26; Mnookin, *supra* note 9; *Judging Teenagers*, *supra* note 11, at 259-267; *see also Hodgson v. Minnesota*, 648 F. Supp. at 765, 766-67.

[65] Indeed, it can be seriously questioned whether a notification statute with a bypass procedure in practice does more than expend judicial resources. At worst, it is a source of anxiety, medically harmful delay, and family conflict. Melton, *Legal Regulation of Adolescent Abortion: Unintended Effects*, 42 Am. Psychologist 79, 82 (1987). That so many minors, despite its burdens, choose to undergo a bypass process and succeed in demonstrating their competence and best interests to a judge, dramatizes the fact that *without* a bypass, the burdens of mandatory parental notification would be intolerable.

Thus, empirical studies of treatment and abortion decisionmaking have found no differences between adolescents aged 14-18 and adults in factors related to legal competence.[66] There is therefore no scientific foundation for the States' assumption that adolescents' decisions to have an abortion are generally less thoughtful and informed than adults' decisions.

Moreover, related research indicates that attempts by the State to compel parental consultation in minors' abortion decisions are unlikely to result in better reasoned decisions.[67] One study found that although adolescents who were able to discuss their unintended pregnancy with two or three people they considered sympathetic and supportive decided upon a course of action faster than women with less social support, no benefit accrued from discussing the pregnancy with parents or others considered unsympathetic.[68] Research has consistently shown

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[66] Studies have recognized differences between adults and adolescents regarding the decision to have an abortion, but those differences do not reflect upon the relative competence of adolescents (or adults) to make the abortion decision. Instead, the differences appear to be related to minors' and adults' differing social situations. For example, adolescents tend to see their decision as more influenced by consideration of its impact on others, and more frequently involve a parent in the decision. They also tend to take more time to reach a decision, making the added delays caused by notification and bypass procedures even more potentially harmful to the adolescents' health than similar requirements would be to adults' health. *See* Interdivisional Committee Study, *supra* note 58, at 73, and studies cited therein.

[67] Melton, *Minors and Privacy: Are Legal and Psychological Concepts Compatible?* 62 Neb. L. Rev. 455, 470-471 (1983); Zabin & Hirsch, Effects of Abortion and Childbearing on Education and the Psychological Status of Black Urban Adolescents 16 (1988) (Paper presented at Annual Meeting of American Public Health Association, available upon request from counsel of record). *See* Rothenberg, *Communication About Sex and Birth Control Between Mothers and Their Adolescent Children*, 3 Population and Env't 35 (1980).

[68] Ashton, *Pattern of Discussion and Decision-making Amongst Abortion Patients*, 12 J. Biosocial Sci. 247 (1980).

that parents are seldom significant sources of sex education for their children.[69] The findings of many studies suggest that sex is an issue of conflict that rarely elicits open and honest communication between parents and adolescents, and that a general lack of rapport between parents and adolescents contributes to their difficulty in communicating about sex.[70] In many instances, therefore, compelled parental involvement in the abortion decision is not likely to be constructive.

C. There Is No Empirical Support For The Proposition That Mandatory Parental Disclosure Will Assist Minors In Dealing With The Psychological Sequelae Of Abortion.

The scientific evidence also fails to lend any support to the States' assumptions that the psychological sequelae of abortion are more severe for an adolescent than for an adult and that forced parental involvement is therefore necessary to ensure the continuing psychological well-being of the adolescent.

1. *Adolescents who choose to abort are not less stable psychologically than other adolescents.*

The increasingly early biological maturation of adolescents is well documented.[71] A majority of individuals become sexually active during adolescence.[72] Indeed, 40% of today's 20-year-old women have had at least one

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[69] Rozema, *supra* note 35, at 532; Bennett & Dickinson, *Student-parent Involvement in sex, birth control and venereal disease education*, 16 J. Sex Research 114, 115 (1980).

[70] *Id.* Parents, not surprisingly, generally disapprove of their children's premarital sexual relations. Marsman & Herold, *Attitudes Toward Sex Education and Values in Sex Education*, 35 Fam. Relations 357 (1986).

[71] Rauh, Johnson, & Burket, *The Reproductive Adolescent*, 20 Pediatric Clinics of North America 1005 (1973).

[72] Marecek, *Counseling Adolescents with Problem Pregnancies*, 42 Am. Psychologist 89 (1987).

pregnancy during their teen years.[73] And there is no empirical support for the supposition that adolescents seeking abortions are drawn from an especially psychologically or emotionally vulnerable subpopulation. Unmarried adolescents who seek abortions are similar in psychological makeup to other adolescents.[74] Moreover, compared to unmarried adolescents who choose to carry to term, those seeking abortions are likely to be somewhat advantaged in terms of social class status, family background and academic achievement.[75] Adolescents who seek abortions, compared to those who choose motherhood, are characterized by a number of traits associated with positive mental health and superior psychological maturity—greater independence, higher academic motivation and aspiration, and more feelings of competence and optimism.[76] Thus, not only is it unproven that as a group adolescents who choose abortions are at special psychological risk, but the opposite is actually shown to be the case.

2. *Much of the stress pregnant adolescents experience is due to unwanted pregnancy, not to abortion.*

More generally, the evidence does not support this Court's assertion that there are "potentially grave emotional and psychological consequences of the decision to abort." *H.L. v. Matheson*, 450 U.S. 398, 412-413 (1980). Three major reviews of the psychological and psychiatric research literature all confirm that for most women who undergo abortion, there are no long-term negative emotional effects.[77]

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[73] Russo, *supra* note 38, at 63.

[74] Olson, *Social and Psychological Correlates of Pregnancy Resolution Among Adolescent Women*, 50 Am. J. Orthopsychiatry 432, 436 (1980) [hereinafter Olson].

[75] *Id.*

[76] *Id.*

[77] Marecek, *Consequences of Adolescent Childbearing and Abortion in* ADOLESCENT ABORTION: PSYCHOLOGICAL & LEGAL ISSUES 96

When women experience regret, depression, or guilt following an abortion, such feelings are mild and diminish rapidly.[78] When serious problems do occur, they are most likely to occur among women with prior histories of psychiatric problems.[79] With respect to adolescents, abortion "is neither psychologically harmful nor in other ways damaging to the patient." [80] "Very few teenagers have severe psychiatric complications after induced abortion." [81]

Abortion not only carries a low risk of negative psychological consequences for adolescents, but the psychological sequelae of abortion for adolescents are usually positive, with significant diminution of anxiety and increased feelings of well-being. "The predominant response following abortion is generally relief." [82] Studies of the mental health status of pregnant women before and after abortion show significant reductions in the symptoms of stress,

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(G. Melton ed. 1986) [hereinafter *Consequences*]; Adler & Dolcini, *Psychological Issues in Abortions for Adolescents in* ADOLESCENT ABORTION: PSYCHOLOGICAL & LEGAL ISSUES 74 (G. Melton ed. 1986) [hereinafter Adler & Dolcini]; Shusterman, *The Psychological Factors of the Abortion Experience: A Critical Review*, 1 Psychology of Women Q. 79 (1976) [hereinafter *Shusterman*]. *See generally* Brief for *Amicus Curiae* American Psychological Association in *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989).

[78] Adler & Dolcini, *supra* note 77, at 84.

[79] *Id. See* NAS REPORT, *supra* note 10, at 195.

[80] Olson, *supra* note 74, at 440.

[81] Cates, *Adolescent Abortions in the United States*, 1 J. Adolescent Health Care 18 (1980); *see* C. CHILMAN (ed.), ADOLESCENT SEXUALITY IN A CHANGING AMERICAN SOCIETY (NIH Pub. No. 79-1426) (1978); Bracken, Hackamovitch & Grossman, *The Decision to Abort and Psychological Sequelae*, 15 J. Nervous and Mental Disorders 155 (1974); *see also* David, Rasmussen & Holst, *Postpartum and Postabortion Psychotic Reactions*, 13 Fam. Plan. Persp. 88 (1981) (only 11.4 psychiatric admissions per 10,000 abortions). *See generally* NAS REPORT, *supra* note 10, at 195-196.

[82] Adler & Dolcini, *supra* note 77, at 84 (and references cited therein).

as measured by standardized psychological tests.[83] Moreover, there is no evidence to support the proposition that any distress resulting from an adolescent's abortion would be mitigated by involuntary parental notification.

An abortion removes serious potential constraints on the minor's life and future. After an abortion, the adolescent can resume her normal life and activities in school, at home, and with peers. In contrast, "adolescent mothers are significantly more likely to curtail their education, to be relegated to low-paying jobs, to be single parents, and to be on welfare," [84] as well as to experience repeat pregnancies and, for those who marry to legitimate the birth, greater marital instability.[85]

As the National Academy of Sciences recently reported, "on the basis of existing research . . . *the contention that adolescents are unlikely or unable to make well-reasoned decisions or that they are especially vulnerable to serious psychological harm as a result of an abortion is not supported.*" [86] Moreover, as noted above, those who need support and can get it from their parents typically seek it voluntarily. For these reasons, it is unsurprising that bypass proceedings invariably result in a ruling favorable to the minor.

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[83] *Shusterman, supra* note 77.

[84] NAS REPORT, *supra* note 10, at 18.

[85] *Consequences, supra* note 77, at 96. Regardless of one's moral position on abortion itself, and *amici* take none herein, the data strongly support the position that abortion is more psychologically benign than carrying to term for almost all adolescents.

[86] NAS REPORT, *supra* note 10, at 277 (emphasis added). "Perhaps the most authoritative form of post-publication review of scientific findings occurs when organizations such as the National Academy of Sciences . . . appoint panels of the most distinguished scientists in the field, provide them with ample time and resources, and commission a state-of-the-art evaluation of a given area of research." Monahan & Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. Pa. L. Rev. 477, 501 (1986).

CONCLUSION

Both the Minnesota and Ohio statutes impose significant burdens on adolescents' right to choose whether to abort or carry to term without significantly advancing any of the asserted state interests. In these circumstances, even parental notification statutes that provide for judicial bypass impose unconstitutional burdens on mature adolescents and adolescents whose interests would be better served by not notifying their parents. The judicial process is invariably stressful and virtually always affirms the minor's choice to proceed without parental involvement. Moreover, to mandate parental notification and *not* provide for judicial bypass would be intolerable, leaving minors mature enough to decide for themselves, and those whose best interests would be injured substantially by parental notification, with a choice between suffering this statutorily imposed injury or carrying to term. Such a fearful choice cannot constitutionally be imposed without a substantial reason.

Amici therefore respectfully submit that the decision of the Eighth Circuit should be reversed and the Minnesota statute struck down in its entirety, and that the decision of the Sixth Circuit concerning the Ohio statute should be affirmed.

Respectfully submitted,

MARK D. SCHNEIDER
1300 Connecticut Ave., N.W.
Room 810
Washington, D.C. 20036
(202) 857-5250

DONALD N. BERSOFF
(Counsel of Record)
SUSAN R. PODOLSKY
JENNER & BLOCK
21 Dupont Circle, N.W.
Washington, D.C. 20036
(202) 223-4400
Attorneys for Amici Curiae

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OCTOBER TERM, 1989

HODGSON, ET AL.,
APPELLANTS AND CROSS APPELLEES,
v.
MINNESOTA,
APPELLEES AND CROSS APPELLANTS.

On appeal from the United States Court of Appeals for the Eighth Circuit

No. 88-805

OHIO,
APPELLANT,
v.
AKRON CENTER FOR REPRODUCTIVE HEALTH,
APPELLEE.

On appeal from the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICI CURIAE* IN SUPPORT OF HODGSON APPELLANTS AND AKRON APPELLEES BY The Center for Population Options, et al.

(Complete list of *amici curiae* appears on first page)

JOHN H. HENN
(Counsel of Record)
NINA JOAN KIMBALL
FOLEY, HOAG & ELIOT
One Post Office Square
Boston, Massachusetts 02109
(617) 482-1390

Blanchard Press, Inc., Boston, Mass. — Law Printers [617] 426-6690

The Center for Population Options
Planned Parenthood League of Massachusetts, Inc.
Girls Clubs of America
Massachusetts Judicial Consent for Minors Lawyer Referral Panel
Mobilization for Youth Health Services, Inc.
United States Student Association
YWCA of Brooklyn
Students and Youth Against Racism
William Kassen, Comm. on Child Development Research & Public Policy
American Public Health Association
National Family Planning and Reproductive Health Association
Abortion Rights Mobilization
Abortion Rights Council
Choices Women's Medical Center
Child Care Law Center
National Organization for Women
American Association of University Women
American Jewish Congress
National Council of Jewish Women
Women's Law Project
Women's Action Alliance, Inc.
National Gay & Lesbian Task Force
National Gay Rights Advocates
Lambda Legal Defense and Education Fund
National Council for Research on Women
Minority Prison Project
All-Peoples Congress
Women's Bar Association of Massachusetts
California Women Lawyers
Women's Bar Association of Illinois
Women Lawyers Association of Los Angeles
New York State Coalition Against Domestic Violence
Tucson Women's Commission
New York Women in Criminal Justice
Missouri Women's Network
Connecticut Women's Education and Legal Fund, Inc.
Hawaii Women Lawyers
North Carolina Equity
San Francisco Women Lawyers Alliance
Queen's Bench of the San Francisco Bay Area
Fresno Free College Foundation

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Interest of *Amici Curiae*

The Center for Population Options and other amici, whose interests are identified in Appendix A, are individuals and organizations concerned with problems of teenage pregnancy and too-early childbearing, and the need for confidential access to safe, legal abortion services for minors. Based on their experience and expertise with teenage girls, *amici* wish to bring to the Court's attention facts concerning the medical risks and societal cost of teenage pregnancy and too-early childbearing, and to urge that the Court allow minors to exercise the fundamental right to choose abortion without the compelled involvement of their parents.[1]

Summary of Argument

This brief focuses on pregnant teenage girls, on the individual and societal importance of preserving their right to make a personal individual choice between abortion and childbirth without the compelled involvement of their parents, and on the devastating harm that removing or restricting that right would cause to teenage girls in particular. At minimum, preservation of their right to choose requires that the state not compel parental notice or consent unless it provides for a meaningful judicial or other alternative.

Whatever we might wish, sexual activity and unintended pregnancies have become a concrete reality of teenage girls' lives. Because most teenage pregnancies are unintended, and because unwanted childbirth and motherhood are so exceptionally burdensome for a teenage girl, a pregnant teenager's right to determine her future must include the right to choose safe, legal abortion instead of childbirth. Legislatively-compelled parental notification can be the functional equivalent of a parental veto of the abortion choice. Teenage girls, therefore, need to be able to make this decision with the support of

[1] This brief is filed with the consent of the parties.

those they choose, including parents, but without the *forced* involvement of their parents, which could result in delays, outright denial of abortion or severe, even violent, consequences.

The life-shaping importance to teenage girls of their existing right to make a personal, individual choice whether to terminate a pregnancy is illustrated in these striking facts:

- Over 1 million teenagers become pregnant each year.[2]
- 84% of all teenage pregnancies (married and unmarried) are unintended.[3]
- 92% of premarital teenage pregnancies are unintended.[4]
- 42% of pregnant teenage girls choose abortion each year, and 44% of these are under the age of 18.[5]
- One in four teenage mothers drops out of high school, and only one in fifty finishes college.[6]
- In 1987, families begun with a teenage birth cost the federal government $19.27 billion in welfare payments.[7]

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[2] Alan Guttmacher Institute [AGI], *Teenage Pregnancy in the United States*, Table 4 (1989) [AGI, *Teenage Pregnancy in the U.S.*]; Ventura, Taffel & Mosher, *Estimates of Pregnancies and Pregnancy Rates for the United States, 1976-85*, 78 Am. J. Pub. Health 506, 508, Table 2 (1988) (data for 1972 to 1985; 1985 is latest year for which detailed statistics on abortion are available); AGI, *Teenage Pregnancy: The Problem That Hasn't Gone Away* 17 (1981) [AGI, *Teenage Pregnancy*].

[3] Jones, Forrest, Goldman, Henshaw, Lincoln, Rosoff, Westoff & Wulf, *Teenage Pregnancy in Industrialized Countries* 40 (1986) [Jones, *et al.*]. Calculations by CPO from cited data.

[4] *Id.*

[5] AGI, *Teenage Pregnancy in the U.S.*, *supra* n. 2, Table 1; Henshaw, *Characteristics of U.S. Women Having Abortions, 1982-83*, 19 Fam. Plan. Persp. 5 (1987).

[6] Center for Population Options [CPO], *The Facts: Teenage Childbearing, Education, and Employment* (1987).

[7] CPO, *1988 Report: Estimates of Public Cost for Teenage Childbearing in 1987* at 2 (1988) [CPO, *1988 Report*] (calculating payments under Food Stamps, Medicaid and Aid to Families with Dependent Children (AFDC) programs). The $19.27 billion represents more than half of all payments under these three programs.

- Parental notification requirements do not significantly increase parental involvement in the abortion decision.[8]
- Forced parental notification of the decision to abort would cause 20% of teenage girls who would not voluntarily consult their parents to self abort or have an illegal abortion rather than notify their parents.[9]
- Only 4% of unmarried teenage mothers surrender their infants for adoption.[10]

As this Court (including Chief Justice Rehnquist) observed in its leading case concerning minors and abortion:

> [T]he potentially severe detriment facing a pregnant woman is not mitigated by her minority. Indeed, considering her probable education, employment skills, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor. In addition, the fact of having a child brings with it adult legal responsibility, for parenthood, like attainment of the age of majority, is one of the traditional criteria for the termination of the legal disabilities of minority. In sum, *there are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible.*[11]

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[8] *Hodgson* v. *Minnesota*, 648 F.Supp. 756, 775 (D. Minn. 1986), *rev'd on legal grounds*, 853 F.2d 1452 (8th Cir. 1988) (en banc); Blum, Resnick & Stark, *The Impact of a Parental Notification Law on Adolescent Abortion Decision-Making*, 77 Am. J. Pub. Health 619, 620 (1987); Torres, *Does Your Mother Know . . . ?*, 10 Fam. Plan. Persp. 280, 281 (1978).

[9] Torres, Forrest & Eisman, *Telling Parents: Clinic Policies and Adolescents' Use of Family Planning and Abortion Services*, 12 Fam. Plan. Persp. 284, 288-289 & Table 7 (1980).

[10] AGI, *Teenage Pregnancy*, *supra* n. 2, at 27.

[11] *Bellotti* v. *Baird*, 443 U.S. 622, 642 (1979) [*Bellotti II*] (plurality opinion) (emphasis added). The statement quoted in text surely commanded the support of eight members of the Court. *See id.* at 652 (concurring opinion of Justices Stevens, Brennan, Marshall, and Blackmun).

Part I of this brief, thus, will describe the unintended and unanticipated nature of most teenage pregnancy; the heightened physical and psychological risks to teenage girls of pregnancy and childbearing, which greatly exceed the risks of abortion at any stage of pregnancy; the overwhelming costs to teenage girls and to society of teenage pregnancy and too-early childbearing; the privacy needs of teenage girls in matters of sexuality and reproductive choice; and the severe, even violent, harm that follows from compelling unwanted parental involvement in the abortion decision. Part II will describe how a minor must be able to exercise her fundamental right to choose abortion without the compelled participation of her parents; will explain why minors must at least retain a judicial consent ("by-pass") or other alternative to such compelled participation; and will propose rules and guidelines for by-pass alternatives to compelled parental participation (specifically referring to those that have been successfully used in Massachusetts for nearly ten years).

Argument

I. A Decision by This Court to Take Away or Constrain the Fundamental Right to Choose Would Devastate Teenage Girls.

This Court would devastate the lives of teenage girls by erecting such insuperable barriers to their long-recognized fundamental right to choose between abortion and childbirth as compelled parental consent or notification. Teenage sexual activity and unintended pregnancies are concrete realities of American life today. Constraining the right to choose abortion by forcing parental involvement in the decision will not reduce teenage sexual activity or unintended teenage pregnancy.[12]

[12] In the United States today, seven out of ten teenage girls and eight out of ten teenage boys have sexual intercourse by the time they reach age twenty. CPO, *The Facts: Teenage Sexuality, Pregnancy, and Parenthood* (1987). As to unintended pregnancies, *see supra* notes 2-7 and statistics in the accompanying text.

What it will do is delay the abortion choice, provoke unnecessary crisis and disharmony in family relations and dramatically increase unwanted teenage childbearing, all with profoundly adverse costs to teenage girls' lives and futures.

A. *Teenage Pregnancy Is Almost Always Unintended.*

Teenage girls do not become pregnant by design. Eight out of ten of the 1.1 million teenage pregnancies in the United States each year are unintended.[13] Most teenagers do not use contraceptives or use them inconsistently, especially in the early months of sexual activity, whether due to ignorance or ambivalence about contraception, or ambivalence about sexuality, or both.[14] Thus, among unmarried teenagers who be-

Studies show that the restrictions on the availability of abortion caused by parental notification and consent laws do not reduce teen pregnancy. Cartoof & Klerman, *Parental Consent for Abortion: Impact of the Massachusetts Law*, 76 Am. J. Pub. Health 397, 400 (1986). The most effective way to reduce teen pregnancy is not to restrict or deny access to abortion but to increase sex education and the availability of contraception. A study comparing teenage pregnancy in the United States with that of other industrialized countries found sexual activity in the United States was comparable to that in other countries, but that teenage pregnancy and birth rates were lower in other countries because of greater availability of sex education, contraceptives and abortion services. Jones, *et al.*, *supra* n. 3, at 234-35.

[13] Jones, *et al.*, *supra* n. 3. 92% of pregnancies to unwed teenage girls are unintended and 51% of pregnancies to married teens are unintended. Altogether, approximately 84% of all teenage pregnancies are unintended, since the vast majority of teen pregnancies (almost 80%) occur out-of-wedlock. *Id.*

[14] AGI, *Teenage Pregnancy*, *supra* n. 2, at 14-16; Zelnick & Kantner, *Sexual Activity, Contraceptive Use and Pregnancy Among Metropolitan-Area Teenagers: 1971-1979*, 12 Fam. Plan. Persp. 230, 236, Table 8 (1980); Zabin & Clark, *Institutional Factors Affecting Teenagers' Choice and Reasons for Delay in Attending a Family Planning Clinic*, 15 Fam. Plan. Persp. 25 (1983). Zabin's study reports that teens tend to delay almost a year (median of 11.5 months) after becoming sexually active before going to a family planning clinic. Moreover, nearly two thirds of unmarried teenage girls reported that they never used contraceptives or did so inconsistently. AGI, *Teenage Pregnancy*, *supra* n. 2, at 14. The reasons for failure to use contraceptives vary, including those who thought they could not become pregnant, those who did not expect to have sexual intercourse, those who "couldn't [use them] under the circumstances," and those who did not know how to get contraceptives. *Id.*

come pregnant, *fifty percent* of pregnancies occur within the first six months of becoming sexually active; *twenty percent* occur within the first month.[15] Forty-two percent of all teenage girls (married or unmarried) choose to resolve their unwanted pregnancies through abortion.[16] These statistics, which reflect the relatively low impact of current contraceptive availability and education on the teenage pregnancy rate, demonstrate that the vast majority of teenage girls do not focus on the issue of whether to bear a child and how childbearing will affect their future until an unintended pregnancy forces them to do so.

At this critical juncture in teenage girls' lives, abortion becomes an especially important — and in many cases life-saving — reality. Common sense, as well as the results of abortion restrictions directed specifically at minors,[17] teaches that erecting barriers to the right to choose abortion will not reduce teenage sexual activity and pregnancy; it will simply increase unwanted teenage childbearing.

B. *Teenage Pregnancy and Childbearing Is Highly Risky Physically and Psychologically for Teenage Girls and the Children They Bear.*

Adolescent pregnancies carried to term, and resulting childbearing, are usually very detrimental physically and psychologically for teenage girls, as well as for the infants they bear. During pregnancy, teenagers are at much higher risk of suffering from serious medical complications, including iron-deficiency anemia, pregnancy-induced hypertension ("toxemia", which is a leading cause of mortality), complications from small pelvises, and cervical immaturity resulting in premature

[15] Hofferth, *Contraceptive Decisionmaking Among Adolescents*, in *Risking the Future: Adolescent Sexuality, Pregnancy, and Childbearing*, Vol. II., at 64 (Hofferth & Hayes eds. 1988) *[Risking* Vol. II]; AGI, *Teenage Pregnancy, supra* n. 2, at 16, 19.

[16] AGI, *Teenage Pregnancy in the U.S., supra* n. 2, Table 1.

[17] Cartoof & Klerman, *supra* n. 12, at 400.

births.[18] Mortality rates from continued pregnancy and childbearing are much higher for teenage girls than for women aged 20-24.[19] Teenage girls aged 15-19 are twenty-four times more likely to die from childbirth than from first-trimester abortion,[20] and the dangers are considerably higher for girls under age 15.[21] By contrast, for all women, but especially for teenage girls, abortion is one of the safest surgical procedures doctors perform.[22] At no time during pregnancy do the risks of abortion surpass the risks of continuing the pregnancy to delivery.[23] The same is true for rates of morbidity — serious illness or injury with lasting effects — related to childbirth when compared to abortion.[24]

A major reason why the health risks of pregnancy and childbearing are greater for teenage girls than for adult women is

[18] Hunter, *Time Limits on Abortion*, in *Reproductive Laws for the 1990s*, at 134 & n. 15 (Cohen & Taub eds. 1989); National Commission to Prevent Infant Mortality, *Death Before Life: The Tragedy of Infant Mortality*, Appendix at 103 (1988) [NCPIM]. Inadequate prenatal care, a problem especially common for teenage girls, is associated with excessive weight gain, premature labor, prolonged labor, vaginal infections and vaginal lacerations. Mackinson, *The Health Consequences of Teenage Fertility*, 17 Fam. Plan. Persp. 132, 134 (1985).

[19] Ory, *Mortality Associated with Fertility and Fertility Control*, 15 Fam. Plan. Persp. 57, 59, Table 2 (1983). Calculations by CPO from cited data.

[20] *Id.*

[21] Sacker & Neuhoff, *Medical and Psychosocial Risk Factors in the Pregnant Adolescent*, in *Pregnancy in Adolescence: Needs, Problems, and Management* 107 (Stuart & Wells eds. 1982); *Risking The Future: Adolescent Sexuality, Pregnancy and Childbearing*, Vol. I, at 124 (C. Hayes ed. 1986) [*Risking*, Vol. I].

[22] Cates & Grimes, *Morbidity and Mortality of Abortion in the United States*, in *Abortion and Sterilization: Medical and Social Aspects*, 155, 177 (Hodgson, ed. 1981). "Complications following induced abortion are generally lower among adolescents than among older women, regardless of the gestation at which the abortion is performed or the method used." *Risking*, Vol. I, *supra* n. 21, at 125; *see also*, Cates, *Adolescent Abortions in the United States*, 1 J. Adolescent Health Care 18, 19-22 (1980) [Cates]; Cates, Schultz & Grimes, *The Risks Associated With Teenage Abortion*, 309 N. Eng. J. of Medicine 621 (1983).

[23] Tietze & Henshaw, *Induced Abortion: A World Review 1986*, at 110, 111 (1986).

[24] Cates, *supra* n. 22, at 20; Cates & Grimes, *supra* n. 22.

that teenagers delay seeking prenatal care if they seek it at all.[25] In New York City, more than one third of pregnant teenage girls received no prenatal care or only last-trimester care, compared to eighteen percent for women as a whole.[26]

Teenage pregnancy, exacerbated by inadequate prenatal care, also leads to premature births and low birth weight,[27] which in turn are leading causes of infant morbidity and mortality. Low birth-weight infants are at increased risk of neurodevelopmental problems, especially cerebral palsy, seizure disorders and mental retardation.[28] Children of teenage mothers are twice as likely to die in infancy than those born to women in their 20s, and are also more likely to die than children of women in their 40s, whose children are also a high-risk group.[29] Low birth weight is also associated with longer-term

[25] Mackinson, *supra* n. 18, at 134. Teens tend to seek prenatal care later than adult women because of its cost, ambivalence or denial concerning their pregnancy, a desire for secrecy and confidentiality, difficulty in scheduling appointments, and/or lack of knowledge about the health care system. Institute of Medicine, *Prenatal Care: Reaching Mothers, Reaching Infants* 78, 101 (Brown ed. 1988) [Inst. of Medicine, *Prenatal Care*]. Policies of some clinics and hospitals to notify parents when minors use their services affects minors' decision to seek prenatal care and choice of clinics. *See* Zabin & Clark, *supra* n. 14, at 26, 27, 29.

[26] Hunter, *supra* n. 18, at 134, citing to *New York City Dep't of Public Health, Summary of Vital Statistics* 16, 17 (1986). Nationally, 13 percent of teens receive late or no prenatal care whereas only 6 percent of women as a whole receive late or no prenatal care. National Center for Health Statistics, *Advance Report of Final Natality Statistics*, Monthly Vital Statistics Report 38:3 Table 30 (1989) [NCHS].

[27] AGI, *Teenage Pregnancy*, *supra* n. 2, at 29; NCHS, *supra* n. 26, Table 15.

[28] Institute of Medicine, *Preventing Low Birthweight* 26-29, 32-33, 37 (1985); *Substantially Higher Morbidity and Mortality Rates Found Among Infants Born to Adolescent Mothers*, 16 Fam. Plan. Persp. 91-92 (1984).

[29] AGI, *Teenage Pregnancy*, *supra* n. 2, at 29. Studies show that other factors such as the mother's socioeconomic status, health care and nutritional habits and education also contribute to health and developmental problems of low birth-weight babies. Teenage mothers are at a high risk of experiencing these characteristics. Mackinson, *supra* n. 18, at 137-38; NCPIM, *supra* n. 18, at 103; *Social Factors, Not Age, Are Found to Affect Risk of Low Birth Weight*, 15 Fam. Plan. Persp. 142-43 (1984).

problems, including a greater frequency of illness, and developmental problems such as lack of success in school.[30]

An *unwanted pregnancy* is a serious and emotionally traumatic event in a teenager's life. Before abortions were legal and accessible to minors in a confidential manner, a large proportion of teenage girls who attempted or succeeded in suicide thought they were, or actually were, pregnant.[31] Few teenagers have adverse psychological reactions to abortion, and most are relieved to have terminated an unwanted pregnancy:[32] "[t]here is no research evidence to support" the assumption that "adolescents are especially vulnerable to serious psychological harm as a result of having an abortion."[33] To the contrary, pregnancy continuation poses "far greater psychological, physical, and economic risks to the adolescent than does abortion."[34]

C. *Pregnant Teenagers, Teenage Mothers and Their Families Are More Likely to Lose Educational and Economic Opportunities and to Be Dependent Upon Public Support.*

Childbearing irrevocably alters the life of a teenage girl. When a woman is ready to bear a child, motherhood is one of the most rewarding and fulfilling of life's experiences. But unwanted motherhood is devastating, especially for a teenage

[30] Inst. of Medicine, *supra* n. 28, at 32-33.

[31] Teicher, *A Solution to the Chronic Problem of Living: Adolescent Attempted Suicide*, in *Current Issues of Adolescent Psychiatry* 129, 136 (Schoolar ed. 1973).

[32] Adler & Dolcini, *Psychological Issues in Abortion for Adolescents*, in *Adolescent Abortion: Psychological and Legal Issues* 84 (Melton ed. 1986).

[33] American Psychological Association, Interdivisional Committee on Adolescent Abortion, *Adolescent Abortion: Psychological and Legal Issues*, 42 Am. Psychologist 73, 74 (1987) [APA].

[34] Lewis, *Minors' Competence to Consent to Abortion*, 42 Am. Psychologist 84, 87 (1987); *see also* Marecek, *Consequences of Adolescent Childbearing and Abortion*, in *Adolescent Abortion: Psychological and Legal Issues* 96-115 (Melton ed. 1986); Adler & Dolcini, *supra* n. 32, at 90; Cates, *supra* n. 22, at 22.

girl. The cost of too-early childbearing is borne not just by the teenager, whose future is suddenly restricted, but by the child she bears and by society as a whole. These costs exist today — in a world in which teenagers *have* a right of abortion choice. The elimination or constriction of that choice could only make those costs vastly higher.

Pregnancy is the leading reason teenage girls drop out of school. One in four teenage mothers drops out of high school and only one in fifty graduates from college. By comparison, one in five women who put off childbearing until their mid-20s graduates from college.[35] Teenage mothers' family responsibilities and frequently truncated education lead them into lower-paying, lower-status jobs, where they accumulate less work experience and earn lower annual wages than women who postpone childbearing.[36]

Children born to teenagers from an unwanted pregnancy will be disadvantaged educationally, socially, and psychologically.[37] They tend to have lower I.Q. and achievement scores, and less success in school.[38] According to expert testimony before Congress on behalf of the American Public Health Association, children born of unwanted pregnancies experienced lower scholastic achievement, had less job satisfaction, fewer and less satisfying relations with friends, lovers and spouses, and began sexual activity earlier than children born of ac-

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[35] CPO, *Teenage Childbearing*, *supra* n. 6; *Risking*, Vol. II, *supra* n. 15, at 125-28. Teenage fathers are also more likely to drop out of high school than their counterparts who remained childless throughout their teens. The lower high school completion rate for teenage fathers restricts their financial ability to support their partner and child. Marsiglio, *Adolescent Fathers in the United States: Their Initial Living Arrangements, Marital Experience and Educational Outcomes*, 19 Fam. Plan. Persp. 241, 247, 249 (1987).

[36] CPO, *Teenage Childbearing*, *supra* n. 6; *Risking*, Vol. I, *supra* n. 21, at 130-32.

[37] *See generally*, Marecek, *supra* n. 34.

[38] Baldwin & Cain, *The Children of Teenage Parents*, 12 Fam. Plan. Persp. 34, 37 (1980); *Adolescent Pregnancy and Childbearing — Rates, Trends and Research Findings From the CPR, NICHD* 10-11 (1988) [*Adolescent Pregnancy and Childbearing*].

cepted pregnancies.[39] "In the aggregate, unwantedness in early pregnancy and involuntary child-bearing have a detrimental effect on the subsequent psychosocial development of the child with socially undesirable longer term implications."[40] That these children could be both unwanted, and forced upon a teenage girl by the state, is doubly tragic.

Teenage motherhood also imposes enormous costs on society. Teenage mothers, whose educational and economic achievement is severely restricted, are more likely to become dependent on public support. Fifty-three percent of AFDC payments are allotted to families that began when the mother was a teenager.[41] In 1987 alone, the federal government spent $19.27 billion in AFDC, Medicaid and Food Stamp benefits on families in which the mother first gave birth as a teenager.[42] It is estimated that over the next twenty years, the federal government will spend $5.7 billion in welfare payments to all babies born in 1987 to teenage girls.[43] Moreover, children of teenage parents are more likely to become teenage parents themselves, thus perpetuating the cycle of poverty begun by a teenage birth.[44]

Too-early childbearing is already a serious public health problem. Erecting barriers to the right to choose abortion will reverse the recent success in reducing the teenage birth rate

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[39] David, *Abortion Obtained and Denied: Psychosocial Risks, Statement prepared for presentation to the Subcommittee on Human Resources and Intergovernmental Relations of the Committee on Government Operations of the U.S. House of Representatives*, at 6 (Mar. 1989).

[40] *Id.*

[41] CPO, *Estimates of Public Costs for Teenage Childbearing* (1986); CPO, *Estimates of Public Costs for Teenage Childbearing* (1987); CPO, *1988 Report*, *supra* n. 7.

[42] CPO, *1988 Report*, *supra* n. 7, at 2. In 1975, 64 percent of AFDC mothers under age 30 had been teenage mothers compared to 24 percent of American women as a whole between age 20 and 30. *Adolescent Pregnancy and Childbearing*, *supra* n. 38, at 12.

[43] CPO, *1988 Report*, *supra* n. 7, at 3.

[44] CPO, *Teenage Childbearing*, *supra* n. 6; *Risking*, Vol. I, *supra* n. 21, at 134; *Adolescent Pregnancy and Childbearing*, *supra* n. 38, at 11.

and frustrate efforts to bring more women into early prenatal care,[45] making an already tragic situation worse.

D. *Teenage Girls Need Even More Privacy in Matters of Sexuality Than Older Women and Forced Parental Involvement Harms, Rather Than Enhances, the Quality of Their Decision Making in Matters of Reproductive Rights.*

Many teenage girls who are faced with reproductive decisions are just becoming acquainted with their own sexuality.[46] Their ambivalence and discomfort over sexual matters enhance their need for confidentiality and privacy in matters of reproductive choice, exceeding that of adult women.[47] For example, confidentiality is a primary reason teenagers choose a particular family planning clinic.[48] Forced parental notification of contraceptive use also leads to a decline in adolescent clinic use and effective use of contraceptives, but not to a decline in sexual activity, thus leading to a rise in unintended pregnancies among teens.[49] Although most teens, particularly young teens, voluntarily involve a parent in a pregnancy deci-

[45] AGI, *Teenage Pregnancy in the U.S.*, *supra* n. 2, Table 5.

[46] Fifty percent of pregnancies among unmarried teenagers occur during the first six months of sexual activity and twenty percent occur during the first month. *See supra* n. 15 and accompanying text.

[47] Unmarried teenage girls are especially concerned to keep confidential the existence of a pregnancy and their decision whether to terminate it. For example, one study found that a desire to keep the pregnancy secret and a need for confidentiality in obtaining prenatal health care services led many teens to seek late prenatal care and influenced their choice in health care providers. Institute of Medicine, *Prenatal Care*, *supra* n. 25, at 78. A study of 17 deaths following post-*Roe* illegal abortions concluded that a desire for secrecy was the primary reason two teenagers who died had self aborted. Binkin, Gold & Cates, *Illegal Abortion Deaths in the United States: Why are They Still Occurring?* 14 Fam. Plan. Persp. 163, 165 (1982); *see also Bellotti II*, 443 U.S. at 644 (requiring "anonymity" for minors' judicial consent for abortion proceedings).

[48] Zabin & Clark, *supra* n. 14, at 26, Table 1.

[49] Torres, *supra* n. 8, at 282. One study found that 56% of minors who attended a family planning clinic without their parents' knowledge (which represented 23% of those attending) would stop attending if their parents were notified. Of those, 65% would stop using medically prescribed contraceptives (i.e., pill, IUD, diaphragm) and would resort to non-medical methods (i.e., condom, foam, withdrawal), 10% would use no contraception at all, and only 10% surveyed said they would refrain from intercourse. Torres, Forrest & Eisman, *supra* n. 9, at 291, Table 10.

sion,[50] those teenage girls who choose not to involve their parents do so for good reasons, ranging from a concern for their parents' feelings to fear of violence or other serious negative consequences, to fear of being prevented from obtaining an abortion.[51]

Parental notification and consent requirements, where they exist, have failed significantly to increase parental involvement in their daughters' reproductive decisions.[52] Instead, most minors who do not choose to consult their parents find ways to avoid compelled parental involvement. For example, more than half of minors who attend family planning clinics without their parents' knowledge would stop attending if their parents were notified. A chilling thirty-nine percent of these girls stated that they would have an illegal or self-induced abortion rather than notify their parents as a condition of a legal abortion. Some would leave home, and four in ten surveyed said that they would carry to term rather than inform their parents of their decision to abort, thus giving up the exercise of their fundamental right to choose abortion.[53]

[50] Studies show that approximately 55% percent of girls under 18 voluntarily discuss matters of reproductive choice with one or both parents. Torres, Forrest & Eisman, *supra* n. 9, at 287 (55% discuss decision to have abortion with parents); Torres, *supra* n. 8, at 281 (55% discuss participation in family planning clinic with parents).

[51] Clary, *Minor Women Obtaining Abortions: A Study of Parental Notification in a Metropolitan Area*, 72 Am. J. Pub. Health 283, 284 (1982); Donovan, *Judging Teenagers: How Minors Fare When They Seek Court-Authorized Abortions*, 15 Fam. Plan. Persp. 259, 260-262 (1983).

[52] Blum, Resnick & Stark, *supra* n. 8, at 620; Cartoof & Klerman, *supra* n. 12, at 400; Torres, *supra* n. 8, at 282.

[53] Torres, Forrest & Eisman, *supra* n. 9, at 289, Table 7. This study found that 55% of minors attending a family planning clinic did so with their parents' knowledge and 1% were not sure whether their parents knew. 21% of those surveyed would not voluntarily inform their parents, but would still

II. The Fundamental Right of Minors To Exercise Their Right To Choose Should Not Be Conditioned on Parental Notice or Consent, and Certainly Not Without A Meaningful Judicial or Comparable By-Pass.

The right to terminate a pregnancy free from unwarranted governmental intrusion remains fundamental for both adult women and minor girls,[54] and regulations that impinge on fundamental rights are assessed with heightened scrutiny.[55] Employing heightened scrutiny, the Court must strike down as unconstitutional an unduly burdensome state regulation that the state fails to demonstrate is narrowly tailored to further a compelling interest.[56]

The Minnesota and Ohio statutes,[57] though ostensibly meant to protect minors from making immature decisions and to enhance intrafamily communications, *in fact* fail to accomplish these purposes. At the same time, they impose severe burdens on teenage girls and their families, the very groups they are meant to protect. Accordingly, these statutes are, in

attend the clinic if their parents were required to be notified. The remaining 23% said they would not attend the clinic if their parents were notified: 9% (which represents 39% of the 23% who would no longer attend the clinic) would have an illegal or self-induced abortion; 9% would carry to term; 2% would leave home; and 3% said they did not know what they would do. *Id.*

[54] *Thornburgh* v. *American College of Obstetricians & Gynecologists*, 476 U.S. 747, 759 (1986); *Bellotti* v. *Baird*, 443 U.S. 622, 633 (1979) *(Bellotti II)*; *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52, 74-75 (1976); *Roe* v. *Wade*, 410 U.S. 113, 153 (1973); *see Webster* v. *Reproductive Health Servs.*, 109 S.Ct. 3040, 3058 (1989).

[55] *Webster*, 109 S.Ct. at 3063 (O'Connor, J., concurring) (regulation that "unduly burdens" right to seek abortion is unconstitutional); *Akron* v. *Akron Center for Reproductive Health*, 462 U.S. 416, 427 (1983); *Bellotti II*, 443 U.S. at 640; *Roe* v. *Wade*, 410 U.S. at 155.

[56] *Id.*; Shaman, *Constitutional Fact: The Perception of Reality by the Supreme Court*, 35 U. Fla. L. Rev. 236, 245 (1983) ("To uphold a regulation without determining that it will in fact [further the state's asserted interest] . . . would be inconsistent with the principles of heightened scrutiny.").

[57] Minn. Stat. Ann. § 144.343(2)-(7) (1989); Ohio Rev. Code §§ 2151.85, 2505.073, 2919.12 (1988 Supp.).

the constitutional sense, not only unduly burdensome, they are not minimally rational.

A. *Parental Notification Laws and Parental Consent Laws Are Functionally Equivalent Because They Cause the Same Harm, and Because For Minors They Impose the Same Burden.*

For minors, there is no real-world difference between parental consent and notification laws.[58] The dangers posed by such requirements are the same: compelled involvement of parents can lead to severely negative, even violent, parental reactions, including preventing the minor from having the desired abortion.[59] According to one study, twenty percent of girls who had decided to have an abortion without their parents' knowledge would carry to term if their parents were *notified* of their decision to have an abortion.[60] In reviewing Minnesota's two-parent notification requirement, the District Court found *as a fact* that revelation of a pregnancy or proposed abortion can lead to obstruction of the desired abortion and, particularly in dysfunctional families, violence and abuse.[61] Parental notification requirements, as well as consent requirements, therefore, can easily act as a veto of a minor's abortion decision. By definition, such an outright veto unduly burdens a minor's right to choose.

[58] Three members of the present Court and Justice Powell have recognized that parental notification requirements are the functional equivalent of consent in the burdens they impose on a minor's exercise of her right to choose. *See H.L.* v. *Matheson*, 450 U.S. 398, 420 & n. 9 (1981) (Powell, J., concurring); *id.* at 437-441 (Marshall, J., dissenting, joined by JJ. Brennan & Blackmun).

[59] Approximately 30% of minors surveyed in one study who did not inform their parents did so for fear of serious negative consequences in the form of physical abuse, other retaliation or being prevented from obtaining the abortion. Clary, *supra* n. 51, at 284.

[60] Torres, Forrest & Eisman, *supra* n. 9, at 288-289 & Table 10.

[61] *Hodgson* v. *Minnesota*, 648 F.Supp. 756, 768-769, 773 (D. Minn. 1986), *rev'd on legal grounds*, 853 F.2d 1452 (8th Cir. 1988) (en banc), *cert. granted*, 109 S.Ct. 3240 (1989).

B. *Parental Notification or Consent Requirements Are Unduly Burdensome and Fail in Operation to Serve Their Intended Purposes.*

Parental notification and consent laws are unconstitutional because they fail to achieve their intended purposes: that of protecting pregnant minors from uninformed or immature abortion decisions, or that of fostering healthy intrafamily communication concerning the decision.[62] Indeed, such laws impose further irrational, gratuitous and useless burdens on minors by damaging their family relationships and delaying their access to abortion services. These statutes were in fact enacted for the unconstitutional purpose of denying access to abortion services.

1. *Parental Notification or Consent Requirements Do Not Protect Minors From Making Immature Decisions.*

Parental notification or consent requirements are overly broad and do not in fact protect minors from making immature decisions. The Minnesota and Ohio statutes, by failing to distinguish mature from immature minors, sweep too broadly. Adolescents as they grow older are generally competent to recognize and assess the consequences of their decisions.[63] Indeed, many states that have enacted parental notification or consent requirements for abortion, including Minnesota and Massachusetts, recognize that minors may be competent to make decisions about their own health care.[64] Minors who are gen-

[62] *Bellotti II*, 443 U.S. at 634.

[63] Lewis, *supra* n. 34, at 85-87.

[64] Minnesota allows *any* minor to give independent consent for diagnosis and treatment for pregnancy, childbearing, venereal disease, alcohol and drug abuse, regardless of his or her maturity. Minn. Stat. Ann. § 144.343(1). In Massachusetts, a pregnant minor or a minor living apart from and financially independent of his or her parents may consent to all forms of medical treatment, including treatment for childbirth, except abortion or sterilization. Mass. Gen L. ch. 112 § 12F (1983 & 1989 Cum. Supp.).

erally less competent to make important decisions, i.e. those who are younger and those who tend to be more conflicted about the decision, generally consult their parents voluntarily.[65] Thus, a notification requirement that covers all minors regardless of age or maturity sweeps too broadly and is not *narrowly* tailored to achieving the state's asserted interest of protecting minors from making immature decisions.

Second, assuming *arguendo* that parental notification and consent requirements were properly motivated, their failure to "protect" immature minors is apparent in their irrational consequences. No intelligible principle could dictate that the best interests of a girl who is so young as to be considered immature and who does not want a child, would best be served by a state-imposed requirement that results in her unwillingly becoming a mother.

The *real* purpose of these statutes is to deny access to abortion. Since abortion is one of the safest medical procedures doctors perform — safer at all stages than childbirth — the special treatment of the abortion decision in these statutes must have as its purpose some reason other than protecting immature minors from making hasty or inadequately-considered decisions about their health care. Such statutes are *over-inclusive* because mature minors are not allowed to consent to an abortion; and they are *under-inclusive* because they allow minors regardless of their maturity to consent to other health care treatment that imposes far greater health risks than abortion.[66] These regulations are neither narrowly tailored, nor even rationally related, to the State's interest in protecting minors from making immature decisions, and are thus unconstitutional.[67]

[65] Lewis, *supra* n. 34, at 87; Torres, Forrest, & Eisman, *supra* n. 9, at 288.

[66] These statutes allow pregnant minors to consent to medical care relating to childbirth, yet teenage girls aged 15-19 are twenty-four times more likely to die from childbirth than from first trimester abortion. Ory, *supra* n. 19, at 59, Table 2. Even an appendectomy is 100 times more dangerous than a legal induced abortion. Cates & Grimes, *supra* n. 22, at 170.

[67] *Thornburgh*, 476 U.S. at 763; *Akron*, 462 U.S. at 427; *Bellotti II*, 443 U.S. at 640; *Roe* v. *Wade*, 410 U.S. at 155.

2. *Parental Notification or Consent Requirements Do Not Enhance Intrafamily Communications.*

These statutes also fail to further, and in practice undermine, the state's alternative asserted purpose of fostering productive intrafamily communication concerning a minor's abortion decision.[68] Most teenagers voluntarily involve their parents.[69] But for those who choose not to involve their parents, these statutes do not significantly increase parents' involvement.[70] Moreover, the evidence at trial in *Hodgson* failed to identify any beneficial effect on intrafamily communication of forced notification. Experts credited by the court testified that voluntariness has been found to be the hallmark of productive family communication, and that forced communication not only fails to promote productive relations but typically damages them. These experts further testified that revelation of a pregnancy or proposed abortion through compulsion or inadvertence "is almost universally negative" and can provoke crisis and disharmony.[71] Such provocation is particularly dangerous in dysfunctional families in which violence and abuse often result from revelation of a pregnancy or desire to terminate it.[72]

[68] *See* Melton, *Legal Regulation of Adolescent Abortion: Unintended Effects*, 42 Am. Psychologist 79 (1987).

[69] One study found that in Minnesota 65.3% of minors voluntarily consult *at least one* parent. Blum, Resnick & Stark, *supra* n. 8, at 620. In Massachusetts, approximately 75% of minors get the consent of their parents for their abortion. Planned Parenthood League of Massachusetts, *The Massachusetts Parental/Judicial Consent Law for Minors Seeking Abortion* 3 (1988) [PPLM]. Two studies of minors attending clinics found that 55% voluntarily informed their parents of their participation in the clinic and of their decision to have an abortion. Torres, *supra* n. 8, at 281 (clinic use); Torres, Forrest & Eisman, *supra* n. 9, at 287 (abortion decision).

[70] One study found that the primary impact of the Massachusetts consent statute was to drive minors out of state to obtain a confidential abortion. Cartoof & Klerman, *supra* n. 12, at 399. A study comparing the notification rate of minors in Minnesota with that of minors in Wisconsin (which has no notification or consent statute) found only a slightly higher percentage of Minnesota minors notified both parents (as required by statute) than did Wisconsin minors, and that the percentage of minors in both states that voluntarily notified at least one parent was statistically indistinguishable (65.3% compared to 62.1%). Blum, Resnick & Stark, *supra* n. 8, at 620. Witnesses who provided counseling and abortion services to minors both before and after enactment of Minnesota's statute testified at trial in *Hodgson* that they did not observe any post-enactment change in the level of parental participation. 648 F.Supp. at 775. The court explicitly considered and rejected the possibility that the very existence of the statute had encouraged minors, particularly immature, non-best-interest ones, to inform parents of their pregnancy. *Id.*

3. *Parental Notification or Consent Requirements Harm Pregnant Teenage Girls by Delaying Their Abortion Choice.*

"The abortion decision is one that simply cannot be postponed."[73] Constricting the right to choose abortion by erecting parental notification or consent requirements (even with a bypass) harms teenage girls disproportionately by delaying their abortion choice. And delay is always harmful.

While abortion at any stage of pregnancy is safer for teenage girls than childbirth, delay in seeking and obtaining an abortion, particularly for girls entering their second trimester, has the largest single effect on the risk to teenage girls of complications from abortion.[74] Yet, for various reasons, teenagers are less likely than older women to obtain abortions during the safer, earlier weeks of gestation.[75]

[71] 648 F.Supp. at 766-770. Experts conclude that communication between parents and children about sexual matters is typically closed, and the forced involvement of parents would not lead to more open, productive communication. *Melton*, *supra* n. 67, at 81.

[72] Melton, *supra* n. 67, at 81; Clary, *supra* n. 51 at 284.

[73] *Bellotti II*, 443 U.S. at 643.

[74] Cates & Grimes, *supra* n. 22, at 158; Yates & Pliner, *Judging Maturity in the Courts: The Massachusetts Consent Statute* 78 Am. J. Pub. Health 646, 648 (1988); *see also Hodgson*, 648 F.Supp. at 765. After eight weeks' gestation, the risk of major complications from abortion rises approximately 15-30% for each week of delay. Cates & Grimes, *supra* n. 22, at 158.

[75] *Risking*, Vol. I, *supra* note 24, at 114. A national survey found that only 34% of abortions obtained by girls ages 15 and younger are performed during the first (and safest) eight weeks of gestation, compared with 41% of

Parental notification and consent requirements necessarily impose additional delay, not only because the minor must wait until the requirements are satisfied, but because the requirements impose another hard and inevitably time-consuming decision on a minor: whether to proceed with such compelled parental involvement, or to pursue alternatives (e.g., going out-of-state or using a judicial by-pass if available). Such further delays only increase the medical risks associated with the abortion procedure to a significant degree.

Even short delays could heighten a patient's emotional tension, increase the costs of the procedure, and push a teenage girl into the second trimester of a pregnancy, when the abortion procedure entails significantly greater financial cost and medical risk.[76] Any increases in the financial costs of the procedure impose heavy, even insurmountable, burdens on teenagers as a group, and fall most heavily on poor teenagers, who tend disproportionately to be members of minority groups. By imposing additional medical risks and prohibitive costs on the

abortions obtained by girls ages 15-19, and 51% of those obtained by women ages 20-24. AGI, *Teenage Pregnancy*, *supra* n. 2, at 55. Adolescents (19 and under) are twice as likely as older women to obtain abortions after twelve weeks. Cates, *supra* n. 22, at 20. One reason for delay is limited access to abortion services, particularly in rural areas, due to difficulties in travel (especially in states with great distances between clinics) and expense. In addition, many teenagers, particularly the very young, fail to recognize the early signs of pregnancy. This may be due to ignorance or because many adolescent girls ordinarily experience menstrual irregularities and therefore do not distinguish them from early signs of pregnancy. *See, e.g.*, AGI, *Teenage Pregnancy*, *supra* n. 2, at 55; *Risking*, Vol. I, *supra* n. 21, at 114; Russo, *Adolescent Abortion: The Epidemiological Context*, in *Adolescent Abortion: Psychological and Legal Issues* 40, 57 (Melton ed. 1986); Bracken & Kasl, *Delay in Seeking Induced Abortion: A Review and Theoretical Analysis*, 121 Am. J. Obstetrics & Gynecology 1008-1019 (1975).

[76] *Hodgson*, 648 F.Supp. at 762. In *Hodgson*, the District Court found as a matter of fact that the cost of abortion increases with gestational age because of the increased skill necessary to perform the procedure. *Id.* at 761. The Court cited the following fee schedule from one clinic: under 12 weeks, $225; 12-14 weeks, $275; 16-18 weeks, $450; 18-19 weeks, $550; 19-21 weeks, $650. After 21 weeks, patients are referred to a particular hospital where, at 22 weeks, the fee is $1600-1800. *Id.*

abortion choice, parental notification and consent requirements run counter to one of the primary reasons abortion was legalized sixteen years ago — to reduce the devastating health risks of illegal abortion.

4. *The Requirement That, to Avoid a Court Hearing, Both Parents Must Be Notified is Unduly Burdensome and Contrary to the State's Asserted Purposes in Many Family Situations.*

The two-parent notification requirement of the Minnesota statute is not even minimally rational. It contains no exception for a divorced parent or for parents who are separated or absent, or who have never married, or for dysfunctional families in which one resident parent is likely to become violent or abusive to either the young woman or the other parent upon being informed that a daughter is seeking an abortion with the other spouse's approval.[77]

The two-parent consultation requirement was *found* in Minnesota to be a significant burden on minors which undermined, rather than promoted, healthy intrafamily communication. State-mandated contact with an absent, disinterested, estranged, separated, or potentially violent second biological parent was found to be frequently detrimental to the pregnant woman and, indeed, to the one parent who has been consulted, resulting in *reduced* intrafamily communication.[78]

In Minnesota, 20-25% of minors seeking judicial authorization voluntarily consulted with or were accompanied to hearings by one parent, demonstrating the severe problems caused by requiring notice to both parents. Indeed, two-parent consultation requirements had the perverse effect of inhibiting parent-child communication: When the daughter and one parent agree that contact with the other parent will be coun-

[77] Minn. Stat. Ann. § 144.343(3).

[78] *Hodgson*, 648 F.Supp. at 769 ("[i]n these instances, the requirement that minors notify both biological parents actually *reduces* parent-child communication") (emphasis supplied).

terproductive, a legally-imposed need to notify the second parent or obtain a judicial waiver of notification "distracts the minor and her parent and disrupts their communication."[79] Voluntary communication with one parent is actually *reduced* by a requirement that only consultation with both will suffice; some minors were dissuaded from contacting even one parent when only the consent of two would obviate the need for judicial proceedings.[80]

C. *If Court Upholds Parental Notification, it Must Preserve a Judicial or Other By-Pass to Protect Minors' Privacy Rights, and the By-Pass Must Be Meaningful and Workable.*

1. *By-Pass Must Be Preserved.*

This Court has properly held that "the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy."[81] Although *every* minor may not be competent to make the abortion decision by herself, for those who are competent, the fundamental right to decide bars the state from delegating the decision to another.

To protect all minors' privacy rights to decide to terminate their pregnancies without the forced involvement of their parents, a state must provide a by-pass procedure that allows a minor to seek the advice, counsel and support of another competent adult who can help her make the decision herself and who can determine, if the minor is not mature, whether it is in her best interests to have the abortion.[82] A judicial determination is but one, and in many cases not the best, by-pass procedure.[83]

[79] *Id.* at 778.

[80] *Id.* at 769, 778.

[81] *Danforth*, 428 U.S. at 74; *see Akron*, 462 U.S. at 439-440; *Bellotti II*, 443 U.S. at 643.

[82] Ordinarily, the determination of a minor's competence to consent to medical treatment is made by the minor's physician. In Massachusetts, for *example, the common law mature minor rule allows the physician to determine whether the minor is capable of giving informed consent to medical treatment and whether it is in the minor's best interests to notify his or her parents. Baird* v. *Attorney Gen.*, 371 Mass. 741, 754 (1977). Immature minors already require the consent of *one* parent. *Id.* at 753.

[83] Maine has just enacted a comprehensive statute that provides for parental consent or judicial by-pass, but also provides for critical and meaningful alternatives. The statute authorizes a physician to perform an abortion on a minor after the physician has received the informed written consent of that minor and the physician has ensured that the consent is truly "informed" by counseling the minor according to specific criteria and determining that the minor is mentally and physically competent to give consent. *See* An Act to Require Parental Consent to a Minor's Abortion, 1989 Maine Acts Ch. 573, § 2 ¶ 2(2), (3) (amending 22 Me. Rev. Stat. Ann. § 1597-A).

Wisconsin requires providers of abortion services to encourage minors to notify their parents unless they determine that the minor has a valid reason not to do so. In that situation, the statute provides an alternative to parental notification. The hospital or clinic personnel encourage the minor to notify another family member, a close friend, a school counselor, social worker or other appropriate person. Wis. Stat. Ann. § 146.78(5) (1989).

Without a judicial by-pass or other alternative to parental involvement in the abortion decision, four out of ten minors — those who would choose not to consult their parents — will be denied their fundamental right to choose to terminate their pregnancy in private. Some will succumb to anti-choice pressure or their parents' will that they carry to term, others will have an illegal abortion or self-abort, and others will suffer the negative, even violent, consequences that the revelation of their pregnancy or abortion decision causes.

2. *By-Pass Must Be Meaningful and Workable.*

Amici wish to emphasize that by-pass does not *cure* the burdens caused by forced parental notification or consent, particularly two-parent notification or consent. Nor do *amici* endorse the concept of judicial by-pass as the best way to protect minors' constitutional rights. Nevertheless, it is the *minimum* necessary to protect minors' constitutional rights to decide to terminate their pregnancy without an actual or *de*

facto parental veto. Accordingly, a judicial by-pass provision must be meaningful and workable.

Massachusetts has had the longest experience with judicial by-pass, initiating the procedure in 1981. Over that time the procedure has worked about as well as such a procedure could for those who have chosen to use it: Thousands of minors have petitioned the court, all but a minute handful of petitions have been granted without appeal,[84] and the average time period from the time an attorney is contacted and a hearing takes place is 4-5 days.[85] Key to the "survivable" working of the Massachusetts procedure are the Rules and Guidelines issued by the Massachusetts courts. *See* Appendix B. These Rules and Guidelines provide for the essential elements of expedition, confidentiality, appointment of counsel, and the determination of maturity or best interests. Although the Massachusetts by-pass procedure is not without its problems, this procedure is, *when the Rules and Guidelines are followed*, faithful to the teaching of *Bellotti* v. *Baird*, and, as confirmed by nearly ten years of experience, representative of what such a procedure must entail.

Time is of the essence when deciding to terminate a pregnancy, as each additional week of gestation increases the health risks from abortion. To ensure that petitions are heard expeditiously, the Rules and Guidelines specify that petitions should be heard in chambers on any day the court is in session,

[84] Between April 1981 and February 1988, 5,460 minors sought judicial consent for abortion in Massachusetts pursuant to Mass. Gen. L. ch. 112, § 12S. Only twelve petitions were denied: Of these nine were overturned on appeal within three days, one minor petitioned another court, one went out of state, and one minor obtained parental consent during appellate proceedings. PPLM, *supra* n. 68, at 2.

[85] Yates & Pliner, *supra* n. 74, at 648 (though 4.2-5.2 days was average delay, specific delays ranged from one day to 39 days). Much of the reason for expedition in Massachusetts is a combination of the efforts of *amicus* Massachusetts Judicial Consent for Minors Lawyer Referral Panel and cooperative court personnel. This Court should not be so naive as to think that lawyers and court personnel in other states would necessarily be as helpful. Moreover, by-pass causes other delays: i.e., locating an attorney initially, any appellate proceedings and scheduling the abortion procedure some time after the hearing.

expeditiously, and if possible *on the same day of filing*.[86] The Rules and Guidelines provide for waiver of fees and for court-appointed counsel, which is essential to navigate expeditiously through any court procedures. To ensure confidentiality, only a sealed affidavit contains the minor's real name. She need not state her name on any other documents or during the hearing, her name should not appear in the transcript of the proceedings, and the in-chambers hearings are to be held out of the presence of unnecessary court personnel. Moreover, statewide venue is provided so that a minor need not attend court in her neighborhood.[87]

Most importantly, and following the precise lead of *Bellotti II*, the Massachusetts Rules and Guidelines set out a two-tiered approach under which judges are to determine whether to grant the petition. First the judge must determine whether the minor is mature enough to make the decision. Only if the judge determines that she is not mature, does the judge move to the second tier of inquiry, whether the abortion would be in her best interests. The Rules and Guidelines further set forth the appropriate inquiry when making these determinations,

[86] App. B at B-3, ¶ 2. Ideally, a statute should specify very short deadlines for scheduling hearings, rendering decisions, and hearing and deciding appeals in order to avoid delays such as the potential 3-week delay wrought by the Ohio statute. Ohio allows 5 business days for scheduling the initial hearing, 4 days for docketing the appeal and 5 days for the appellate hearing, and calls for decisions "immediately" after the hearing. *Akron Center for Reproductive Health* v. *Rosen*, 633 F.Supp. 1123, 1141-1142 (N.D. Ohio 1986), *aff'd*, *Akron Center for Reproductive Health* v. *Slaby*, 854 F.2d 852 (6th Cir. 1988), *jurisdiction noted*, 109 S.Ct. 3239 (1989). *Compare* La. Rev. Stat. Ann. § 40:1299:35:5 (1989 Cum. Supp.) (hearings to be held within 48 hours of filing of application, for both initial petition and appeal); Nev. Rev. Stat. Ann. § 442.255.2(c) (1986) (hearing must be held within 2 days of filing and decision rendered within 1 day of hearing), *with* Maine Acts Ch. 573 § 2 ¶ 6(C) (5 days both for initial hearing and for appeal); Wyo. Stat. § 35-6-118 (1989 Cum. Supp.) (5 days for initial hearing, no guideline for appeal).

[87] App. B at B-2, ¶¶ 2-3; B-3 to B-4, ¶¶ 4-5. Contrast with the Ohio practice, which requires a minor to provide her true name and address on the complaint. *Rosen*, 633 F.Supp. at 1143-44. Yet, even with the Massachusetts guidelines, a minor's confidentiality can be breached when persons she knows recognize her at court. *See* PPLM, *supra* n. 68, at 4.

including the minor's age, school and work experience, whether the decision is her own and whether she has discussed it with others.[88]

The Rules and Guidelines specifically caution that a judge should not question a minor in such a way as to promote "a particular set of moral values." They direct judges not to inquire into the minor's or her parents views on the morality of abortion, whether the minor considers the fetus to be an "unborn child," or whether the minor believes she is destroying life.[89]

Only if the judge fails to find the minor mature, should he or she consider whether the abortion is in the minor's best interests. The Rules and Guidelines then propose that judges apply the doctrine of "substituted judgment"[90] in conducting the best interests inquiry, explaining,

> [t]hat doctrine essentially requires a court to determine what an incompetent person would choose were she fully

[88] App. B at B-4, ¶¶ 6-8.

[89] App. B at B-4, ¶ 7. Unfortunately, in Massachusetts, and one could predict elsewhere, this guideline is far from uniformly followed. *See Planned Parenthood League of Massachusetts* v. *Bellotti*, 868 F.2d 459, 466 (1st Cir. 1989). Nevertheless, former Massachusetts Superior Court Judge Paul Garrity, who testified in *Hodgson* about his experience with the Massachusetts statute, admitted that he is personally opposed to abortion, yet he heeded the Guidelines' admonition not to let his personal views interfere. He found every minor who appeared before him mature enough to make the decision. Tr. at 1322-1325, *Hodgson*.

Other statutes' lack of standards for determining maturity and best interests are an open invitation for judges improperly to question the minor about her moral and religious views. For example, the Maine statute's catch-all provision that allows a judge to consider "[a]ny other evidence that the court may find useful," 1989 Maine Acts Ch. 573 § 2 ¶ 6(C)(3), opens the door to such improper inquiry. *See also In re T.W.*, 543 So.2d 837, 841 (Fla. App. 5 Dist. 1989) (Florida statute's lack of guidelines for determining maturity or best interests imposes clear danger that judges will render decision on basis of their own moral, religious or political beliefs rather than on a constitutionally permissible basis).

[90] *Superintendent of Belchertown State School* v. *Saikewicz*, 373 Mass. 728, 750 (1977); *Brophy* v. *New England Sinai Hosp., Inc.*, 398 Mass. 417, 431 (1986).

> competent, while bearing in mind her expressed choice and partial competency. Various considerations may be relevant to a "best interest" determination. As to this finding, the court may inquire into the minor's reasons for not seeking her parents' consent. Where the minor is accompanied by one parent who supports her petition, that support should be given great if not dispositive weight.[91]

This Guideline is, of course, critical because it ensures that a judge does not assess a minor's best interests according to the judge's moral views of abortion.[92]

If followed, rules such as the Massachusetts Rules and Guidelines can properly shield minors from harassing questions by judges, expedite the proceedings to avoid undue delay, and protect the minor's privacy and confidentiality as much as possible under the circumstances.

Conclusion

To exercise their fundamental right to reproductive choice, minors need access to reliable information about childbearing and abortion from a competent adult, including a parent, if they choose, or from trained counselors and physicians so that they may ultimately make the decision that is best for

[91] App. B at B-4 to B-5 ¶ 8.

[92] Application of the substituted judgment standard would have prevented the four-week delay in obtaining an abortion for a minor in Alabama where the judge determined that an abortion was not in her best interests because her prognosis for delivering a baby was fair! *See Ex Parte Anonymous*, 531 So.2d 901, 902-903 (Ala. 1988). The minor, 12 years old and 14-16 weeks pregnant, whose mother was in a psychiatric ward and father had left home, testified that she did not want to have the baby, could not take care of the baby or herself, and that her two aunts agreed with her decision. After finding that she was not mature, the trial judge denied her petition ruling that, at 14-16 weeks gestation, her prognosis for delivery was fair. *Id.* Although the ruling was reversed on appeal as clearly improper, four weeks elapsed during appeals to the appellate court, which remanded instead of granting the petition outright, and to the Supreme Court of Alabama.

themselves. If this Court is truly concerned with the quality of childbearing decision making by minors, it must not deter minors who will not voluntarily consult their parents from getting the counseling and health services that they desperately need for a safe abortion or a safe pregnancy. Forced parental notification or consent bars the provision of safe abortion counseling and services to those individuals who need help the most — minors who feel they cannot involve their parents in their reproductive decisions. To protect a minor's privacy, if such notification is upheld, a meaningful by-pass is required, as eight members of this Court recognized in *Bellotti* v. *Baird*. Guidelines such as those in Massachusetts provide the *minimum* essential ingredients of a meaningful, workable by-pass procedure.

For the foregoing reasons, the judgment below in *Hodgson* v. *Minnesota* should be reversed in part, and the judgment in *Ohio* v. *Akron Center for Reproductive Health* should be affirmed.

Respectfully Submitted,

JOHN H. HENN
(Counsel of Record)
NINA JOAN KIMBALL
FOLEY, HOAG & ELIOT
One Post Office Square
Boston, Massachusetts 02109
(617) 482-1390
Attorneys for *Amici Curiae*

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APPENDIX A

Interests of Amici

The Center for Population Options (CPO) is a national, non-profit organization dedicated to the prevention of unintended adolescent pregnancy and too-early childbearing. CPO develops programs to increase opportunities for young people through education, comprehensive health care, and access to family planning services.

Planned Parenthood League of Massachusetts, Inc. is a non-profit organization which, with others, is the certified class representative of minor women who are engaged in an ongoing challenge to the Massachusetts minors' abortion parental consent/judicial by-pass statute, Mass. Gen. L. Ch. 112, §12S, which has been in effect longer than any other such statute in the nation, and which was enacted in direct response to the striking down of the predecessor §12S by the Court in *Bellotti* v. *Baird*.*

Girls Clubs of America serves more than 250,000 girls and young women ages 6-18 nationally through programs and advocacy. Preventing adolescent pregnancy is an important goal of the organization. A major objective of its program in this area is to improve communications between parents and their daughters.

The Massachusetts Judicial Consent for Minors Lawyer Referral Panel is a volunteer association of over two hundred Massachusetts lawyers who for the last eight years have represented more than 6,000 pregnant minors seeking judicial consent for an abortion (in lieu of parental consent) under Mass. Gen. Laws ch. 112, §12S.

Mobilization for Youth Health Services, Inc. is concerned that the erosion of *Roe* v. *Wade* will lead us back to the days where social class and ability-to-pay were highly determina-

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* 443 U.S. 622 (1979) *(Bellotti II)*. The history of the new §12S and the litigation challenging it is set forth in part in *Planned Parenthood League of Massachusetts* v. *Bellotti*, 868 F.2d 459 (1st Cir. 1989).

minative of whether choice was available and, if available, whether that choice was exercised under conditions of hygiene, care, and skill normally accepted as standard for the medical profession. Social realities being what they are, the victims of the curtailment of an essential right for women would be millions of disadvantaged and poor women in the United States.

The United States Student Association (USSA) is a nationwide non-profit membership organization which represents approximately two million students at approximately 200 colleges and universities throughout the United States. USSA has a strong commitment to ensuring access to higher education and the right to self-determination for all individuals regardless of age, gender, economic status, race, disability, sexual/affectional orientation, or veteran status.

Brooklyn YWCA (Young Women's Christian Association) is part of the oldest and largest worldwide women's membership organization dedicated to empowering women. The Brooklyn YWCA opposes any effort to restrict the access of poor and young women to quality health care services, as well as any attempt to deny them their right to reproductive freedom.

Students and Youth Against Racism is a national organization based in New York City with chapters nationwide whose women members include students and youth from many communities. It supports the right of all young women to make the decision to terminate a pregnancy through abortion, without restrictions, if they so choose. To deny safe, legal abortion would seriously harm the health of and discriminate against untold numbers of young women, especially the poor, unemployed, and Black, Latino, Asian and Native Americans, who, without the funds to obtain safe abortions, would have to resort to dangerous health-threatening procedures.

Professor William Kassen, a child psychologist at Yale University, is a member of the National Academy of Sciences and the vice chairman of the Committee on Child Development Research and Public Policy that proposed and contributed to the report *Risking the Future: Adolescent Sexuality, Pregnancy, and Childbearing.*

The American Public Health Association, established in 1872, is a national nongovernmental professional society representing 55,000 members in all disciplines and specialities in public health. APHA is devoted to the universal protection and promotion of public health, and the equality of health services for all persons.

The National Family Planning and Reproductive Health Association, Inc. (NFPRHA) is a non-profit membership corporation designed to improve and expand the delivery of comprehensive family planning and reproductive health care information and services throughout the United States. NFPRHA represents over 85 percent of the agencies and organizations that operate family planning programs with funds received under Title X of the Public Health Services Act of 1970.

Abortions Rights Mobilization (ARM) is a Section 501(c)(3) organization, which uses lawsuits, education and other techniques "to implement and guarantee a women's right to legal abortion as decreed by the U.S. Supreme Court," following ARM's by-laws.

Abortion Rights Council (ARC) was founded in 1968 and currently has 5,000 members and 12,000 supporters in the State of Minnesota. It has as its sole purpose keeping abortions safe and legal for all women. ARC opposes any further restrictions on women's access to abortions and supports the principles established in *Roe* v. *Wade.*

Choices Women's Medical Center is a New York State licensed medical facility serving over 30,000 patients a year in the New York City area for family planning, abortion and prenatal care. Since its founding in 1971, Choices Women's Medical Center has been at the forefront of insuring high quality feminist women's health care to its patients and fighting politically to retain the right to choose.

Child Care Law Center in San Francisco, California is the only legal services organization in the country exclusively dedicated to expanding the supply of affordable, quality child care. It has a particular emphasis on serving the needs of low-income women, and as such it strongly supports the rights of low-income women to have equal access to health services, including abortion.

The National Organization for Women (NOW) is the largest feminist organization in the United States. Fundamental to NOW's purpose is the right of women to control their own bodies and to determine if and when to bear children. Women's right to reproductive freedom impacts not only their right to privacy, but also their health and safety.

The American Association of University Women (AAUW), a network of 140,000 college-educated women, promotes equity for women and girls. The AAUW supports the right of every woman and girl to safe and comprehensive reproductive health care. AAUW believes that decisions concerning reproductive health care are personal ones, and that the right to make informed decisions should be available to *all* women.

The American Jewish Congress, an organization of American Jews founded in 1918, is fully committed to protecting the right of all women to exercise reproductive choices. While it believes that involving parents in the choices of their teenage daughters is desirable, it believes that such involvement cannot be mandated by law, because study after study demonstrates that these laws are wholly ineffective, even, in many cases, counterproductive.

The National Council of Jewish Women, founded in 1893 and numbering 100,000 members across the United States, is dedicated, in the spirit of Judaism, to advancing human welfare and the democratic way of life through a combination of social action, education and community service. It has adopted a National Resolution to work for "the protection of every female's right to choose abortion, and the elimination of obstacles that limit reproductive freedom."

The Women's Law Project (WLP) is a non-profit law firm dedicated to advancing the status and opportunities of

women. WLP believes that the right to reproductive choice is an essential component of women's ability to play an equal role with men in this society, and has engaged in extensive litigation and public education designed to protect women's legal right to abortion.

The Women's Action Alliance, Inc. in New York City works extensively with community-based organizations serving women of color, young women, and low-income women. We are keenly aware of the importance of maintaining a full range of reproductive options for these and all women. If abortion services or access to abortion were to be restricted, these women would have no alternative but to seek dangerous alternatives to safe and legal abortion.

The National Gay & Lesbian Task Force (NGLTF) is a national membership advocacy and political organization founded in 1973, to protect and advance the civil and social rights of lesbians and gay men. NGLTF strongly supports the reproductive freedom of all women and the expansion of a fundamental right to privacy of all people in the area of reproductive and sexual decision-making.

The National Gay Rights Advocates (NGRA) is a non-profit public-interest law firm founded in 1978, which engages in impact litigation throughout the country on behalf of lesbians and gay men. Preserving the constitutional rights to liberty and privacy, rights that are principal components of a woman's right to choose abortion, are of fundamental concern to NGRA's work and its membership.

Lambda Legal Defense and Education Fund, Inc., founded in 1973, is the nation's oldest and largest national legal advocacy organization working in furtherance of the rights of lesbians and gay men. As an organization representing the lesbian and gay community's belief in the constitutional right to liberty and bodily autonomy, Lambda strongly supports the position that women in our society are constitutionally entitled to make their own decisions about whether to choose abortion.

The National Council for Research on Women is an independent association of established centers and organizations that provide institutional resources for feminist research, policy analysis, and educational programs for women and girls.

The Minority Prison Project of Memphis, Tennessee works for the protection of the men, women, and children imprisoned in the United States. We work to try and regain the rights for these humans, under the Constitution, that is denied them daily.

All-Peoples Congress, based in New York City, is a national organization with chapters in communities in many major cities whose women members are Black, Latino, Asian, Native, white, students, lesbians, workers, unemployed, disabled, seniors, single heads of households and those on fixed incomes. It strongly supports a comprehensive federal program of guaranteed reproductive rights and health care for all women, which includes safe, legal, affordable abortion.

The Women's Bar Association of Massachusetts (WBA), with over 1,000 members, is committed to the advancement of women attorneys, to the protection of all women in the legal system, and has been particularly concerned with the protection of a woman's right to choice. The WBA also sponsors a panel of attorneys who represent minors seeking judicial consent for abortion (amicus Massachusetts Judicial Consent for Minors Lawyer Referral Panel).

California Women Lawyers (CWL) is an organization of several thousand women lawyers founded in 1973 for the primary purpose of improving the situation of women in the State of California. CWL is committed to all issues affecting a woman's right to choice, lobbying against various parental consent bills and working with a broad-based coalition to encourage funding and support for programs supportive of choice.

The Women's Bar Association of Illinois ("WBAI") was founded in 1914 for the purpose of promoting and fostering the interests and welfare of women and women attorneys and

to maintain the honor and dignity of the legal profession. WBAI's 1,000 members have long campaigned for individual rights and liberties, including the right of women to make reproductive decisions free from governmental interference.

Women Lawyers' Association of Los Angeles (WLALA), founded in 1919, is the largest local bar association in the State of California emphasizing the concerns of women. WLALA has as members over 1,200 female and male lawyers, judges, and law students who are personally and professionally concerned with the importance of preserving a woman's right to choose for herself whether to terminate a pregnancy.

The New York State Coalition Against Domestic Violence is a membership organization of battered women's shelters, safe home projects, counseling and advocacy organizations and individuals committed to empowering women and helping them to lead violence-free lives. The Coalition believes in women's rights to choice and in the accessibility of services to all women, regardless of economic status. This includes every woman's right to reproductive choice and to medical assistance.

The Tucson Women's Commission was founded in late 1975 by the Mayor and Council of the City of Tucson to assist women in attaining full equality of opportunity in all aspects of life. The Tucson Women's Commission also maintains that public policy in the best interest of women will support a full range of options, information, and services so that every woman has the ability to make her own decision about when, whether, and under what conditions to bear a child.

New York Women in Criminal Justice is an organization of women whose members include police, probation, and correction officers; judges, attorneys, and social workers; others who work in the criminal justice system; inmates and ex-offenders. In furtherance of our concern that offenders who go through the system not come out worse than when they went in, we strongly support the right of a woman to choose abortion, knowing that the offspring of women in prison become the

dysfunctional children in school and often the criminals of the future.

The Missouri Women's Network is a banding together of Missouri organizations and individual women and men to facilitate communication, promote education, and to strengthen advocacy for women's issues based on the 1977 National Plan of Action for Women (adopted in Houston).

The Connecticut Women's Educational and Legal Fund, Inc., with over 400 members, is a non-profit public interest law firm advocating for women's rights. As an organization working for equality, we believe that every woman, without regard to age, religious belief, income, race or disability, must be able to control her own health and reproduction.

Hawaii Women Lawyers is dedicated to the improvement of the status of women attorneys and the support of issues of concern to all women, so as to promote the advancement of all women.

North Carolina Equity, a non-profit organization, is dedicated to the economic advancement of women. We support women's full realization and exercise of their most basic legal rights, including a woman's right to control her own body. This right must include her right to choose an abortion.

The San Francisco Women Lawyers Alliance is a progressive, activist bar organization that was founded in 1983 to provide a vehicle through which women lawyers could address women's issues and enhance the position of women in our society. One of the issues of particular concern to our membership is freedom of choice and reproductive rights for all women.

Queen's Bench of the San Francisco Bay Area, founded in 1912, is the largest bar association in the Northern California area established to promote the interests of women attorneys. Queen's Bench is concerned in maintaining a woman's fundamental right of choice to terminate a pregnancy that was established in *Roe* v. *Wade*.

Fresno Free College Foundation is a community organization with offices in Fresno, California. Its origin in 1968 is connected to an academic freedom case and, since that time, it has, in various ways, been supportive of academic freedom and the civil liberties of students, professors, and citizens.

APPENDIX B

STANDING ORDER 5-81. UNIFORM PROCEDURES REGARDING PETITIONS FOR ABORTION AUTHORIZATION UNDER G.L. c. 112, s. 12 TO INCLUDE AS AN ATTACHMENT SUGGESTED GUIDELINES, ORIGINALLY SET FORTH IN *PLANNED PARENTHOOD LEAGUE OF MASSACHUSETTS* v. *BELLOTTI*, NO. 81-124 CIVIL (SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY; LIACOS, J. SINGLE JUSTICE) (JUNE 16, 1981)

(Amended)

Applicable to All Counties

Effective August 1, 1981

(1) Upon the filing of a petition or motion (petition) under G.L. c. 112, § 12S, inserted by St.1980, ch. 240 (a copy of which is attached), the Clerk-Magistrate (clerk) shall immediately bring the matter to the attention of the Regional Administrative Justice or His/Her Designee who will either hear the petition in his/her session or, through the clerk, assign it for a hearing in another session.

In any event, the matter shall be given priority over all other cases then pending "so that the court may reach a decision promptly and without delay so as to serve the best interests of the pregnant woman." G.L. c. 112, § 12S, inserted by St.1980, ch. 240. In this regard, the court should not decline to decide a case brought under § 12S because of any pleading omissions or other technical defects and shall assist the minor, particularly if unrepresented by counsel, in presenting relevant facts and by liberally construing the pleadings. (A copy of a form petition, which is to be made easily available to petitioners, is attached.)

If the position is filed in a county in which no session is being held, the clerk of court who received the petition shall immediately notify the Chief Justice of the Superior Court by telephone of the pending petition. The Chief Justice shall then take such action as is necessary to reach a decision promptly

and without delay so as to serve the best interests of the pregnant woman.

(2) Although § 12S permits a pregnant woman less than eighteen years of age to participate in proceedings in the Superior Court Department in her own behalf, it is preferable that the minor be represented by counsel. The statute requires that the court advise her that she has a right to court-appointed counsel and that the court shall, upon her request, provide her with such counsel.

Also, the court may appoint a guardian *ad litem* to represent the minor or may make such other orders as necessary pursuant to Mass.R.Civ.P. 17(b). The compensation for counsel and/or for the guardian *ad litem* shall be certified by the justice as an expense incident to the operation of the court. If the minor requests waiver of costs and fees, as provided by St.1980, c. 539, such costs and fees are to be waived.

(3) As provided by § 12S, all proceedings shall be confidential and all pleadings and other papers filed shall be designated anonymously. For example, the proceedings shall be titled Mary Moe, Mary Doe, etc. If the minor files papers which do not insure her anonymity, the court shall have the papers processed in a manner which will insure anonymity and shall return the defective papers to the minor or her counsel. An affidavit shall accompany the papers in the case. Such affidavit shall reveal the minor's true identity. The affidavit shall be sealed in an envelope which will be identifiable by having the docket number of the case inscribed upon it. All such envelopes shall be kept in a separate file by the clerks of the various courts. All papers in the proceeding shall be impounded.

The clerks of the various courts should undertake to insure that the minor's contact with the clerk's office is confidential and expeditious to the fullest extent practicable. For example, assistance in filing a petition should be provided in a confidential setting, such as a private office. Similarly, one or more persons in the clerk's office should be at all times available to

answer questions asked by a minor, either in person or by phone, and to assist the minor in expeditiously presenting her petition to the court. Each clerk shall designate one or more persons to receive and process § 12S petitions and shall insure that one such person is available to insure prompt treatment.

(4) All proceedings under c. 112, § 12S, shall be conducted jury-waived with a court reporter present. The statute requires the court to make in writing specific factual findings and legal conclusions supporting his or her decision and to order that a record of evidence be maintained which includes his or her own findings and conclusions.

(5) Suggested guidelines, originally emanating from a memorandum of the Single Justice for Suffolk County in *Planned Parenthood League of Massachusetts* v. *Bellotti*, No. 81-124 Civil (Supreme Judicial Court for Suffolk County; Liacos, J. Single Justice) (June 16, 1981), are attached hereto.

SUGGESTED GUIDELINES

The following guidelines for handling § 12S petitions ("petitions") are suggested to the Superior Court. These guidelines are intended to supplement amended Superior Court Standing Order No. 5-81 and not to replace it.

1. Petitions should ordinarily be heard on any day the court is in session.

2. Petitions should be heard as expeditiously as possible upon filing with the Clerk/Magistrate's office, and on the same day if practical.

3. All technical defects in the proceedings and in the pleadings and papers should ordinarily be disregarded by the Court and by the Clerk/Magistrate.

4. Hearings must be confidential and should be held in the judge's lobby except where physically impossible. The petitioner ("minor") should be permitted to have present any person she desires (social worker, counselor, parent, friend), but the judge should exclude all unnecessary court personnel or others. The minor should be free to choose whether to go forward without counsel.

5. The minor should not be required to state her true name. After explaining the impoundment procedures used to ensure confidentiality, the judge may wish to ask the minor her true first name in order to address her by it during the hearing. The transcript should not contain the minor's full true name since she will have previously stated her identity on a sealed affidavit held by the Clerk/Magistrate pursuant to Superior Court Standing Order 12-80.

6. It is contemplated that the judge will conduct the hearing on a "two-tier" basis with "maturity" determined first, and "best interest" addressed only if maturity is not found.

7. As to the "maturity" finding, inquiry may be appropriate in such areas as the minor's age and school and work experience, any history of mental illness or other treatment relating to mental competence, and whether the abortion decision is a personal decision and not one forced upon the minor by another and whether the minor has discussed her decision with other persons. In any inquiry as to the minor's maturity and her understanding of the nature, consequences and significance of her abortion choice, or in any inquiry as to her best interests, it is suggested that the judge should avoid the creation of the appearance of seeking to promote a particular set of moral values by inquiring into the minor's or her parents' views as to the morality of abortion; or into whether the minor considers a fetus to be an "unborn child," as to whether the minor believes she is in some way taking or destroying life.

8. Where the court finds a minor is not mature, it must make a determination of whether the abortion or childbirth alternative is in her "best interest". The court may be guided in making such a determination by the substantially coextensive doctrine of substituted judgment. That doctrine essentially requires a court to determine what an incompetent person would choose were she fully competent, while bearing in mind her expressed choice and partial competency. Various considerations may be relevant to a "best interest" determination. As to this finding, the court may inquire into the minor's

reasons for not seeking her parents' consent. Where the minor is accompanied by one parent who supports her petition, that support should be given great if not dispositive weight.

9. Where the court preliminarily concludes that the minor is mature, appointment of a guardian ad litem should ordinarily be unnecessary. Where the court preliminarily concludes that the minor is not fully mature, it should consider whether such an appointment is necessary to assure protection of the minor's best interest or whether it would lead to unnecessary delay, particularly if the minor is represented by counsel, or has been counseled by competent professionals, or is accompanied by a parent or other adult.

10. In view of the statutory mandate for expeditious decisions, petitions may be decided in chambers and should, in any event, be decided as promptly as possible, and ordinarily within twenty-four hours or less. The Clerk/Magistrate should inform the minor of the decision as soon as possible and in the manner which the minor requests.

11. The Judge or Clerk/Magistrate should give the minor a copy of an order under § 12S bearing the court's docket number, and a copy of her sealed affidavit bearing the same docket number. Where the decision can be made immediately, the Judge may choose to have the minor wait, deliver the order and a copy of the affidavit to her, and seal the original affidavit in her presence.

12. A petition should not be denied or a hearing delayed solely because the minor has not selected a particular clinic, hospital or doctor for performance of the abortion. If the judge authorizes an abortion for an immature minor on the "best interest" basis, he may inquire into her contemplated plans in order to assure himself that the particular course of medical treatment she intends to follow will be in her best interests.

13. Appointed counsel in § 12S proceedings should be paid for in the same fashion as in criminal cases or in such other fashion as the Chief Administrative Justice of the Trial Court finds is best suited for such proceedings.

No. 88-790; No. 88-805; Nos. 88-1125, 88-1309.

IN THE

Supreme Court of the United States

October Term, 1989

Supreme Court, U.S.
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KENNETH J. BIALKIN,
Counsel of Record
PEGGY L. KERR
DAVID C. MARCUS
919 Third Avenue
New York, New York 10022
(212) 735-3000

Of Counsel:
MEYER EISENBERG
RUTH LANSNER
JUSTIN J. FINGER
JEFFREY P. SINENSKY
STEVEN M. FREEMAN
JILL L. KAHN
LIVIA D. THOMPSON
Anti-Defamation League of B'nai B'rith
823 United Nations Plaza
New York, New York 10017
(212) 490-2525

QUESTIONS PRESENTED

1. Do the Illinois, Minnesota and Ohio statutes at issue violate the establishment clause by endorsing one religious theory of when life begins?

2. Do the Illinois, Minnesota and Ohio statutes at issue impose an impermissible burden on a woman's free exercise of religion by restricting her fundamental religious interest in deciding whether to continue a pregnancy?

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IN SUPPORT OF APPELLEES IN NOS. 88-790 AND 88-805
AND APPELLANTS IN NOS. 88-1125 AND 88-1309

CONSENT OF THE PARTIES

All parties have consented to the filing of this brief and their letters of consent are being filed with the Clerk of the Court.

INTEREST OF AMICI CURIAE

This consolidated Brief *Amici Curiae* is submitted in support of appellees Richard M. Ragsdale and Akron Center for Reproductive Health, and appellant Jane Hodgson.

The Anti-Defamation League of B'nai B'rith ("ADL") is a national Jewish human relations organization dedicated to principles of religious and individual liberty including the right to privacy. ADL views abortion as an issue of personal and religious freedom. Accordingly, it believes that a woman's decision to have an abortion is constitutionally protected, with due regard for the right of women to exercise freely their own religious beliefs and not be constrained by the religious beliefs of others which have been given the sanction of state law. ADL recognizes that various religious faiths and denominations hold divergent views about abortion. In light of this multiplicity of views, ADL believes that no single religious group's beliefs should be legislatively established. Rather, individuals should be permitted broad latitude in deciding for themselves, in accordance with their own religious and moral convictions, whether to continue a pregnancy to term. Thus, ADL views most forms of government interference with an individual's exercise of religious conscience on the question of procreative choice, before viability, including those here at issue, to be unconstitutional under the First and Fourteenth Amendments. For these reasons, ADL supports the principles established in *Roe v. Wade*, 410 U.S. 113 (1973), and opposes erosion of the fundamental rights secured by that decision. ADL believes the Minnesota and Ohio parental notification requirements and Illinois' licensing scheme violate constitutionally protected principles of privacy, free exercise and establishment.

ADL has previously filed briefs in this Court in numerous cases dealing with First and Fourteenth Amendment principles, including *Allegheny County v. Greater Pittsburgh ACLU*, 109 S. Ct. 3086

(1989); *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989); *Bowen v. Kendrick*, 108 S. Ct. 2562 (1988); *Frazee v. Illinois Dep't of Employment Sec.*, 109 S. Ct. 1514 (1989); and *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986). Thus, the Anti-Defamation League is able to bring its special expertise relating to religious liberty and its experience advocating religious freedom to the issues raised on these appeals.

B'nai B'rith Women is an organization of 120,000 Jewish women who, since 1968, have advocated the right of women to choose for themselves on matters of reproduction. As members of a minority religion, BBW members are especially sensitive to keeping the state from restricting religious freedom, and as women BBW members have particular concerns about preserving their rights. Basic to the rights of every woman is that of deciding when and whether to have children, and so BBW firmly supports upholding these rights as outlined in *Roe v. Wade*.

Catholics for a Free Choice is an independent national membership organization established in 1974. One of CFFC's objectives is to protect the legal right of all women and girls to act as moral agents in decisions related to sexuality and reproductive health care without coercive legal or quasi-legal interference by religious institutions. As Catholics, CFFC members support policies of strict separation of church and state based not only on the U.S. Constitution but also on the Roman Catholic *Declaration on Religious Liberty* (Vatican II *Dignitatis Humanae* 7, December 1965) which declares:

> [T]he civil authority must see to it that the equality of the citizens before the law, which is itself society, is never violated either openly or covertly for religious reasons and that there is no discrimination among its citizens.

Women's American ORT has long held a pro-choice position on the issue of reproductive freedom, and believes that any erosion of the rights articulated in *Roe v. Wade* will be corrosive to fundamental individual liberties. Women's American ORT, and its 145,000 members, believe that when and whether to bear a child is a woman's private decision and opposes attempts to narrow the opportunity for women to control their own lives and be free from all levels of governmental intervention.

STATEMENT OF THE CASE

Amici adopt the Statement of the Case set forth by the appellees in *Turnock v. Ragsdale*, No. 88-790 and *State of Ohio v. Akron Center for Reproductive Health*, No. 88-805, and by appellants in *Hodgson v. State of Minnesota*, Nos. 88-1125 and 88-1309.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Roe v. Wade*, 410 U.S. 113 (1973), the Supreme Court held that the right of privacy, grounded in the concept of personal liberty guaranteed by the Constitution, encompasses a woman's right to decide whether to continue a pregnancy to term. The doctrine of *Roe v. Wade* "protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy." *Maher v. Roe*, 432 U.S. 464, 473-74 (1977). *Roe v. Wade* and its progeny effectuate the constitutional guarantee that in making critical, private decisions, a woman must be permitted to exercise her personal and religious conscience without state interference.

Webster v. Reproductive Health Services, 109 S. Ct. 3040 (1989), does not, by its terms, overrule *Roe v. Wade*. However, as Justice O'Connor expressly noted in her concurring opinion, and as the plurality indicated, while the Court deliberately chose not to overrule *Roe*, the various opinions are clearly an effort to reexamine its constitutional validity. *Webster*, 109 S. Ct. at 3060 (O'Connor, J., concurring). Moreover, by upholding the state statute challenged in *Webster*, this Court has dangerously narrowed the principles set forth in *Roe v. Wade*. Further, the various opinions have created uncertainty as to the appropriate standard of review.

Amici believe that the Court's decision in the three cases before it today will determine whether the constitutional guarantees recognized in *Roe v. Wade* will retain any vitality. As this Court has recognized, most recently in *Texas v. Johnson*, 109 S. Ct. 2533 (1989), the Constitution requires the Court to apply a strict scrutiny analysis to all cases impinging on First Amendment rights. Under this principle, the statutes at issue are unconstitutional under both the establishment and free exercise clauses.

These statutes place significant and direct burdens upon the exercise of the right to have an abortion and directly contravene the principles of *Roe v. Wade*. The Illinois statutory and regulatory scheme sets forth complex and oppressive regulations for the operation of private clinics in which abortions may be performed, and effectively regulates such clinics out of business. Parental notification statutes, such as the Minnesota and Ohio statutes, are designed to frustrate the decision to terminate a pregnancy and cause teenagers to delay abortions. This statutorily-imposed postponement of the abortion decision until a later, more dangerous time, and the concomitant creation of greater emotional turmoil and stress, impermissibly burden the right to choose whether to terminate or continue a pregnancy.

Although the protections in *Roe v. Wade* are grounded in the constitutionally-based right of privacy, the 7 to 2 majority in *Roe* recognized the religious nature of the abortion decision. *See Roe*, 410 U.S. at 150. More recently, Justice Stevens acknowledged the religious component in *Webster*, when he argued that the establishment clause of the First Amendment is also implicated by any state-imposed burden upon a woman's right to make, and implement, her own choice with respect to the termination of a pregnancy. 109 S. Ct. at 3081-82 (Stevens, J., concurring in part and dissenting in part). Any erosion of the principles articulated in *Roe v. Wade* damages not only the privacy interests at stake but also implicates religious freedoms.

Clearly, a woman's religious beliefs often play a major role in shaping her views about abortion. The religious component of the decision—and of the debate surrounding whether abortion should be allowed or not—is attested to by the fact that 67 religious organizations submitted their views as *amici curiae* in *Webster*. When a state creates significant obstacles to abortion, it effectively establishes one view on abortion, and unduly burdens the free exercise of religious conscience by those holding other views. The First Amendment does not permit such an establishment or tolerate such undue burdens absent a compelling state interest; in the conflict between dictates of law and dictates of conscience, freedom to pursue religious practice must prevail. As *Amici* will demonstrate below, freedom of religion is predicated on protecting matters of

individual conscience such as whether or not to terminate a pregnancy.

In Section I of this brief, *Amici* establish the religious nature of the abortion decision and demonstrate the multiplicity of religious views on abortion. Section II demonstrates that the Illinois, Ohio and Minnesota statutes promote a particular religious view, without advancing an articulable secular purpose, thus violating the establishment clause. Section III argues that these statutes also violate the free exercise clause because they cut deeply into fundamental religious rights, while failing to advance any of the interests they were purportedly designed to serve. For these and other reasons, these statutes are unconstitutional.[1]

ARGUMENT

I. ABORTION IS AN ISSUE IMPLICATING DEEPLY HELD RELIGIOUS BELIEFS AND IS THE SUBJECT OF ONGOING RELIGIOUS DEBATE

The decision to terminate a pregnancy is profoundly personal. An unwanted pregnancy affects every aspect of a woman's life, from her physical health and emotional well-being to her social relationships and economic standing. Moreover, the physical burdens imposed by pregnancy may also affect a woman's ability to provide emotional and financial care to her family. Accordingly, a woman's abortion decision must be guided by her unique personal circumstances, and not by the government. *See* S. Law, *Rethinking Sex and the Constitution*, 132 U. Pa. L. Rev. 955, 1017 (1984); Cates, *Legal Abortion: The Public Health Record*, 25 Science 1587, 1589 (1982).

For many women, religious beliefs pervade the decision whether to continue or terminate a pregnancy. When life begins is a theological question—a matter of belief and personal conviction. As this Court recognized in *Roe*,

[1]*Amici* are aware that both the parties and certain other *amici* briefs filed on the same side develop the privacy analysis at great length, and therefore *Amici* note their support for the position taken in those briefs. *Amici* submits this brief limited to a discussion of an issue about which it has special expertise and interest—the impact of the Court's decision in these three cases on freedom of religion.

> We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.

410 U.S. at 159. No uniform theological view exists on the question of when human life begins or on the morality of abortion. Indeed, "the intensely divisive character of much of the national debate over the abortion issue reflects the deeply held religious convictions of many participants in the debate." *Webster*, 109 S. Ct. at 3085 (Stevens, J., concurring in part and dissenting in part). In the United States alone, there are over 200 religious groups and denominations, a majority of whom have a position on the morality of abortion. *See* C. Jacquet, ed., *Yearbook of American and Canadian Churches* (1984).

The Anti-Defamation League, B'nai B'rith Women and Women's American ORT, whose constituents represent different religious views on the issue of abortion, bring a personal interest and knowledge about Jewish positions on this issue to the debate. According to Jewish law, the fetus is not considered a human being and has no juridical personality until after its birth. For this reason, many Jews do not equate abortion with murder. Indeed, in certain circumstances, Jewish law views abortion not only as a permissible choice for a woman, but also as her religious and moral duty. *See* H. Donin, *To Be A Jew: A Guide to Jewish Observance in Contemporary Life* 140-141 (1972) ("[a]ll halakhic scholars agree that therapeutic abortions—namely, abortions performed in order to preserve the life of the mother— are not only permissible but mandatory."); D. Feldman, *Birth Control In Jewish Law: Marital Relations, Contraception And Abortion* 284 (1968) ("therapeutic abortion. . . is mandated by the Mishnah. . ."). [2]

Beyond this general consensus, however, different branches of Judaism, and different groups within each branch, disagree about the legal and moral status of abortion and about the specific circumstances under which it is permitted or required. Within the different

[2]The *Mishnah* is a compilation of oral Jewish law collected about A.D. 200 into a work known as the *Talmud*.

strands of Orthodox Judaism, for example, debate persists about the permissibility of therapeutic abortions in situations deleterious to the health of the mother, but not life-threatening, and in situations where there is a grave risk to her mental health. *Id.* at 284-294.

Most Orthodox Jewish groups have traditionally opposed abortion except in pressing situations, such as the endangerment of the mother's life. *Id.* at 275-283. Still other Orthodox Jews emphasize the physical and mental health of the woman as the paramount concern. "[T]he woman's pain 'comes first'. . . considered ahead of the husband's interest in his future child *and* ahead of the potential life of the child itself." *Id.* at 291 (emphasis in original). These groups believe that "insanity constitutes a danger to life and accordingly permit[ ] an abortion when it is feared that the mother may otherwise become mentally deranged." J.D. Bleich, *Contemporary Halakhic Problems* 363 (1977). Further, they counsel that an abnormal fetus may constitute "a grave necessity" in certain instances which would mandate an abortion (for example, if the possible abnormality of the fetus causes great mental anguish to the mother). *Id.* at 367. Finally, such Orthodox groups permit abortion when the pregnancy is the result of rape. D. Feldman, *supra*, at 287.

The Conservative, Reform and Reconstructionist branches of Judaism view abortion differently from many of their Orthodox counterparts and from each other. These branches sanction a woman's decision to terminate a pregnancy and endorse the holding of *Roe v. Wade*. Rabbi Balfour Brickner, Senior Rabbi of the Stephen Wise Free Synagogue and former director of the New York Federation of Reform Synagogues, notes that Reform Jewish thought is in accord with *Roe v. Wade*'s holding that: "The Constitution does not define 'person' in so many words. The use of the word is such that it has application only post-natally." *Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 94th Cong., 2nd Sess. 335 (March 24, 1976) (Rabbi Brickner, statement on behalf of the Religious Coalition for Abortion Rights) (citing *Roe v. Wade*, 410 U.S. at 157).

Similarly, the official Conservative Jewish position paper, recently issued, endorses the *Roe v. Wade* guarantees:

> Conservative Judaism continues to affirm its strong support for the 1973 Supreme Court decision of *Roe v. Wade*. Any weakening, limitation, or withdrawal of the *Roe v. Wade* decision is sure to produce tragic consequences. In light of the recent Supreme Court decision, we must be diligent in our efforts to safeguard and preserve the full personal and religious freedom given to the American people.

A Statement On Abortion (issued by the Social Justice Committee of the Rabbinical Assembly) (July, 1989).

Even among these Jewish groups, however, there is disagreement on the rationale for upholding a woman's right to terminate a pregnancy. Under certain circumstances, such as when a pregnancy threatens a woman's life, as the Orthodox view counsels, or where necessary to preserve a woman's health, Jewish law may compel termination of a pregnancy. *See McRae v. Califano*, 491 F. Supp. 630, 696 (E.D.N.Y.), *rev'd sub nom. Harris v. McRae*, 448 U.S. 297 (1980) (citing testimony of Rabbi David Feldman). Others would protect a woman's right to choose an abortion as the exercise of her own religious and moral convictions. See M.D. Bial, *Liberal Judaism At Home; The Practices Of Modern Reform Judaism* 13 (1971).

Many Reform Jews base their support of a woman's right to have an abortion before a fetus is viable on the belief that a woman should have control over her body. *Id.* at 13. Others stress a woman's physical, psychological and emotional well-being in support of her right to choose an abortion. *Id.* at 12-13. Finally, some view abortion as necessary to safeguard the right of a couple to produce only that number of children for whom they can properly provide. *See* Statement of Rabbi Brickner, *supra*, at 337.

Like the Jewish community, Christians have diverse and often sharply opposing views on abortion. Thus, for example, among the Baptist churches, there is no distinct moral or theological view on the subject of abortion. Denominational pronouncements reflect the views and guidance of elected representatives, but are not considered binding positions. Some authorities within the Baptist Church support liberty of conscience and the exercise of individual moral judgment, and advocate a public policy which guarantees the right of each woman to make her own decision with respect to abortion.

See McRae v. Califano, 491 F. Supp. at 697 (citing statement of Dr. James E. Wood, Executive Director of the Baptist Joint Committee on Public Affairs). However, the Southern Baptist Convention opposes "abortion on demand," and advocates legislative restrictions on abortion. *Id.* at 699 (citing 1976 and 1977 Resolutions of the Southern Baptist Convention).

The Episcopal Church, USA has consistently supported a woman's right to choose abortion and maintain control over her body. At its 1988 General Convention, the Church declared support for the " 'termination of pregancy' particularly in those cases where 'the physical and mental health of the mother is threatened seriously, or where there is substantial reason to believe that one child would be badly deformed in mind or body, or where the pregnancy has resulted from rape or incest'. . . . Termination of pregnancy for these reasons is permissible." Letter from Ann Smith, Office of the Presiding Bishop and the Executive Council of the General Convention, the Episcopal Church Center (March 6, 1989).

The General Synod of the United Church of Christ supports the legality of abortion, in recognition that "life is less than perfect and the choices that people have to make are difficult." United Church of Christ, *Abortion: A Resolution Of The 12th General Synod Of The United Church Of Christ* (Public Policy Pamphlet 12GS-12) (1979). The United Church of Christ thus sanctions a woman's right to consider abortion as an expression of her personal conscience, stressing only that she "act faithfully" when making such a decision. *Id.* In 1971, the Church sanctioned the weighing of such considerations as the "welfare of the whole family, its economic condition, the age of the parents, their view of the optimum number of children consonant with their resources and the pressures of population" when deciding whether to bear a child. *Freedom Of Choice Concerning Abortion* (adopted by the General Synod of the United Church of Christ) (June, 1971).

Other religious denominations respect a woman's right to choose precisely because of the diversity of views held by their members. For example, in its policy statement, the Presbyterian Church noted that it "exists within a very pluralistic environment. [The Church's] own members hold a variety of views. It is exactly that plurality of beliefs that leads us to the conviction that the decision regarding

abortion must remain with the individual, to be made on the basis of conscience and personal religious principle free from governmental interference." *Covenant And Creation: Theological Reflections On Contraception And Abortion* at 51 (adopted by the 195th General Assembly of the Presbyterian Church) (1983).

Canonical and theological history establishes that no unanimous tradition on the question exists within the Catholic Church. *See* Maguire, *The Catholic Legacy And Abortion*, 114 Commonweal 657 (1981). Furthermore, as *Amicus* Catholics for a Free Choice poignantly demonstrate, committed Catholics do not all agree on the subject of abortion. *See also* Brief *Amicus Curiae* of Catholics For A Free Choice, *Webster v. Reproductive Health Services*. Many Catholics view the abortion decision as one which must be evaluated by the individual with reference to theology, church tradition and individual prayer. *Id.* at 27.

The current official doctrine of the Roman Catholic Church sharply conflicts with that of many Jewish groups and Protestant denominations. *The Declaration on Abortion of the Sacred Congregation for the Doctrine of the Faith of November 18, 1974*, the current text on the teachings of the Roman Catholic Church, states that life begins at fertilization, and that abortion is immoral, although it does not take a position on the commencement of moral or legal personhood.

By passing legislation which restricts the rights of women to choose whether to continue their pregnancies, Illinois, Minnesota and Ohio have intruded into an area where the First Amendment's protection of religious freedom requires that women be allowed to follow the dictates of their individual consciences. These states have made it impossible for women to decide, in keeping with their sincere religious beliefs about when life begins and when termination of a pregnancy is appropriate, whether to have an abortion or continue a pregnancy. Abortion must remain a legal option for women so that they are free to consult their own conscience and beliefs in making a choice.

The establishment clause and the free exercise clause of the First Amendment require government neutrality and reasonable accommodation in the face of competing religious claims. These constitu-

tional principles simply do not allow states to set conditions for the termination of a pregnancy which effectively burden a woman's freedom of choice in such a way as to require her to follow the religious doctrine of a particular sect or sects and conform her conduct accordingly, even though she holds no such religious beliefs. "In the relationship between man and religion, the State is firmly committed to a position of neutrality." *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 226 (1963).

II. THE STATUTES AT ISSUE VIOLATE THE ESTABLISHMENT CLAUSE

A. The Establishment Clause Requires Government Neutrality Concerning Religion

The First Amendment's establishment clause "requires the state to be a neutral in its relations with groups of religious believers and non-believers." *Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947). Last term, this Court reaffirmed that "government may not promote or affiliate itself with any religious doctrine or organization." *Allegheny County v. Greater Pittsburgh ACLU*, 109 S. Ct. 3086, 3099 (1989).

The Court has established a three-prong test to determine whether a statute violates the establishment clause. "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally the statute must not foster 'an excessive government entanglement with religion.'" *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (citation omitted).

The *Lemon* test was further refined in *Allegheny*, 109 S. Ct. at 3101, where the Court described the establishment clause protection as follows:

> Whether the key word is "endorsement," "favoritism," or "promotion," the essential principle remains the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from "making adherence to a religion relevant in any way to a person's standing in the political community." *Lynch v. Donnelly*, 465 U.S. at 687 (O'Connor, J., concurring).

A law will not pass constitutional muster if the purported secular purpose is a "sham". *Wallace v. Jaffree*, 472 U.S. 38, 74-75 (1985) (O'Connor, J., concurring). Thus, the "mere existence of some secular purpose" is not enough. *Lynch v. Donnelly*, 465 U.S. 668, 691 (1984) (O'Connor, J., concurring). The stated purpose must be "sincere." *Wallace v. Jaffree*, 472 U.S. at 75 (O'Connor, J., concurring).

As *Amici* argue below, while the purported purpose behind legislation restricting a woman's choice whether to continue her pregancy to term may be secular (*e.g.*, family harmony, protection of a woman's health), closer inspection reveals that these statutes are in fact animated by the religious beliefs of the legislators as to when life begins and when abortions should be permissible under their theological scheme. Although the majority in *Webster* did not address this First Amendment component of the attack on the Missouri statute, Justice Stevens faced this issue directly, concluding that the Missouri statute was an unconstitutional endorsement of one religious theory of when life begins. *Webster*, 109 S. Ct. at 3082 (Stevens, J., concurring in part and dissenting in part).

As this Court continues to review statutes which restrict women's right to choose whether to carry a pregnancy to term, the concerns raised by Justice Stevens in *Webster* arise with renewed urgency. Indeed, if the Illinois, Minnesota and Ohio statutes are permitted to stand, especially when coupled with *Webster*, the cumulative effect would be a serious erosion of establishment clause principles. As Justice Blackmun emphasized, writing for the Court in *Allegheny*, "we have expressly required 'strict scrutiny' of practices suggesting 'a denominational preference'. . . in keeping with 'the unwavering vigilance that the Constitution requires' against any violation of the Establishment Clause." 109 S. Ct. at 3109 (citations omitted).

B. The Statutes At Issue Establish Religion

The Illinois, Ohio and Minnesota statutes violate the establishment clause in several ways. First, they fail to serve or further the purportedly secular purposes identified by the states. Rather, they promote the religious view that life begins at conception, and are a thinly-veiled attempt to block access to abortion. "That fact alone compels a conclusion that the statute[s] violate[ ] the Establishment

Clause." *Webster*, 109 S. Ct. at 3082-83 (Stevens, J., concurring in part and dissenting in part), citing *Wallace v. Jaffree*, 472 U.S. at 56.

Illinois has argued that its rigid regulation of outpatient abortion clinics has a medical purpose—the protection of women's health. *Ragsdale v. Turnock*, 625 F. Supp. 1212, 1230 (N.D. Ill. 1985), *modified*, 841 F.2d 1358 (7th Cir. 1988). The record is to the contrary: Illinois was unable to present any evidence that the particular regulations at issue here were enacted to further that purported purpose. *Ragsdale*, 625 F. Supp. at 1230. In fact, the legislative history demonstrates the legislators' concern with the status of the fetus—a religious concept—and not the health of the woman or the safety of the clinics. The Illinois General Assembly intended to obstruct women's access to abortions when it created the challenged statutory scheme in 1973. *See Ragsdale*, P. Jt. App. at A4-A5[3] ("We must make the best of a very sorry situation by at least regulating that procedure so that the Abortion Mills will not proliferate") (statement of Rep. Hyde). This underlying impermissible purpose has been very successfully served by the Illinois statute—many private clinics have had to close since the statute went into effect, and there are vast areas of the state where there are no facilities available to women seeking to terminate a pregnancy. *Ragsdale*, 625 F. Supp. at 1227.

After reviewing the legislative history, the Illinois district court found that the regulatory scheme did not advance the purported secular legislative purpose. *Id.* (defendants failed to produce "any evidence at all" that the "statutes and regulations are medically necessary"). Indeed, the Seventh Circuit found that the Illinois legislature made the regulations at issue applicable to all clinics rather than clinics that perform abortions alone in "an effort to save the statute from unconstitutionality." *Ragsdale*, 841 F.2d at 1369.

The lack of any plausible secular explanation for the intrusive regulatory scheme and the legislators' focus on the nature of the fetus and not on the well-being and health of the woman involved demonstrates that the Illinois statute was intended to endorse the

[3]The proceedings of the Illinois House of Representatives General Assembly are included in plaintiffs' joint appendix.

sectarian position that life begins at conception. The establishment clause does not allow government to mandate one religious view. *See Allegheny*, 109 S. Ct. at 3104-05.

Minnesota's and Ohio's parental notification statutes similarly impose one religious view about abortion on their citizens. Both Minnesota and Ohio have argued, like Illinois, that the statutes have a valid secular purpose—the protection of the well-being of minors by encouraging them to discuss the abortion decision with their parents. *Hodgson v. State of Minnesota*, 648 F. Supp. 756, 766 (D. Minn. 1986), *rev'd*, 853 F.2d 1452 (8th Cir. 1988). *Akron Center for Reproductive Health v. Rosen*, 633 F. Supp. 1123 (N.D. Ohio 1986), *aff'd sub nom. Akron Center for Reproductive Health v. Slaby*, 854 F.2d 852 (6th Cir. 1988). A careful analysis of the legislative history, however, leads to the inescapable conclusion that the states were actually motivated by a non-secular purpose—preventing minors from having abortions in order to further the legislators' beliefs about when life begins. *Hodgson; Akron.*

The Minnesota legislators made little attempt to disguise the fact that they were motivated by their belief that life begins at the moment of conception and abortions should be strongly discouraged if not outlawed. *Hodgson*. Influential supporters of the legislation said they hoped, by encouraging minors to continue their pregnancies, to "save lives." *Id.* The Minnesota trial court found that the Minnesota legislature was motivated by "a desire to deter and dissuade minors from choosing to terminate their pregnancies." *Id.* Significantly, although the Eighth Circuit reversed the legal conclusions of the district court with regard to the constitutionality of the parental notice provision, the appellate court did not contradict the factual finding that the legislators were motivated by improper religiously-based purposes.

Both the district court and the Sixth Circuit apparently accepted, at face value, Ohio's assertion that the statute's purpose was to facilitate parental involvement in child rearing. *See Akron Center for Reproductive Health v. Rosen*, 633 F. Supp. at 1130-1131, *aff'd*, 854 F.2d at 863. However, as the above discussion of *Hodgson* and *Ragsdale* indicates, it is probable that at least some of the legislators were seeking to advance their religious view of when life begins, an impermissible government purpose. Both the district and appellate

courts *did* conclude that Ohio could not present any legitimate state interest behind its onerous bypass procedures, *Akron v. Rosen*, 633 F. Supp at 1137; *Akron v. Slaby*, 854 F.2d at 863, presumably because the only reason for such a cumbersome process was to make it more difficult for minors to terminate their pregnancies.

Because the Illinois, Minnesota and Ohio statutes do not advance the interests they purportedly were designed to serve, the only plausible reason for such legislation is to further the belief that life begins at conception. Of course, this non-secular belief, unsupported by medical knowledge, may not be established by state law. *See Webster*, 109 S. Ct. at 3082 (Stevens, J., concurring in part and dissenting in part). *See also Aguillard v. Edwards*, 107 S. Ct. 2573, 2582 (1987) ("The Legislative history documents that the [creation science] Act's primary purpose was to change the science curriculum of public schools in order to provide persuasive advantage to a particular religious doctrine . . . ."); *Wallace v. Jaffree*, 472 U.S. at 57-61.

The challenged statutes also fail under the 'effect' prong of the *Lemon* test. The Illinois regulatory scheme, which imposes onerous regulations unrelated to health concerns, *Ragsdale*, 625 F. Supp. at 1230, has a perceived and actual effect of advancing the non-secular aims of certain religions. The regulations essentially endorse the religious belief that life begins at conception, to the detriment of those who do not share it. *See Roemer v. Board of Public Works*, 426 U.S. 736, 747 (1976) ("[t]he State must confine itself to secular objectives, and neither advance nor impede religious activity").

The Ohio and Minnesota statutes fail under the second prong of the *Lemon* test as well. While Minnesota had asserted that its parental notice statute sought to enccurage intra-family communication, no witnesses involved in the statute's implementation testified that the statute had a beneficial effect on the minors whom it was presumably intended to assist. *Hodgson*, 648 F. Supp. at 775. What the requirements of parental notification or judicial permission have done is to tell teenage girls that the state endorses the religious view that abortions are wrong. The placement of burdensome barriers, *see, e.g., Akron v. Rosen*, 633 F. Supp. at 1137; *Hodgson*, 648 F. Supp. at 764, in the way of young women seeking abortions conveys

the unmistakable message that abortion must be discouraged. This "symbolic union of church and state" cannot be allowed to stand. *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 390 (1985); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 126-127 (1982).

In each case, the statute's message that abortion is wrong promotes "one religion or religious theory against another or even against the militant opposite" in contravention of the First Amendment. *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). A woman from either Minnesota, Ohio or Illinois whose sincere religious beliefs have led her to decide to terminate a pregnancy has been ostracized by her state government and given an unmistakable message—not only does the state believe abortions are morally reprehensible, but also that the State will prevent her from acting on her religious beliefs. As this Court held last term in *Allegheny*, such favoritism is unconstitutional. 109 S. Ct. at 3101.

The three state statutes also violate the entanglement prong of the *Lemon* test, and will lead to the kind of religious and political divisiveness condemned by this Court in *Engel v. Vitale*, 370 U.S. 421, 436 (1962). State enforcement of restrictions on abortions, whether relating to the availablity of clinics (Illinois) or the requirement of parental notice (Minnesota and Ohio), put state governments in the position of aiding those religions and religious groups which believe abortion is wrong, to the detriment of those who believe decisions about terminating a pregnancy should be left to individual choice. As the weeks since this Court issued its *Webster* opinion have demonstrated, the tension between these two approaches has become a major political issue at the state and local level. There will be no end to the political controversy, and to the involvement of various religious groups in that controversy, unless this Court properly places a barrier between government and the individual choice to decide whether to continue a pregnancy.

Permitting the state to communicate the religious message that abortion is morally reprehensible flouts the guarantees of the establishment clause. The First Amendment prohibits the fusion of government and religion which occurs whenever government endorses or supports the theological tenets of one religion or several, over others. *See Grand Rapids Sch. Dist. v. Ball*, 473 U.S. at 389 (when

the government "conveys a message of governmental endorsement or approval of religion, a core purpose of the establishment clause is violated"). *See also Everson*. As this Court has said:

> The wholesome "neutrality" of which this Court's cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of government and religious functions or a concert of dependency of one upon the other to the end that official support of the state or federal government would be behind the tenets of one or of all orthodoxies; this is what the Establishment Clause prohibits.

School Dist. of Abington v. Schempp, 374 U.S. 203 at 222. *See also Allegheny*, 109 S. Ct. at 3099-3105.

The Illinois, Minnesota and Ohio statutes have placed government "behind the tenets" of some religions, to the detriment of *Amici* and other religious groups. This imposition violates the very core of the establishment clause.

III. THE CHALLENGED STATUTES IMPOSE AN IMPERMISSIBLE BURDEN ON A WOMAN'S FREE EXERCISE OF RELIGION

The three statutes before this Court purport to address a variety of state interests, including the mother's health, potential human life, and intra-family communication. As discussed above, these purported purposes merely provide a legislative cover for the real objective of the statutes, which is to impose such burdens on women seeking to terminate pregnancies that they are deterred from doing so. However, it is well established that states may not vindicate even legitimate interests in a manner which unduly infringes upon individuals' free exercise rights. *See School Dist. of Abington v. Schempp*, 374 U.S. at 222. The free exercise clause was designed to prohibit governmental interference with the individual's right to act in accordance with the dictates of her own conscience in matters of religion. *Wallace v. Jaffree*, 472 U.S. at 52. *See also United States v. Ballard*, 322 U.S. 78, 87 (1944).

Nowhere is this principle of government neutrality more important than in the highly controversial and emotional issue of reproductive rights. *See Griswold v. Connecticut*, 381 U.S. 479 (1965); *See also Eisenstadt v. Baird*, 405 U.S. 438 (1972); S. Law, *supra* at 1023. Because, for many women, the abortion decision necessarily implicates a woman's religious beliefs, restrictions on a woman's decision may interfere with the exercise of religious conscience by imposing one view (opposing abortion) and by stifling individual choice.

A. For Many Women, the Decision Whether To Terminate a Pregnancy Is an Issue of Fundamental Religious Belief

In *Roe v. Wade*, the Court held that a woman's right to decide whether to terminate her pregnancy was "fundamental." 410 U.S. 113, 152. *See also Carey v. Population Services Int'l*, 431 U.S. 678, 685 (1977) ("[t]he decision whether or not to beget or bear a child is at the very heart of [the] cluster of constitutionally protected choices"). Since *Roe v. Wade* was decided, the Court "repeatedly and consistently has accepted and applied the basic principle that a woman has a fundamental right to make the highly personal choice whether or not to terminate her pregnancy." *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 420 n.1 (1983). Moreover, as this Court has noted, "[t]he States are not free, under the guise of protecting maternal health or potential life, to intimidate women into continuing pregnancies." *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 759 (1986).

The plurality opinion in *Webster* tries to beg the question by claiming that "there is wisdom in not unnecessarily attempting to elaborate the abstract differences between a 'fundamental right' to abortion . . . a 'limited fundamental constitutional right' . . . or a liberty interest protected by the Due Process Clause . . . ." *Webster*, 109 S. Ct. at 3058. However, as the *Webster* dissent correctly points out, the Court's failure to renew its commitment to protecting the fundamental privacy and First Amendment interests at stake has already led to an increasingly hostile and divisive political debate. 109 S. Ct. at 3079 (Blackmun, J., concurring in part and dissenting in part).

Amici urge the Court, in the three cases before it today, to reaffirm a half century of decisions holding that the right to make an individual decision regarding childbearing free from government

coercion—and to the exercise of one's religious beliefs and conscience free from governmental endorsement or disapproval—is a fundamental right. *See Wallace v. Jaffree; Roe v. Wade; Eisenstadt v. Baird*; *Griswold v. Connecticut; Skinner v. Oklahoma*, 316 U.S. 535 (1942).

Amici believe that this fundamental right is grounded in both privacy rights and freedom of religious conscience. State statutes regulating abortion restrict a woman's ability to exercise freely her private religious beliefs. Requiring a woman to conform her actions to the government's view of when life begins is repugnant to the protections of the free exercise clause.

This Court must not allow Illinois, Ohio and Minnesota to prevent women from exercising their religious freedom.

B. Statutes Regulating Abortion Affect Fundamental Religious Interests and Are Subject to Strict Scrutiny

As this Court has repeatedly acknowledged, the government may not burden the free exercise of religion unless it can establish that "an inroad on religious liberty. . . is the least restrictive means of achieving some compelling state interest." *Thomas v. Review Bd. of the Indiana Employment Sec. Div.*, 450 U.S. 707, 718 (1981). *See also Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136 (1987). The Court has further emphasized that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (when evaluating free exercise claims, the Court must consider "whether some compelling state interest . . . justifies the substantial infringement of [a] First Amendment right").

This First Amendment standard of review is applicable whether unemployment benefits are at stake, *see Hobbie*, or schooling for children, *see Yoder*, or the right to decide whether to continue a pregnancy, as in *Roe v. Wade*. The plurality decision in *Webster* failed to address the First Amendment component to the rights implicated by the Missouri abortion statute. For this reason, the plurality's suggestion that restrictions on abortion may be evaluated

under a lesser standard of review is unpersuasive. Indeed, the Court itself recently reiterated that statutes which implicate First Amendment rights must be strictly scrutinized. *Texas v. Johnson*, 109 S. Ct. 2533 (1989) (applying the strict scrutiny test to strike down a state court conviction for desecration of the American flag).

Justice O'Connor's effort in *Webster* to respond to the uncertainties of the plurality opinion nevertheless failed to address the First Amendment aspect of the abortion debate. *Webster*, 109 S. Ct. at 3058-64 (O'Connor, J., concurring). It is this constitutional dimension—which only Justice Stevens addressed in his partial concurrence and partial dissent — that requires this Court to apply the very highest standard of review to any statute, including those regulating abortion, which restrict the enjoyment of rights guaranteed by the First Amendment.

Under this standard, as properly applied, only a compelling state interest justifies state infringement on fundamental free exercise rights. *See, e.g., Hobbie*, 480 U.S. at 141-42; *Thomas*, 450 U.S. at 718; *Sherbert*, 374 U.S. at 406. In keeping with these cases and consistent with this Court's logic, the statutes at issue must be evaluated under a strict scrutiny standard. *See Thomas*, 450 U.S. at 718; *City of Akron*, 462 U.S. at 427.

As demonstrated below, the instant statutes profoundly burden women's rights to the free exercise of their religious choices about childbearing. Moreover, Illinois, Minnesota and Ohio have failed to demonstrate that the statutes further a compelling state interest.

C. The Challenged Statutes Significantly Burden the Free Exercise of Religion

Illinois, Minnesota and Ohio have burdened women's free exercise rights by making it impossible for them to carry out their religious beliefs regarding a uniquely personal and moral decision. Although a woman in any of these states is still able to decide, on the basis of her personal religious beliefs or convictions, that she wishes to terminate her pregnancy, she may be prevented from implementing her decision. This Court has repeatedly held that state regulations which prevent someone from exercising his or her reli-

gious beliefs, without a compelling state interest, are unconstitutional. *See, e.g., Hobbie; Yoder.*

The Illinois licensing scheme virtually regulates private facilities out of existence, thus making it extremely difficult, if not impossible, for a woman in that state to obtain an abortion. As the district court judge found, "the challenged statutes and regulations do place a very real and a very heavy burden on the right of a woman to decide to terminate her pregnancy. The effect of the statutory and regulatory scheme is to increase the cost of abortions and decrease their availability." *Ragsdale*, 625 F. Supp. at 1227. Thus, the clear effect of the Illinois statute is to block the ability of Illinois women to obtain abortions. *Id.* at 1227 ("as a result of the scheme . . . the only outpatient abortion facility in northwest Illinois, will close . . . .").[4]

The Minnesota and Ohio statutes also place serious barriers in the way of a woman's access to abortion, requiring a young woman to endure a sometimes insurmountable obstacle course of regulations before she can obtain an abortion.[5] The Ohio statute requires the attending physician personally to notify the parent, which impinges upon the minor's right to privacy, leads to intra-family conflict, and requires violation of the physician/patient privilege. It is also directly in conflict with the holding in *City of Akron*, 462 U.S. at 448, that states may not require physicians personally to obtain informed consent from parents of a minor.

Further, although there is a judicial bypass procedure, its burdensome pleading requirements and standard of proof vitiate any protection the legislature intended to accord young women. This Court has held that a bypass proceeding must assure "anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained . . . ." *Bellotti v. Baird*, 443 U.S. 622, 644

[4]Moreover, since *Webster* appears to allow states to forbid the use of public facilities for abortions, upholding the restrictions on private facilities in the Illinois statute would mean that a state could virtually legislate abortion facilities out of existence.

[5]Amici refer to appellees' briefs in *Ragsdale* and *Akron Center for Reproductive Health* and appellant's brief in *Hodgson* for a fuller explanation of the burdens imposed by the statutes.

(1979). The potential three week wait for a judicial decision in Ohio does not comply with any notion of expediency. By requiring a woman to disclose her name and address, the Ohio statute fails to guarantee a woman's anonymity.

The Minnesota statute provides that a minor seeking an abortion must notify both of her parents and may not thereafter have an abortion for forty-eight hours. This mandatory two parent notification, which does not take into account whether the minor is living with both of her parents (or one or neither), amounts to an "absolute, and possibly arbitrary, veto" deemed unconstitutional in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 74 (1976). As with the Ohio statute, Minnesota's legislation will only promote family strife and subject the minor to additional emotional distress during an already difficult time. *Hodgson*, 648 F. Supp. at 763-64. Minnesota, like Ohio, has a judicial bypass provision which, because of its cumbersome procedures and built-in delays, is also unduly burdensome. *Hodgson*, 648 F. Supp. at 776.

The fact that these two statutes are directed at minors, in whose protection states may have a heightened interest, does not eliminate the constitutional concerns. "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights." *Danforth*, 428 U.S. at 74. Indeed, this Court has recognized minors' First Amendment rights in a number of contexts. *See, e.g., Tinker v. Des Moines Indep. Comm. Sch. Dist.* 393 U.S. 503, 506 (1969); *Hazelwood Sch. Dist. v. Kuhlmeier*, 108 S. Ct. 562 (1988).

Like adult women, many teenage girls have sincere religious beliefs which are protected by the free exercise clause. They face the same difficult choices as mature women in deciding whether to continue a pregnancy and should not have to overcome greater obstacles in effectuating that decision. Any contrary conclusion ignores this Court's recent decision in *Stanford v. Kentucky*, 109 S. Ct. 2969 (1989). There, the Court held that minors and adults are equally responsible for their criminal activity and that minors, like adults, can be put to death for murder. The majority held that minors are "mature enough to understand that murdering another human

being is profoundly wrong, and to conform [their] conduct to that most minimal of all civilized standards." *Id.* at 2977. *Amici* do not necessarily endorse the Court's view that the Constitution allows the government to put minors to death. However, if minors can be presumed mature enough to appreciate the consequences of their actions and to be sentenced to death, it surely follows that they are mature enough to make and carry out decisions about procreation.

D. The Challenged Statutes Do Not Serve Any Compelling State Interests Which Would Justify Incursions in Religious Liberty

Any purportedly permissible state interest claimed by Illinois, Ohio and Minnesota in support of their legislation dissipates upon careful analysis. The purported state interest underlying the Illinois law is the preservation and protection of a patient's health. However, the Seventh Circuit found that: (1) "many of the physical plant requirements . . . have 'no medical justification whatsoever' when applied to first and early second trimester abortions"; and (2) the certificate of need proceeding requirement does not serve any articulable interest. *Ragsdale*, 841 F.2d at 1373-74. The record before this Court in these cases and many others establishes, without contradiction, that the health effects of unwanted pregnancies and delays in securing abortions are devastating. *See* National Research Council, *Risking the Future: Adolescent Sexuality, Pregnancies, and Childbearing* (1987).

The state interest underlying the Minnesota and Ohio statutes is purported to be the fostering of intra-family communication and protection of the well-being of pregnant minors. However, neither of these statutes effectuates the state's interest in maternal health; nor does either further intra-family communication. Indeed, intra-family communication, if poor, is unlikely to be improved by legislatively-mandated communication. Far from protecting minors, the notice/bypass statutes force minors into situations that can only increase their fear and anxiety, causing them to postpone the abortion until a later, more dangerous time. The statutes may also coerce a young woman into continuing a pregnancy against her personal wishes, religious beliefs and best interests, an equally unacceptable alternative.

The district court in *Hodgson* found that the Minnesota statute "fails to serve the State's asserted interest in fostering intra-family communication and protecting pregnant minors." 648 F. Supp. at 775. Similarly, the Ohio district court found that the Ohio statute overstresses parental interests and thus "misperceives" the permissible interest a notification statute may serve—the protection of minors. *Akron v. Rosen*, 633 F. Supp. at 1137. The Ohio district court found no compelling state interest to justify the burdensome notice/bypass scheme there. *Id.* Moreover, the Sixth Circuit concluded that "the State of Ohio has presented no legitimate justification for imposing its pleading requirement which . . . is a 'procedural trap.'" *Akron v. Slaby* at 862-63. As the lower courts have already determined, these statutes are not even rationally related to the advancement of the purported state interests.

The challenged statutes have been animated by the religious view that abortion is morally wrong and that life begins at conception. They impose that view on women who, as a matter of religious conscience, believe differently. Because these statutes conflict with the rights guaranteed by the First Amendment, they must fall.

Amici concur with the views of an Episcopal priest, who recently said:

> Whether pro-choice or anti-abortion, you do not have the right in this diverse, pluralistic society to force beliefs and opinions on others. There can never be a just law requiring uniformity of behavior on the abortion issue.[6]

Indeed, the First Amendment stands as a bulwark against government-enforced uniformity in exercising and implementing religious convictions.

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[6] *A Priest on Abortion: Women as the Proper Moral Agent*, Los Angeles Times, August 6, 1989, Part V, at 1, col. 1.

CONCLUSION

For the foregoing reasons, the decisions of the Courts of Appeal for the Sixth and Seventh Circuits should be affirmed and the decision of the Court of Appeals for the Eighth Circuit should be reversed.

Respectfully submitted,

KENNETH J. BIALKIN,
Counsel of Record

PEGGY L. KERR
DAVID C. MARCUS
919 Third Avenue
New York, New York 10022
(212) 735-3000

Counsel for *Amici Curiae*
August, 1989

Of Counsel:
MEYER EISENBERG
RUTH LANSNER
JUSTIN J. FINGER
JEFFREY P. SINENSKY
STEVEN M. FREEMAN
JILL L. KAHN
LIVIA D. THOMPSON

Anti-Defamation League of B'nai B'rith
823 United Nations Plaza
New York, New York 10017
(212) 490-2025

(14) (16)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JANE HODGSON, *et al.*,
Petitioners,

v.

THE STATE OF MINNESOTA, *et al.*,
Respondents.

STATE OF MINNESOTA, *et al.*,
Cross Petitioners,

v.

JANE HODGSON, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF THE LUTHERAN CHURCH-MISSOURI SYNOD AS AMICUS CURIAE IN SUPPORT OF THE STATE OF MINNESOTA

LEONARD J. PRANSCHKE
SIBYL C. BOGARDUS
PHILIP E. DRAHEIM *
DRAHEIM & PRANSCHKE
12444 Powerscourt Drive
Suite 450
St. Louis, Missouri 63131
(314) 965-6455
Attorneys for Amicus Curiae

* Counsel of Record

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QUESTION PRESENTED

Whether the Minnesota statute requiring a 48-hour written notice to parents of an unemancipated minor of their minor's pending abortion, without a judicial by-pass procedure, is constitutionally permissible because it protects the family right of privacy and promotes the integrity of the family.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

No. 88-1125

JANE HODGSON, *et al.*,
Petitioners,
v.
THE STATE OF MINNESOTA, *et al.*,
Respondents.

No. 88-1309

STATE OF MINNESOTA, *et al.*,
Cross Petitioners,
v.
JANE HODGSON, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF THE LUTHERAN CHURCH-MISSOURI SYNOD AS AMICUS CURIAE IN SUPPORT OF THE STATE OF MINNESOTA

INTEREST OF AMICUS CURIAE

The Lutheran Church-Missouri Synod is the second largest Lutheran denomination in North America and the eighth largest Protestant body in the United States.

It is composed of approximately 6,200 member congregations which, in turn, have approximately 2,600,000 individual members. The Lutheran Church-Missouri Synod holds a profound belief that human life begins at conception and opposes willful abortion, except as tragically necessitated to prevent the death of the mother. The Lutheran Church-Missouri Synod believes that parents have the primary duty and right to counsel a pregnant, minor daughter on the issue of an unplanned pregnancy and to provide compassionate alternatives to abortion.

The letters from the parties consenting to the filing of this brief are submitted herewith to the Clerk pursuant to Rule 36.2.

STATEMENT OF THE CASE

The amicus adopts the statement of the case in the Brief for the Cross Petitioners.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case presents to the Court a Minnesota statute regulating the family decision-making process when a minor child chooses to have an abortion. The statute's "pure notice" provision requires a minor's physician or his agent to notify both of the minor's parents 48 hours before her planned abortion, without provision for a judicial bypass procedure. Minn. Stat. § 144.343(2) (1988).

This case is a significant opportunity for the Court to re-examine the constitutional basis for *Bellotti v. Baird*, 443 U.S. 621 (1979) (*Bellotti II*), *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976), and other cases which give minors the right to an abortion without the involvement of their parents. The issues in this case require the Court to consider the wisdom of granting minors a right to an abortion without family involvement, a right which directly violates the fundamental right to family privacy. By permitting a minor to have an abortion without parental involvement, the Court is interfering with the right of parents who believe religiously that it is their duty to guide and counsel their children. The Court is further contributing to the decline of the family, the traditional source of the instruction of moral values to American youth.

The Court should uphold the "pure notice" provision of the Minnesota statute based on the fundamental right of family privacy. In so doing, the Court should overturn its holdings in *Danforth*, *Bellotti II*, *Planned Parenthood v. Ashcroft*, 462 U.S. 476 (1983) and *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983), to the extent they require state laws regulating minors' abortions to permit a bypass of parental involvement in minors' decisions to have abortions.

ARGUMENT

THE MINNESOTA STATUTE REQUIRING A 48-HOUR NOTICE TO PARENTS OF A MINOR THAT SHE INTENDS TO HAVE AN ABORTION SHOULD BE UPHELD UNDER THE CONSTITUTION. THE PARENTS' RIGHTS TO RAISE A FAMILY AND TO GUIDE THEIR CHILDREN IN ETHICAL AND MORAL DECISIONS SHOULD NOT BE VIOLATED BY COURT HOLDINGS THAT GIVE A MINOR THE RIGHT TO HAVE AN ABORTION.

Supreme Court decisions stating that a minor has a right of privacy entitling her to an abortion free of parental authority contradict the case law precedents for *Roe v. Wade*, 410 U.S. 113 (1973).

1. *Roe v. Wade's* right of privacy analysis depends largely upon *Griswold v. Connecticut*, 381 U.S. 479 (1965), and other family privacy cases.

In 1973, in *Roe v. Wade*, the Supreme Court held that under the United States Constitution a woman has a fundamental right to privacy which may include the right to an abortion. 410 U.S. 113 (1973). The Supreme

Court based its rationale in large part on *Griswold v. Connecticut*, a case involving constitutional protection of the right to family privacy. After searching for a source for the right to an abortion, the *Roe* Court relied on the right of privacy which is "founded in the Fourteenth Amendment's concept of personal liberty and restrictions on state action." *Id.* at 153. The Court found that the sources for the right of privacy under the fourteenth amendment existed both in the penumbras of the Bill of Rights, as held in *Griswold v. Connecticut*, and in the concept of liberty guaranteed by the first section of the fourteenth amendment, as held in *Meyer v. Nebraska*, 262 U.S. 390 (1923) and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), discussed below. The Court extended the family privacy right found in these cases to justify a right to an abortion, relying on the concept that the right of personal privacy has "some extension" to activities relating to marriage, procreation, contraception, family relationships, child rearing, and education. *Roe*, 410 U.S. at 152-153. In this manner, the right of privacy, upon which *Roe* and the subsequent minors' abortion rights cases are based, is derived from the family right of privacy established in *Griswold*, *Pierce*, and *Meyer*.

2. The constitutional right of marital privacy in *Griswold* is based upon the right of privacy in raising a family.

In 1965, the Supreme Court held in *Griswold v. Connecticut* that married people have a fundamental right of privacy which protects their use of contraceptives from state interference. 381 U.S. at 485-486. On the basis of this family right to privacy, the *Griswold* Court struck down a Connecticut statute prohibiting the use of contraceptives. *Id.* The Court declared that the statute was unconstitutional, not because it regulated sexual activity, but because the statute interfered directly in the intimate relationship of husband and wife. The Court based its

decision on the concept that the family relationship merits special protection from state interference. The Court stated in *Griswold*:

> We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Id. at 486.

The majority opinion in *Griswold* reveals the Court's intent to reinforce this Nation's continuing esteem for the family. The privacy right in *Griswold* is deliberately based on the right of family privacy. The Court protected the marital relationship as the very core of the family. At the time of *Griswold*, the Court had recognized the right of family privacy as a fundamental right for over forty years. As precedent for its holding, the *Griswold* Court cited the 1923 Supreme Court decision of *Meyer v. Nebraska*, 262 U.S. 390 (1923), and its 1925 decision of *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). *Griswold*, 381 U.S. at 481. The language of the *Griswold* opinion evidences the Court's marked concern for family integrity, legally affirming the family relationship as a noble, lasting institution deserving protection from state interference.

3. The precedents for *Griswold* establish that the foundation of the family privacy right is a fundamental right of parents, not the state, to decide how to raise their children.

Two major precedents for the fundamental privacy right relied upon in *Griswold* are *Meyer* and *Pierce*. In these cases and those following them, discussed below, the Supreme Court has consistently recognized, respected,

and protected family integrity. The constant theme found in these early family privacy cases is that the unique nature of the family entity and its fundamental right of privacy require the Court to insulate the family in a special, private realm from the dictates of the state in decisions affecting child development and rearing.

An examination of these two early cases on the fundamental right to family privacy reveals the stark contrast between the traditional constitutional protection the Court provides the family, and the Court's marked lack of reverence for the family when presented with the issue of the minor's right to an abortion.

In the first of the two major privacy cases cited in the *Griswold* opinion, *Meyer v. Nebraska*, the Court struck down a Nebraska statute which prohibited the teaching of foreign languages to students below the eighth grade level. The Court held that the statute unconstitutionally infringed upon the liberty guaranteed to families under the due process clause of the fourteenth amendment. 262 U.S. at 401-402. The Court based this holding on the family's "natural duty" to educate its children, a duty from which necessarily flows the corresponding constitutional, fundamental right of parents to make decisions and to control the upbringing of their children. *Id.* at 399. The *Meyer* Court found that the inherent value of the family to society elevates family privacy to the level of a fundamental constitutional right. *Id.* at 399-400.

Meyer introduced two major themes into the constitutional family privacy line of cases. First, by emphasizing the family's role in the development of their children as citizens, the Court stated that the inherent value of the family socialization function merits a special measure of protection. *Id.* at 399, 402. The Court's opinion said that families instill the various values that cause children to become individuals, an important quality in American society. *Id.* at 399-400; *see also Moore v. City of East Cleveland*, 431 U.S. 494, 503-504 (1977) ("It is through

the family that we inculcate and pass down many of our most cherished values, moral and cultural."); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."). In *Meyer*, the Court protected the function of the family and criticized governments that remove children from the control of their parents in attempts to produce ideal citizens. *Meyer*, 262 U.S. at 401-402.

The second major theme of *Meyer* is that state control over children conflicts with the "established doctrine" that legislative action may not arbitrarily or unreasonably interfere with man's liberty "to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Id.* at 399. While the Supreme Court recognized the state's power over children, such as the power to compel school attendance, the Court refused to permit a state to use such power when it resulted in interference with family integrity. *Id.* at 402-403.

In the second major family privacy case on which the Court relied in *Griswold*, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), the Court re-affirmed the sanctity of the family institution protected in *Meyer* and continued to apply and develop the two themes of *Meyer*. In *Pierce*, the Court first relied on *Meyer* to hold that the state's compulsory education act, requiring every child between the ages of eight and sixteen to attend public schools, unconstitutionally infringed upon and interfered with the liberty of parents "to direct the upbringing and education" of children under their control. *Pierce*, 268 U.S. at 534-535. The Court relied on the two complementary theories asserted in *Meyer*: the family has inherent value

because of the ways in which parents raise and educate their children; and the "fundamental theory of liberty" of the family excludes any general power of the state to "standardize its children." *Id.* at 535.

The *Pierce* Court restated the second theory of *Meyer* as follows: Rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state. *Id.* In holding the state's compulsory education act unconstitutional, the Court asserted that decisions relating to child-rearing are not within the competency of the state. As in *Meyer*, the Court respected the fundamental right of the parents to make family decisions affecting their minor children, preferring the parents' interest above the asserted interest of society and the state: "The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id.* As in *Meyer*, the Court protected the parents' decisions from interfering state legislation based upon the fundamental right to family privacy.

4. In defining the fundamental right of family privacy in non-abortion cases, the Court has shown a consistent respect for American tradition and history, as well as for its own precedents.

The Court has applied the doctrine of family privacy in numerous cases.[1] The discussion in this Section argues that it is settled constitutional law that the parents' au-

[1] *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (plurality opinion); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Armstrong v. Manzo*, 380 U.S. 545 (1965); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *id.* at 495-496 (Goldberg, J., concurring); *id.* at 502-503 (White, J., concurring); *May v. Anderson*, 345 U.S. 528 (1953); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

thority within their households to direct the rearing of their children is primary and is paramount to a state's interest in regulating the relationship between parents and children. The Court has invariably protected the family from state intrusion, in the absence of abuse, neglect, or other danger to the child. As the cases reveal, the Court has consistently adhered to the parents' rights to rear their children in cases that involve issues just as sensitive as abortion and in cases in which the parents' rights arguably conflict with those of the child.

The right to family privacy developed as the Court considered a wide variety of issues involving the relationship of the state to parents and children. In general, the Court has applied the family privacy right to protect all members of the family as a discrete unit from unwarranted state interference. In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Court held that the first and fourteenth amendments prevent a state from compelling Amish parents to send their children to public school from eighth grade through age sixteen. In *Yoder*, the Court cited the *Pierce* rule: the functions of a state which relate to children, such as education, must yield to the right of parents to direct the religious upbringing and education of their children. *Id.* at 213.

The *Yoder* Court explained that tradition and precedent require the Court to protect the family's privacy from state interference, as a fundamental right. First, the Court continued to regard the family unit as a discrete entity, emphasizing the traditional esteem in which American society holds the child rearing role of the family. *Id.* at 214. In the opinion of the Court, parental direction of their children's future is a family role which has a "high place in our society." *Id.* The Court believed that the history of Western civilization showed a strong tradition of parental concern for the upbringing of their children, reflected in an enduring American tradition

that parents have the primary role as decision makers in their children's lives. *Id.* at 232.

Second, the Court respected the doctrines of its precedents which established a fundamental, due process right to family privacy. The *Yoder* Court cited *Pierce* for the proposition that the autonomy of the family is a "fundamental" concept which forms the basis of all United States government and which derives from the common law duty of parents to raise their children. *Id.* at 232-233. The Court defined this concept to include the duty and corresponding constitutional right of parents to teach their children moral standards, religious beliefs, and elements of good citizenship. *Id.* at 233. As in other family privacy cases, the Court found that this familial duty deserves constitutional protection from the state and precludes the state from standardizing children.

In *Ginsberg v. State of New York*, 390 U.S. 629 (1968), the Court favored parental rights over those of the child and upheld a statute which forbade merchants to sell obscene materials to minors. The Court held that dual state interests justified such a statute: the interest in the well-being of youth and the interest in reinforcing parental authority. *Id.* at 639-640. The Court determined that "[t]he legislature could properly conclude that parents and others, teachers for example, who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility." *Id.* at 639. In upholding the law, the Court emphasized that the statute did not interfere with the parental role in assessing sex-related materials and did not prevent parents from giving obscene materials to their children if they chose to do so. *Id.* As in *Meyer* and *Pierce*, the Court required state statutes regulating the relationship between parents and children to respect the inviolability of the parental right to control their children. *Id.*

The Court's decisions in family privacy cases do not recognize an absolute right to parental autonomy but rather a strong parental right of liberty to control family life, which is tempered by society's concern for the well-being of children and the need for security within organized society. The Court in *Prince v. Massachusetts*, 321 U.S. 158 (1944), discussed this balance and upheld application of a criminal statute, a child labor law, to prevent the parent of a minor child from allowing the child to distribute religious literature on a city street.

The *Prince* case raised the competing claims of the parents' right to rear children and the state's authority to regulate, as well as the sensitive issue of freedom of religion. *Id.* at 168. The *Prince* Court stated the general constitutional standard that a state may act as parens patriae to restrict parents' control in order to guard the state's general interest in the youth's well-being. *Id.* at 168-171. *Compare Yoder*, 406 U.S. at 230 (the power of parents to make decisions for a minor is subject to limits if it appears the parents' decision will either jeopardize the health and safety of a child or potentially cause significant social harm) *and Stanley v. Illinois*, 405 U.S. 645 (1972) (states may intervene in family decisions and limit parental rights when the child's welfare or safety is endangered or when the public must be protected, if tht state cannot protect the interests adequately without intervention) *with Parham v. J.R.*, 442 U.S. 584, 624 (1979) (Stewart, J., concurring) (state intervention, whenever a parent commits a child, is not warranted because there is a rebuttable presumption that a parent is acting in the best interests of his child and because Georgia law provides that an unfit parent may be stripped of his parental authority under laws dealing with neglect and abuse of children).

5. The Court's holdings that minors have the right to an abortion without parental involvement clash with the accepted doctrines of the family privacy line of cases.

By requiring exclusion of the parents from the moral, social, and religious decision surrounding an unplanned pregnancy, the Court has created law which contradicts *Roe*'s own long-standing precedents establishing the family privacy right. The result of the Court's decisions in the minors' abortion cases is that an individual right of privacy has been held to supersede the very right from which it was derived, the right to raise a family, found in Supreme Court precedents which protect the family from state interference. Ironically, the Court has eviscerated the very precedents upon which it based *Roe*.

This destruction of the force of the family privacy right violates the doctrine that the Court must respect the themes and holdings of its precedents. Important policy considerations support a continuity and predictability in the law. *Boys Markets, Inc. v. Retail Clerk's Union, Local 770*, 398 U.S. 235, 240 (1970). Stare decisis plays an important role in orderly adjudication and serves the broad societal interests in evenhanded, consistent, and predictable application of legal rules. *Thomas v. Washington Gas Light Co.*, 448 U.S. 261 (1980). Respect for past decisions should not mean a mechanical formula of adherence to the latest decision, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience. *Helvering v. Hallock*, 309 U.S. 106, 119 (1940), *cited in Thomas*, 448 U.S. at 241. Proper respect for the rule of stare decisis calls for a return to the doctrines of family autonomy set forth in *Pierce* and *Meyer* and followed by the Court in *Griswold*, by overruling this Court's holdings that a minor must have the right to circumvent parental involvement in her decision to have an abortion.

The tortuous reasoning in the Supreme Court cases on minors' rights to abortions evidences the Court's inability adequately to reconcile the abortion right with the fundamental rights of family privacy. In *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976), the Court ignored the inherent inconsistency in granting minors the right to an abortion without parental consent, in spite of a long line of constitutional cases acknowledging the parents' fundamental right to dictate their child's moral, social, and religious decisions and to affect general development of their children. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923). *Danforth* marks the beginning of the erosion of the two long-accepted doctrines of *Meyer* and *Pierce*, that parents control their children's decisions and may do so without state interference. *Danforth* gave pregnant children the constitutional right to make decisions without their parents' involvement and contrary to their parents' wishes, thereby permitting a state to isolate a child from her parents without the state showing any harm to the child from the parents' involvement.

To reach its conclusion that a Missouri statute requiring parental consent for a minor's abortion was unconstitutional, the *Danforth* opinion first states that a wife has a constitutional right to obtain an abortion without spousal consent. Since neither the state nor any third party could veto an adult woman's abortion decision, the Court bootstrapped to finding a minor's right, reasoning that a minor must have a right to an abortion without a veto by her parent. *Danforth*, 428 U.S. at 74. The Court then held the consent statute unconstitutional, omitting any analysis of established precedents that parents have the "high duty" to direct their children in moral, social, and religious decisions. The abortion decision involves precisely the type of value judgments which

the Court traditionally and consistently has held are reserved to the parents in guiding their children. Since *Danforth*, the Court has isolated the pregnant child from the parent in what may be the single most stressful and confusing choice she must make in a lifetime. The *Danforth* decision, therefore, shows a blatant disregard for the family and the earlier family privacy decisions of the Court.

No adequate reason is found in the *Danforth* opinion for requiring the removal of a minor from parental involvement in her pregnancy decision. According to the opinion, the very existence of the minor's pregnancy had so "fractured" the family that it was fruitless for the state to attempt to enhance parental control and authority through a consent requirement. *Id.* at 75. The Court also recognized the "truism" that a minor who has exhibited the ability to become pregnant has exhibited a degree of maturity sufficient to elevate her right to an abortion above her parents' fundamental right to affect her development. *Id.* The Court later repudiated both of these "truths." *See Bellotti II*, 443 U.S. at 648 (the Court assumed that a "normal family relationship" exists when a minor child is pregnant); *H. L. v. Matheson*, 450 U.S. 398, 408 (1981) ("There is no logical relationship between the capacity to become pregnant and the capacity for mature judgment concerning the wisdom of an abortion."). The minor's right to an abortion, without parental consent, is not supported by any rationale in the *Danforth* opinion other than the conclusion that an adult woman has the right to decide to abort her pregnancy without her husband's consent.

The Court has continued woodenly to apply the minor's right to an abortion without parental involvement, as decided in *Danforth*, despite its own contrary precedents supporting family-made decisions. The Court has conceded that similar factors are present in the situation of a minor with an unplanned pregnancy as were present

in cases such as *Yoder* and *Pierce*: the particular vulnerability of children, the inability of children to make critical decisions in an informed and mature manner, and the importance of the guiding role of parents in the upbringing of their children. *Bellotti II*, 443 U.S. at 633-39; *see also H. L. v. Matheson*, 450 U.S. 398 (1981) (the state's interest in preventing medical, emotional, and psychological harm are significant when a pregnant girl is a minor). The Court acknowledged that the state validly may limit freedom of minors when making important affirmative choices with potentially serious consequences and that the state may impose parental notice and consent requirements on a minor's right to make important decisions. *Bellotti II*, 443 U.S. at 634, 640.[2] The Court has said that it is constitutionally permissible for a state to require minors to seek parental advice about a pregnancy. *Bellotti II*, 443 U.S. at 634, 640-641; *Akron*, 462 U.S. at 427 n.10.

In the face of these statements of precedent, the Court has ignored the state's interest in protecting parents' rights. The *Bellotti II* Court rationalized that the state must act with "particular sensitivity" when it legislates to foster parental involvement because the decision involves the "unique nature of the abortion decision" and a "constitutional right to seek an abortion." *Bellotti II*, 443 U.S. at 642. While the plurality in *Bellotti II* recog-

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[2] The language of the Court in *Bellotti II* with respect to parental notice and consent is in accord with the general rule that the consent of the parent is necessary for an operation on a child. *Rogers v. Sells*, 61 P.2d 1018 (Okla. 1936); *Zoski v. Gaines*, 260 N.W. 99 (Mich. 1935); *Franklyn v. Peabody*, 228 N.W. 681 (Mich. 1930); *Browning v. Hoffmann*, 111 S.E. 492 (W. Va. 1922); *Moss v. Rishworth*, 222 S.W. 225 (Tex. Crim. App. 1920); *Commonwealth v. Nickerson*, 87 Mass. (5 Allen) 518 (1862); *see also Parham v. J. R.*, 442 U.S. 584, 603 (1979) ("Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. Parents can and must make those judgments.").

nized that alternatives to abortion may be feasible and relevant to the minor's best interest, the Court concluded that *Danforth* prevented a state from requiring parental consent. *Id.* at 643.

The *Bellotti II* decision is an example of how the Court has blindly applied *Roe* and *Danforth* as precedents on the abortion issue, while ignoring the older fundamental family privacy precedents and the adverse effects of isolating a child from her parents in an important moral, social, and religious decision. The Court intrudes deeply into the family by its decisions in *Danforth* and *Bellotti II*, creating divisiveness and distrust in a most sacred, intimate relationship, and causing the precise type of interference with the family entity that the Court forbade in *Pierce*, *Meyer*, and *Yoder*.

6. The fundamental right of parents to direct the rearing of their children outweighs a minor's right to an abortion as a matter of sound constitutional law.

The irony of the Court's decisions depriving parents of involvement in their children's decisions to have abortions is increased by the realization that the Court apparently does *not* feel that a minor's right to an abortion is a *fundamental* right, yet the Court believes the minor's right must outweigh the parents' right of family privacy, which is fundamental. The Court has not stated that minors have a fundamental right to an abortion. The level of scrutiny the Court applies in the minors' abortion rights cases evidences that the Court does not feel that minors have a fundamental right to abortions.

Generally, legislation that does not interfere with a fundamental right is examined under a "rationally related" test to determine whether the legislation is constitutional. *New Orleans v. Dukes*, 427 U.S. 297 (1976); *San Antonio Ind. School Dist. v. Rodriquez*, 411 U.S. 1 (1973); *Reed v. Reed*, 404 U.S. 71 (1971). However, in

contrast to this lowest standard of scrutiny, state legislation that encroaches upon a fundamental constitutional right is subject to strict scrutiny, the most exacting standard: the regulation may be justified only by a compelling state interest, and the law must be narrowly tailored to express only that legitimate state interest. *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Cantwell v. Connecticut*, 310 U.S. 296 (1940). The state must show that its action is necessary to promote a compelling or overriding state interest. *San Antonio Ind. School Dist.*, 411 U.S. 1 (1973). A third approach, intermediate scrutiny, has been used by the Court when the statute implicates an important, but not fundamental, right. The legislation must bear a substantial relationship to an important state interest when state action affects an individual's significant interest or right. *Craig v. Boren*, 429 U.S. 190 (1976).

In *Danforth* the Court sought a "significant," as opposed to compelling, state interest behind the parental consent requirement of the statute under scrutiny, thereby implying that the right of the minor was not a fundamental right. *Danforth*, 428 U.S. at 75. The Court stated that intermediate scrutiny is the proper standard in the minors' abortion cases in *Carey v. Population Services Intern.*, 431 U.S. 678, 693 (1977). This is a less rigorous test than the "compelling state interest" test applied to restrictions on adults' fundamental privacy rights. *Carey*, 431 U.S. at 693 n.15. According to the Court, the mid-tier standard of scrutiny is appropriate when a state statute regulates minors' abortions, because the state has greater power in the regulation of children; the abortion decision requires independent decision making; and children are regarded by the law as having less capability to make these decisions. *Id.* The Court has found that a state has an "important" interest in en-

couraging a familial, rather than a judicial, resolution of a minor's pregnancy decision. *Bellotti II*, 443 U.S. at 639; *see also Matheson*, 450 U.S. at 411-413 (the state has a "significant" interest in regulating minors' abortions).

A post-*Danforth* decision which did not involve abortion signals that family privacy is still a fundamental right. *Parham v. J. R.*, 442 U.S. 584 (1979), presented to the Court the opportunity to limit the parents' right to make decisions for children and to apply generally the limits on parents the Court imposed in *Danforth*. *Parham* involved the right of parents voluntarily to commit their child to a mental health facility without a state statute imposing a pre-commitment, formalized fact-finding hearing for the child. The family privacy right was held to prevent state intrusion into a family decision because the law's concept of the family "rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions." *Id.* at 602. The Court stated that the risk of abuse

> [C]reates a basis for caution, but is hardly a reason to discard wholesale those pages of human experience that teach that parents generally do act in the child's best interest. The statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition.

Id. at 602-603 (citation omitted) (emphasis in original).

The Court's analysis in *Parham* demonstrates that the family privacy right is still a fundamental right. The Court should reconcile its continued deference to the family decisional right with the Court's disregard for the family when it is faced with an unplanned pregnancy.

The Court should analyze the parental notice requirement of the Minnesota statute at issue in this case with

proper respect for the traditional, fundamental right to family privacy, balancing against that right the less than fundamental right of the minor to have an abortion without parental involvement.

Upholding the "pure notice" provision of the Minnesota statute supports an important component of the time-tested fundamental right to family privacy—the fundamental right of a parent to influence the child on *all* moral, social, and religious decisions. *Yoder*, 406 U.S. at 232. The abortion decision is a moral, social, and religious decision. When a minor faces an unplanned pregnancy, the parents should have the right to discuss the moral, social, and religious implications of the decision with their daughter. A family with a pregnant minor is still a family; the value of the family unit is as high as before the child's pregnancy; and parents have a deep interest in discussing the pregnancy with their child. If anything, the sensitive nature of an unplanned pregnancy requires increased protection of the parents' important right to counsel their child. A holding that the Minnesota statute's "pure notice" provision is constitutional will serve to strengthen the family unit and the traditional American value of parental authority within it.

The Lutheran Church-Missouri Synod believes parents have a God-given right and responsibility to be the primary shapers of their children's values and morals. Dr. Martin Luther clearly enunciated this principle in *The Large Catechism*, written in 1529. The Lutheran Church-Missouri Synod and virtually all Lutheran churches in the world still regard *The Large Catechism* as an official and binding doctrinal statement.

Lutherans believe that "God has exalted this estate of parents above all others; indeed, He has appointed it to be His representative on earth." Luther, *The Large Catechism*, in *The Book of Concord* 382 (T. Tappert ed.

1959). Parents "occupy the place of God," *id.* at 389, who "has created and ordained them to be our parents." *Id.* at 380. Moreover, God has appointed and commanded obedience to father and mother "next to obedience to His own majesty"; for that reason, "nothing ought to be considered more important than the will and word of our parents, provided that these, too, are subordinated to obedience toward God." *Id.* at 381. "Out of the authority of parents all other authority is derived," including that of schools, households, and civil government. *Id.* at 384ff. With such authority goes the parental responsibility to "earnestly and faithfully discharge the duties of their office, not only to provide for the material support of their children . . . but to bring them up to the praise and honor of God"; this is a "strict commandment and injunction of God, who holds you accountable for it." *Id.* at 388. Accordingly, "we must spare no effort, time, and expense in teaching and educating our children to serve God and mankind," for it is a parent's chief duty, "on pain of losing divine grace, to bring up his children in the fear and knowledge of God." *Id.* at 380.

Because parents are charged with the responsibility of training their children in the moral values of the Christian faith, statutes permitting children to bypass parents in reaching the important moral decision of what to do about an unplanned pregnancy deprive parents of that right and responsibility, thereby directly interfering in the practice of an important religious belief.

Interference by the state in family decisions concerning abortion violates another important religious belief—that abortion itself, except as necessary to save the life of the mother, is contrary to the will of God and, therefore, is not a moral option. The sanctity of human life from conception and opposition to abortion are sincere and deeply held religious beliefs of The Lutheran Church-Missouri Synod. The Synod has, throughout its history, opposed abortion and has adopted official positions in its

conventions since 1971, condemning willful abortion as contrary to the will of God. Its convention resolution, "To State Position on Abortion" adopted in 1979, states that based upon Scripture, "the living but unborn are persons in the sight of God from the time of conception"; that "as persons the unborn stand under the full protection of God's own prohibition against murder"; and that abortion is not a moral option, except as tragically necessitated by medical procedures applied to prevent the death of the mother. *See* 1979 Lutheran Church-Missouri Synod Resolution 3-02A "To State Position on Abortion," Appendix 1a.

Adherence to the prior holdings of this Court that a judicial bypass procedure must be included in parental notice and consent statutes regulating minors' abortions results in undermining the fundamental family right of privacy, a right which includes the parents' right to affect their child's religious, moral, and medical decisions. The judicial bypass inserts the state, through the court system, directly between the parent and child, destroying all hope that parents can talk to the child about her pregnancy and thus exercise their religious beliefs and fundamental right of family privacy.

Such state intervention is not justified, and by requiring it, the Court violates the general standard the Court established in *Prince* and *Yoder*, that the state may intrude on the privacy of a family only to protect a child from harm. The Court should not continue to mandate such a violation of a fundamental right, because of some possibility of an undefined harm to the minor when the parents learn of the pregnancy. If the Court requires the Minnesota "pure notice" statute to include a judicial bypass provision, the Court will contradict the traditional assumption that parents act in their child's best interests and that each family is a healthy, well-functioning family. *Parham*, 442 U.S. at 604. The Court should not ignore such a time-honored American belief.

The Court should hold the "pure notice" section of the Minnesota statute constitutional, based upon the fundamental right of privacy of the family which, on balance, is paramount to any non-fundamental right of a minor to have an abortion. In doing so, the Court should overturn its earlier holdings in *Danforth*, *Bellotti II*, *Akron*, *Ashcroft*, and *Matheson*, requiring state laws to have judicial bypass procedures as alternatives to parental involvement in minors' abortion decisions.

CONCLUSION

The Lutheran Church-Missouri Synod believes that this Court should end its participation in the current trend toward erosion of the parents' authority over their children and disintegration of the traditional American family. It asks this Court to reverse the United States Court of Appeals for the Eighth Circuit by upholding the constitutionality of the Minnesota statute requiring prior notice to a minor child's parents of her intention to have an abortion, without requiring the statute to include a judicial bypass procedure.

Respectfully submitted,

LEONARD J. PRANSCHKE
SIBYL C. BOGARDUS
PHILIP E. DRAHEIM *
DRAHEIM & PRANSCHKE
12444 Powerscourt Drive
Suite 450
St. Louis, Missouri 63131
(314) 965-6455
Attorneys for Amicus Curiae

* Counsel of Record

APPENDIX

TO STATE POSITION ON ABORTION

RESOLUTION 3-02A

Overtures 3-20A-3-23 (*CW*, pp. 97-99)

WHEREAS, The Lutheran Church-Missouri Synod throughout its history has opposed abortion and since 1971 has spoken in convention to condemn "willful abortion as contrary to the will of God"; and

WHEREAS, We as members of Christian congregations have the obligation to protest this heinous crime against the will of God legally sanctioned in the United States and other lands; and

WHEREAS, The practice of abortion, its promotion, and legal acceptance are destructive of the moral consciousness and character of the people of any nation; therefore be it

Resolved, That The Lutheran Church-Missouri Synod in convention urgently call upon Christians—

1. To hold firmly to the clear Biblical truths that (a) the living but unborn are persons in the sight of God from the time of conception (Job 10:9-11; Ps. 51:5; 139:13-17; Jer. 1:5; Luke 1:41-44); (b) as persons the unborn stand under the full protection of God's own prohibition against murder (Gen. 9:6; Ex. 20:13; Num. 35:33; Acts 7:19; I John 3:15); and (c) since abortion takes a human life, abortion is not a moral option, except as a tragically unavoidable byproduct of medical procedures necessary to prevent the death of another human being, viz., the mother; and

2. To speak and act as responsible citizens on behalf of the living but unborn in the civic and political arena to secure for these defenseless persons due protection under the law; and

3. To offer as an alternative to abortion supportive understanding, compassion, and help to the expectant parent(s)—and family, and to foster concern for unwanted babies, encouraging Lutheran agencies and families to open hearts and homes to their need for life in a family; and be it further

Resolved, That the Synod earnestly encourage its pastors, teachers, officers, and boards—

1. To warn publicly and privately (Prov. 31:8-9) against the sin of abortion;

2. To instruct the community of God that abortion is not in the realm of Christian liberty, private choice, personal opinion, or political preference;

3. To nurture a deep reverence and gratitude for God's gracious gift of human life;

4. To oppose in a responsible way attitudes and policies in congregations, schools, hospitals, Lutheran social service agencies, and other institutions within their sphere of influence and work which suggest that abortion is a matter of personal choice;

5. To support the efforts of responsible pro-life groups in their communities, e.g., "Lutherans for Life" (CTCR Report, *CW*, p. 74);

6. To promote clear instruction of Christian morality in homes, schools, and churches of the Synod, showing the blessings and safeguards inherent in God's will for sexual chastity before marriage and faithfulness in marriage;

7. To teach within our Lutheran schools and churches the biological, social, and parental functions of childbearing; and

8. To support the efforts to secure the human life amendment to the United States Constitution.

Supreme Court, U.S.
FILED
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CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

NO. 88-1125 and NO. 88-1309

HODGSON, et al.,

Petitioners,

v.

MINNESOTA, et al.,

Respondents.

MINNESOTA, et al.,

Cross-Petitioners,

v.

HODGSON, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF MEMBERS OF THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA, AS AMICI CURIAE IN SUPPORT OF THE STATE OF MINNESOTA

*Maura K. Quinlan
Philip J. Murren
BALL, SKELLY, MURREN & CONNELL
511 North Second Street
P. O. Box 1108
Harrisburg, PA 17108
(717) 232-8731
Counsel for Amici Curiae

Counsel of Record

September 29, 1989

PACKARD PRESS / LEGAL DIVISION, 1617 JFK BOULEVARD, PHILA., PA. 19103 (215) 563-9000

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INTEREST OF THE AMICI CURIAE

Amici are members of the Pennsylvania General Assembly whose names are listed in Appendix A hereto attached. They represent members of both the House and Senate and both the Democratic and Republican parties. Pennsylvania is one of many states which have relied on the sincerity of this Court's statements in *Roe v. Wade*, 410 U.S. 113 (1973), that the right to abortion, as recognized therein, is not absolute and that the states may regulate abortion in a manner which furthers their important and legitimate interests.

In keeping with its duty to protect innocent life and preserve maternal health, the General Assembly has grappled with the abortion issue for the past sixteen years. It has been difficult, however, for the General Assembly to comply with the rulings of this Court regarding abortion, given the inherent uncertainty regarding the contours of *Roe* under its existing trimester framework. It also has been distressing to see the General Assembly's motives for regulating abortion challenged when it has consistently attempted to comply with this Court's own prior rulings. *See, e.g., Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 744, 764 (1986).

In 1982, Pennsylvania enacted a law requiring parental consent or judicial authorization prior to the performance of an abortion upon a minor child. This law was crafted to comply with this Court's decision in *Bellotti v. Baird*, 443 U.S. 622 (1979)(Bellotti II). However, its enforcement was enjoined prior to its operation on the ground that it did not expressly protect the confidentiality of the judicial proceedings. *A.C.O.G. v. Thornburgh*, 656 F.Supp. 879, 889 (E.D.Pa.1987). The General Assembly, in 1988, enacted even more explicit language governing the judicial bypass proceedings. That statute, like its predecessor, specifically provides that all court proceedings "shall be confidential" and, in addition, provides that the court which conducts the judicial proceedings "shall order a sealed record of the pleadings, submissions, transcripts, exhibits, orders, evidence and any other written material to be maintained." Despite this express language, the district court also

enjoined enforcement of the new law; holding that it did not guarantee absolute confidentiality since "[t]here is no assurance that the minor's petition will be sealed from the moment it is filed." *Planned Parenthood v. Casey,* 686 F. Supp. 1089 (E.D.Pa.1988). *Amici* have a substantial interest in preventing such overly technical and rigid approaches by the lower courts from frustrating the legitimate efforts of the Pennsylvania General Assembly to regulate in this area.

Amici, representing large constituencies in Pennsylvania, also urge the Court to reexamine *Roe* and to overrule it so that states may have greater flexibility in providing additional protections for pregnant women, pregnant minors, and unborn children. A right, on the part of states, must be recognized to deal with those interests according to values inherent in the fabric and traditions of American constitutional law.

SUMMARY OF THE ARGUMENT

Minnesota law requires, with certain exceptions, that both parents of a pregnant minor be notified 48 hours prior to the performance of an abortion on their daughter. The Eighth Circuit Court of Appeals held that prior decisions of this Court required that Minnesota also provide for a judicial procedure whereby the minor could avoid notification if she were found to be mature or that an abortion was in her best interest. No prior decision of this Court, however, requires a state to provide a judicial alternative to parental notice. Moreover, when reviewed under the standards set forth in *Roe* and subsequent decisions, Minnesota's statute is constitutional.

Amici respectfully urge this Court to determine and announce the proper benchmark by which statutes regulating abortion should be judged so that state legislatures may be guided by a clearly enunciated constitutional standard when carrying out their duty to enact legislation in this sensitive and difficult area. *Amici* believe this would best be accomplished by reexamination and overruling of *Roe v. Wade.*

ARGUMENT

I. MINNESOTA'S PARENTAL NOTICE STATUTE IS CONSTITUTIONAL UNDER *ROE v. WADE* AND SUBSEQUENT DECISIONS OF THIS COURT.

Minnesota's law requires that both parents of a pregnant minor be notified 48 hours prior to the performance of an abortion upon her unless: (1) one of the parents cannot be located through reasonably diligent efforts; (2) a medical emergency exists and there is insufficient time to provide the required notice; (3) the written consent of the parties required to be notified already has been provided; or (4) the pregnant minor declares that she is the victim of sexual abuse, neglect, or physical abuse and has notified the proper authorities of that fact. Minn.Stat. §144.343. Believing itself to be bound by prior decisions of this Court, the Eighth Circuit held that Minnesota could not require such notice unless it also provided for a judicial procedure whereby the pregnant minor could avoid notification altogether if she were found to be mature or that an abortion was in her best interest. *Hodgson v. Minnesota,* 853 F.2d 1452, 1456-57 (8th Cir. 1988).

No prior decision of this Court, however, has held that a judicial alternative is required in the context of a parental notice requirement. Thus, that question remains open. Moreover, a requirement of parental notice does not constitute an undue burden on abortion and is rationally related to the state's legitimate interests in protecting the fundamental right of parents to direct the upbringing of their children and in protecting their children from making imprudent decisions involving serious and irreversible consequences. Indeed, even if a requirement of parental notice were considered to constitute an "undue burden," it would be constitutional because it reasonably relates to the state's compelling interests in protecting parental rights, minor children and unborn children.

A. This Court has not Held that States Must Provide a Judicial Alternative to Parental Notice.

A majority of this Court has held that the "relevant legal standards with respect to parental-*consent* requirements are not in dispute." *Planned Parenthood v. Ashcroft,* 462 U.S. 476, 490 (1983) (emphasis added). A state wishing to require parental consent prior to the performance of an abortion on a minor also "must provide an alternative procedure whereby a pregnant minor may demonstrate that she is sufficiently mature to make the abortion decision herself or that, despite her immaturity, an abortion would be in her best interests." *Akron v. Akron Center for Reproductive Health,* 462 U.S. 416, 439-440 (1983).[1]

A majority of this Court, however, has never held that a law requiring parental notice must also provide a judicial alternative to notice. The statutes at issue in *Bellotti II, Akron,* and *Ashcroft* all involved parental *consent,* where a veto power was given to parents, rather than parental notice which provides for no such veto power.[2] Indeed, the Court specifically noted in both *Akron* and *Ashcroft* that parental notice provisions were not at issue.[3]

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1. *Amici* recognize that prior decisions of the Court hold that parental consent requirements are invalid without a bypass procedure. However, they note that a majority of the present Court has never adopted that position. Given that the cases relied upon by plaintiffs throughout this litigation involved parental consent and the standards articulated in that context, it would be appropriate for this Court to reevaluate the continuing validity of such decisions. If a minor has no constitutional right to obtain an abortion without parental consent, she surely has no right to do so without parental notification.

2. Although much of the plurality opinion of Justice Powell in *Bellotti II* appears to equate notice and consent provisions, it is clear that a majority of that Court did not hold that notice and consent were equivalent. *See,* 443 U.S. at 654 n.1 (Stevens, J., concurring in judgment, joined by Brennan, Marshall and Blackmun, JJ.) ("Neither *Danforth* nor this case determines the constitutionality of a statute which does no more than require notice to the parents, without affording them or any other third party an absolute veto.") *Id.* at 651-52 (Rehnquist, J., concurring); *Id.* at 656-57 (White, J., dissenting) (continuing to hold his views expressed in Danforth).

3. In *Akron,* the Court stated: "The Court of Appeals upheld §1870.05(A)'s notification requirement . . . . The validity of this ruling has not been challenged in this Court." 462 U.S. at 439 n.29 (citation omitted). *See also, Akron,* 462 U.S. at 469 n.12 (O'Connor, J., dissenting). Also, in *Ashcroft,*

H.L. v. Matheson, 450 U.S. 398 (1981), was the only case in which the constitutionality of a statute requiring parental notice rather than consent was before the full Court.[4] In that case, the Court expressly declined to rule on the question of whether a judicial alternative is necessary in the context of parental notice.[5]

Since no decision of the Court has held that a judicial alternative to parental notice is constitutionally mandated, that question remains open.

B. A Requirement of Parental Notice is Constitutional Because it Does Not Constitute an "Undue Burden" on Abortion and is Rationally Related to Legitimate State Interests.

In *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. 747 (1986), Justice O'Connor restated the standard under which abortion laws should be reviewed:

> Under this Court's fundamental-rights jurisprudence, judicial scrutiny of state regulation of abortion should be limited to whether the state law bears a rational relationship to

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the Court stated: "The lower courts found that §188.028's notice requirement was unconstitutional. The State has not sought review of that judgment here. Thus, in the posture in which it appears before this Court for review, §188.028 contains no requirement for parental notification." 462 U.S. at 491 n.17 (citations omitted).

4. Although *Hartigan v. Zbaraz,* 484 U.S. 171, 98 L.Ed.2d 478 (1987) involved the Illinois parental notice statute, the Court only affirmed the judgment below by an equally divided vote.

5. "Members of the particular class now before us in this case have no constitutional right to notify a court in lieu of notifying their parents. This case does not require us to decide in what circumstances a state must provide alternatives to parental notification." 450 U.S. at 413, n.22 (citation omitted). *See also, Matheson,* 450 U.S. at 414 (Powell, J., concurring) ("I join the opinion of the Court on the understanding that it *leaves open* the question whether §76-7-304(2) unconstitutionally burdens the right of a mature minor or a minor whose best interest would not be served by parental notification.") (emphasis added); *Id.* at 420-421 (Stevens, J., concurring) (Court should have addressed the question of whether a State may require notification of all minor women regardless of their maturity and should have held that it may require such notice).

> legitimate purposes such as the advancement of [the state's] compelling interest . . . An undue burden will generally be found "in situations involving absolute obstacles or severe limitations on the abortion decision," not wherever a state regulation "may 'inhibit' abortions to some degree."

Thornburgh, 476 U.S. at 828 (internal citations omitted).

There is a fundamental difference between a statute which requires parental consent prior to the performance of an abortion on a minor and one which requires only that parents be notified prior to the abortion. This Court has viewed a requirement of consent as granting to parents "an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent." *Planned Parenthood v. Danforth,* 428 U.S. at 74.[6] In contrast, a notice requirement grants no veto power to the parents whatsoever. Regardless of her parents' wishes, the minor may obtain an abortion once her parents have been notified. Thus, a requirement of parental notice does not involve an "absolute obstacle" to or even a "severe limitation" on abortion. Accordingly, it does not constitute an "undue burden."[7]

Since a requirement of parental notice does not constitute an "undue burden," it need only rationally relate to the state's legitimate interests. Minnesota has a legitimate and compelling interest in protecting the rights of parents to counsel their children on important decisions and in protecting minors "who often lack the ability to make fully informed choices that take account of both immediate and long-range consequences [of

6. Justice Stevens, however, argued persuasively in *Danforth* that a parental consent requirement is justified by the state's compelling interests. 428 U.S. at 102-105 (Stevens, J., dissenting).

7. The fact that the Minnesota law requires a 48-hour waiting period does not alter this conclusion. The waiting period is designed to allow parents some meaningful opportunity to consult with their daughters and merely postpones the effectuation of the minor's decision. Should the parents disagree with a decision to abort, they cannot prevent the minor from obtaining an abortion by withholding their consent. Rather, at the conclusion of the waiting period, the minor may effectuate her decision despite her parents wishes.

their decisions]," from making imprudent decisions without the benefit of their parents' guidance. *Bellotti II,* 443 U.S. at 640. *See also, Matheson,* 450 U.S. at 421 (Stevens, J., concurring) (the state's interest is "fundamental and substantial.") Requiring that parents be notified prior to the performance of an abortion upon their minor daughter and affording them an opportunity to consult with her and advise her regarding the wisdom of undergoing an abortion certainly furthers both of the state's interests.

Plaintiffs argue that there is no need for parental notice laws and that such laws are not rationally related to the state's interest in assuring that a wise decision is made regarding the desirability of abortion. They base this claim, in part, upon expert testimony from their witnesses, that by age 14 minors are indistinguishable from adults in their capacity to make personal decisions. Aside from the fact that such an assertion conflicts with common sense and experience, it has been soundly criticized in technical journals as overstating the premise. *See* Gardner, Scherier & Tester, *Asserting Scientific Authority: Cognitive Development and Adolescent Legal Rights,* American Psychologist, 895-902 (June, 1989) (criticizing assertions of "fact" regarding equivalence of decision-making skills of children and adults in briefs filed in this Court in *Hartigan v. Zbaraz).*

Indeed, much of the plaintiffs' expert testimony regarding the maturity of minors to make the abortion decision without parental involvement reflects a pro-abortion mentality – starting from the premise that a decision to undergo an abortion evidences maturity and that, *a fortiori,* a minor who desires an abortion is mature. States must not be restricted to legislating in a manner which relies upon such biased assumptions and "facts" which are largely unprovable.

> C. Assuming, *Arguendo,* that a Requirement of Parental Notice Does Constitute an "Undue Burden" on Abortion, Thereby Triggering Heightened Scrutiny, the Statute is Still Constitutional Because it is Reasonably Related to Compelling State Interests.

Heightened judicial scrutiny of state abortion regulations is, as Justice O'Connor stated:

> . . . reserved for instances in which the state has imposed an "undue burden" on the abortion decision . . . And if a state law does interfere with the abortion decision to an extent that is unduly burdensome, so that it becomes "necessary to apply an exacting standard of review," the possibility remains that the statute will withstand the stricter scrutiny.

Thornburgh, 476 U.S. at 828, O'Connor, J., dissenting.

The "stricter scrutiny" applied by this Court in abortion cases, however, does not encompass the "narrowly drawn" test traditionally applied to statutes involving fundamental rights. As Justice O'Connor noted in *Akron:*

> The Court has never required that state regulation that burdens the abortion decision be "narrowly drawn" to express only the relevant state interest. In *Roe,* the Court mentioned "narrowly drawn" legislative enactments, 410 U.S. at 155, but the Court never actually adopted this standard in the *Roe* analysis. In its decision today, the Court fully endorses the *Roe* requirement that a burdensome health regulation, or as the Court appears to call it, a "significant obstacle," (citation omitted) be "reasonably related" to the state's compelling interest.

Akron, 462 U.S. 416, 467-468, n.11.[8]

8. The *Roe* Court noted that "[w]here *certain* 'fundamental rights' are involved, the Court has held that regulation limiting those rights may be justified only by a 'compelling interest,' and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." 410 U.S. at 155 (citations omitted) (emphasis added). Although this passage of *Roe* is often quoted as the appropriate standard of review for abortion legislation, the Roe Court clearly did not adopt the "narrowly drawn" part of that test. The above comment was made in the context of a review of the Court's approach previously taken toward various privacy interests—*i.e.*, marital intimacy, marriage and contraceptives. After tracing the manner in which fundamental rights grounded in privacy traditionally had been reviewed, the Court stated that the fundamental right of privacy as it concerned abortion was inherently different from those other fundamental rights. *Id.* at 159.

This "reasonableness" test was relied upon by the Court throughout its 1983 decisions. For example, in *Akron,* the Court stated:

> [T]he state "may regulate the abortion procedure to the extent that the regulation *reasonably relates* to the preservation and protection of maternal health." Roe, 410 U.S. at 163.

462 U.S. at 430-431 (emphasis added). Again, in *Ashcroft,* the Court upheld the Missouri statute requiring that a second physician be present during post-viable abortions because it "reasonably further[ed] the State's compelling interest in protecting the lives of viable fetuses." 462 U.S. at 486.[9]

The test ultimately adopted in *Roe* was an intermediate one which reflects the differences, noted by the Court, between the right of privacy as it concerns abortion and that right as it concerns other fundamental interests which do not involve "potential life." After noting that the state's interest in maternal health becomes compelling at approximately the end of the first trimester, the Court held that states could regulate abortions after that stage in pregnancy in a manner that "*reasonably relates* to the preservation of maternal health." *Roe,* 410 U.S. at 163 (emphasis added).

9. The Court upheld this requirement even for abortions performed by dismemberment (D&E) when there was no possibility of fetal survival. Justice Blackmun, in dissent, felt that the Court's relaxed and flexible approach was an unjustified departure from "narrowly drawn" standards applied in other privacy areas. Thus he stated:

> When a D&E abortion is performed, the second physician can do nothing that furthers the state's compelling interest in protecting potential life. His presence is superfluous . . . . Because the statute is not tailored to protect the state's legitimate interest, I would hold it invalid.

Id. at 500. A majority of the *Ashcroft* Court, however, rejected Justice Blackmun's reasoning and his application of a narrowly drawn approach to such legislation. Instead, it applied the reasonableness test adopted in *Roe* and reaffirmed in *Akron.*

> [T]he state's compelling interest in protecting the viable fetus justifies the second physician requirement even though there may be the rare case when a physician may think honestly that D&E is required for the mother's health. *Legislation need not accommodate every conceivable contingency.*

Id. at 484 n.7 (emphasis added).

Moreover, it is clear that the "narrowly drawn" test has not been applied in the context of statutes requiring parental involvement. For example, in *Bellotti II,* Justice Powell stated:

> As [the Massachusetts law] provides for involvement of the state superior court in minors' abortion decisions, we discuss the alternative procedure described in this text in terms of judicial proceedings. We do not suggest, however, that a state choosing to require parental consent could not delegate the alternative procedure to a juvenile court or an administrative agency or office. Indeed, much can be said for employing procedures and a forum less formal than those associated with a court of general jurisdiction.

443 U.S. at 643, n.22. Certainly, employment of "procedures and a forum less formal than those associated with a court of general jurisdiction" would be less restrictive than requiring minors to pursue a judicial alternative to parental consent. Although the Court recognized that such less restrictive alternatives were available, it held that the states could impose the more burdensome requirement of proceeding in a court of general jurisdiction.

Thus, plaintiffs' claim that a "parental involvement requirement, with or without a judicial bypass system, cannot be sustained unless the state is able to prove that the statute is necessary, narrowly tailored, and actually serving state interests previously recognized as significant or compelling" (Petition for Certiorari at 9 n.15) is unsupported by this Court's prior decisions and must be rejected.

Assuming, *arguendo,* that a requirement of parental notice does constitute an "undue burden," it is still constitutional under the above standards. Parents have a fundamental constitutional right to direct the upbringing of their children. *Bellotti II,* 443 U.S. at 637-639. It is virtually impossible for them to exercise this right and fulfill their responsibilities regarding the upbringing of their children when those children are spirited away and convinced to have abortions without notifying their

parents.[10] To hold that the Constitution requires a judicial alternative to parental notice would effectively nullify the fundamental right of parents to have a guiding role in the upbringing of their children. At a minimum, parents have a right to be notified when their children are in stressful circumstances, faced with decisions having irreversible and grave consequences, and to offer them advice and guidance. Thus, the parental notice law furthers the state's compelling interest in protecting parental rights.

The state also has a compelling interest in protecting pregnant minors from the consequences of an incorrect abortion decision. As has been noted several times by members of the Court:

> There can be little doubt that the state furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child. That is a grave decision, and a girl of tender years, under emotional distress, may be ill equipped to make it without mature advice and emotional support. It seems unlikely that she will obtain adequate counsel and

10. A California case is illustrative of this concern. In *Preston v. Thermalito School District, et al.,* No. 89930 (Butte County, California Superior Court filed Mar. 24, 1986, refiled Dec. 15, 1986), a junior high school teacher, through a course of deceptive conduct, arranged for an abortion for a 14 year old immature and unemancipated minor student without notifying the child's parents, despite the fact that the mother had personally visited the school principal to request that she, through a system of "daily reports," be kept apprised of all matters relating to her daughter.

The facts allege that despite the mother's explicit plea to be so informed, the daily reports were manipulated by the school in an effort to conceal the fact that the minor had been excused from school on several occasions relative to the abortion. In addition, the teacher sent the mother a note seeking permission for the girl to babysit at the teacher's home, when in fact the teacher planned to transport the minor to have the abortion.

The girl's mother did not learn of the deception and the abortion until four days later when summoned to the hospital emergency room where her minor daughter was undergoing emergency surgery for post-abortion complications.

> support from the attending physician at an abortion clinic, where abortions for pregnant minors frequently take place.

Danforth, 428 U.S. at 91 (Stewart, J., concurring) (footnote omitted); *Bellotti II,* 443 U.S. at 621-22 (Powell, J.,).

It remains true that the vast majority of minors obtain abortions in clinics where they are counseled, if at all, by those who do not know them and, thus, have no reliable way of judging what is in their best interest. In addition, the fact that the salaries of clinic "counselors" are paid by the abortion clinic which profits when they convince a minor to have an abortion hardly ensures that they will be provided unbiased information.

Moreover, it is quite possible that many teenagers will misjudge their parents' reactions. As Justice Stevens noted in *Matheson:*

> If there is no parental-[notice] requirement, many minors will submit to the abortion procedure without ever informing their parents. An assumption that the parental reaction will be hostile, disparaging, or violent no doubt persuades many children simply to bypass parental counsel which would in fact be loving, supportive, and, indeed, for some indispensable. It is unrealistic, in my judgment, to assume that every parent-child relationship is either (a) so perfect that communication and accord will take place routinely or (b) so imperfect that the absence of communication reflects the child's correct prediction that the parent will . . . [act] arbitrarily to further a selfish interest rather than the child's interest. A state legislature may conclude that most parents will be primarily interested in the welfare of their children, and further, that the imposition of a parental-[notice] requirement is an appropriate method of giving the parents an opportunity to foster that welfare by helping a pregnant distressed child to make and to implement a correct decision.

450 U.S. at 423-424. Also, as Justice Stevens aptly noted:

> The possibility that some parents will not react with compassion and understanding upon being informed of their daughter's predicament or that, even if they are receptive, they will incorrectly advise her, does not undercut the legitimacy of the State's attempt to establish a procedure that will enhance the probability that a pregnant young woman exercise as wisely as possible her right to make the abortion decision.

Id. at 424.

Thus, states should not be forced to provide a bypass procedure to the notification requirement. The record in this case shows that some Minnesota judges simply "rubber stamp" petitions of minors utilizing the bypass procedure. *Hodgson v. Minnesota,* 648 F.Supp. 756 (D.Minn.1986). Contrary to plaintiffs' assertions, however, this fact does not indicate that parental notice laws serve no purpose. Instead, it demonstrates only that the states are prevented from adequately furthering their interests in preserving parental rights and protecting minor children when they are required to provide "rubber-stamp" bypass procedures.

The Minnesota law reasonably relates to the State's interest in protecting pregnant minors by assuring that those who are most likely to have the minor's best interests in mind—her parents—are given the opportunity to provide her advice. This protects the pregnant minor from being left to rely on whatever information biased and unfamiliar clinic personnel wish to provide.

Finally, the State has a legitimate and compelling interest in protecting fetal life which exists throughout pregnancy. *Ashcroft,* 462 U.S. at 505 (O'Connor, J., dissenting). The state also has a compelling interest in preventing teen pregnancy—a problem of seemingly runaway proportion. Prior to enforcement of the Minnesota parental notice law, the number of teen pregnancies and abortions had been steadily increasing. After the law became effective, both the teen abortion rate and teen pregnancy rate dropped substantially.[11] Thus, the Minnesota

---

11. In Minnesota, between 1980 (the last full year prior to enforcement of the parental notice law) and 1984, (a time during which the law was in effect), the number of abortions for teenagers under the age of 18 dropped from 2,327 to 1,395—a decline of 40.1%— and the decline in the abortion rate

law has also furthered these state interests.

II. THE COURT SHOULD REEXAMINE *ROE V. WADE* AND OVERRULE IT.

In *Webster v. Reproductive Health Service*, five Justices of this Court expressed the view that *Roe's* trimester framework is "unworkable," "flawed," and "problematic." 106 L.Ed.2d at 435-36 (Rehnquist, C.J., joined by Kennedy, J. and White, J.); *Id.* at 443 (O'Connor, J., concurring); *Id.* at 445 (Scalia, J., concurring). However, only Justice Scalia stated that he was willing to reexamine *Roe* and overrule it explicitly. And, although Justices Rehnquist, White and Kennedy would have abandoned the *Roe* trimester framework in *Webster*,[12] Justice O'Connor did not feel it necessary to reject that framework

for this age group was 32.2%. Figures based on data contained in *Reported Induced Abortions*, published yearly by the Minnesota Department of Health. For the same time period and age group, the number of births dropped from 2,083 to 1,654—a decline of 18.6%—and the birthrate dropped statewide by 7.9%. Figures obtained from Minnesota Department of Health computer printouts regarding births and female population size. Also during this time period, the number of pregnancies (abortions plus births) for Minnesota teens under age 18 dropped from 4,360 to 3,049—a decline of 30.1%—and the pregnancy rate decreased 20.9%. *Id.*

Thus, not only does it appear that the parental notice law has reduced the number of teen abortions, it also appears that the law has had a beneficial impact on reducing the overall teen pregnancy rate. Indeed, that teens are avoiding pregnancy altogether is also supported by the statements made by a pregnant teen seeking an abortion in Utah. In response to a question from the judge regarding whether she had attempted to prevent the pregnancy the pregnant girl indicated that she had not since she thought she could easily obtain an abortion without her parents learning about it. *H.B. v. Wilkinson*, 639 F.Supp. 952, 956 (D.Utah 1986). Presumably, this girl would have used preventive measures or avoided sexual activity had she known, in advance, that her parents would be notified in the event she became pregnant and sought an abortion.

12. It should be noted that while Justice Rehnquist stated that *Roe* need not be reevaluated because Missouri had chosen viability as the point at which it wished to protect fetal life, that statement fails to recognize that Missouri "chose" the point of viability to regulate on behalf of fetal life only because this Court struck down its prior law which protected the unborn child throughout pregnancy, in *Danforth v. Rodgers*, 414 U.S. 1035 (1973).

despite her continued belief that it "cannot be supported as a legitimate or useful framework" and has "no justification in law or logic." *Akron*, 462 U.S. at 453, 459.

Amici urge the Court to abandon this piecemeal approach because it effectively places the state legislatures in no-man's-land. *Amici* are required to attempt to divine the views of the various Justices regarding the extent to which abortion is constitutionally protected in order to enact legislation which will protect unborn children to the fullest extent possible. This, of course, is a very difficult task given the variety of opinions issued in *Webster*.

Consequently, *amici* respectfully submit that the Court should determine the proper benchmark by which statutes regulating abortion should be judged *before* evaluating the constitutionality of those statutes. Such a determination would be greatly preferable to the unpredictable course resulting from the division of opinion in *Webster*.

The issue of abortion is divisive and hotly disputed in the legislative arena as well as this Court. As Justice O'Connor stated in *Thornburgh*, this Court's abortion decisions "have already worked a major distortion in the Court's constitutional jurisprudence" and have had an "institutionally debilitating effect" on the Court. *Thornburgh*, 476 U.S. at 814 (O'Connor, J., dissenting). *Amici* submit that the absence of an identifiable standard after *Webster*—thus requiring the state legislatures to speculate about the scope of the "limited" nature of the right to abort—will have a similar "institutionally debilitating effect" upon the State General Assemblies.[13]

Without definite guidance from the Court regarding the constitutional limits on their ability to enact legislation, the states will be forced to address the issue with great uncertainty again and again--to the potential detriment of other pressing business. Given that the members of the General Assemblies of the various states take an oath to uphold the Constitution, it is

13. Significantly, whenever the General Assembly is wrong in its assessment, the Commonwealth may be penalized by having substantial awards of attorneys' fees assessed against it.

appropriate for this Court to declare whether the right of privacy protected by the Constitution includes the right to obtain an abortion. And, if the Constitution presently does not prohibit states from protecting fetal life, the Court should make this known to the states so that they may be allowed to regulate to the fullest extent constitutionally permissible, if they so choose.[14]

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14. Although only a few states would probably limit abortions to those necessary to preserve a woman's life, dire predictions abound of women dying from "back alley" abortions. These predictions are simply unfounded. For example, a leading member of the pre-*Roe* "abortion reform" movement, Dr. Bernard N. Nathanson (co-founder of the National Abortion Rights Action League), has admitted to his organization's knowing falsification of "back-alley" abortion death statistics:

> How many deaths were we talking about when abortion was illegal? In N.A.R.A.L. we generally emphasized the drama of the individual case, not the mass statistics, but when we spoke of the latter it was always "5,000-10,000 deaths a year." I confess that I knew the figures were totally false, and I suppose the others did too if they stopped to think of it. But in the 'morality' of our revolution, it was a *useful* figure, widely accepted, so why go out of the way to correct it with honest statistics? The overriding concern was to get the laws eliminated, and anything within reason that had to be done was permissible.

B.N. Nathanson, M.D., *Aborting America,* at 193 (1979).

In 1972 prior to *Roe,* 33 states prohibited abortions except where necessary to preserve the life of the mother, while others permitted abortion in various circumstances. The CDC report on induced abortions shows that during 1972 (when medical technology was not as advanced as today) 24 women died from legal abortions while 39 died from illegal abortions. *Centers for Disease Control: Abortion Surveillance 1981,* p. 51, Figure 8. It is unlikely that, in the present political climate, 33 states will be able to pass legislation limiting abortions to life-of-the-mother situations. But even if this many states were to do so, with advances in medical care, it is exceedingly unlikely that anywhere near 39 women would die of illegal abortions.

Moreover, in 1973, after *Roe* made abortion legal on demand, 25 women died from legal abortions and 19 died from illegal abortions. Thus, legalizing abortion on demand has had little impact on the number of maternal deaths from abortion. Indeed, between 1973 and 1982 (the last year for which statistics are available) while abortions have been legal on demand, almost four times as many women have died from legal abortion as from illegal abortions. *Id.*

At the core of the majority opinion in *Roe* there operates the fundamental fallacy that state legislatures are constitutionally forbidden to provide significant legal protection for human life at its most vulnerable stage. Yet it is state legislatures which are expressly designed as fora for the resolution and continuing adjustment of such difficult governmental questions. *Roe's* disregard for the judgment of state legislators casts this Court in the role of deciding essentially legislative questions, and transfers the burden of correcting "unwise" legislative judgments from the electoral process to the federal courts. Not only does this assumption of the legislative role sap the legitimacy of the courts, it has failed to achieve the political stabilization of the issue of abortion which was its evident purpose. *Roe* has only served to postpone the achievement of that stabilization.

In an earlier time, Justice Holmes urged the prompt correction of the fallacious premise of *Swift v. Tyson,* 16 Pet. 1 (1842):

> [T]he fallacy has resulted in an unconstitutional assumption of powers by the courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct.

Meanwhile, unborn children die at a rate of 1.5 million per year--with approximately 1%, or 15,000 per year (220,000 since *Roe),* being killed between the 20th week of pregnancy and birth. *Centers for Disease Control: Abortion Surveillance 1981,* p.iv, Summary Table. Such late-term abortions must be allowed for any reason relevant to the "health" of the woman. *Roe v. Wade,* 410 U.S. at 163. As defined in *Doe v. Bolton,* "health" is broad, indeed, including emotional well-being and the woman's family situation. 410 U.S. 179, 192 (1973); *A.C.O.G. v. Thornburgh,* 737 F.2d 283, 299 (3rd Cir. 1984) (the broad definition of "health" applies to abortions after viability as well as before viability). Indeed, few late-term abortions are performed due to risk to the physical health of the mother. A recent study indicated that 71% of the women obtaining abortions after the 16th week of pregnancy did so because they did not recognize that they were pregnant or had misjudged gestation. Torres & Forrest, *Why do Women Have Abortions?,* 20 Family Planning Perspectives 169, 174 (Table 4) (1988). Maternal health as a reason for late-term abortion did not have sufficient statistical significance even to be listed in the table, *Id.* And, the study states that women "were less likely to be having a later abortion . . . if they were having health problems. . ." *Id.*

Black & White Taxicab and Transfer Co. v. Brown & Yellow Taxicab and Transfer Co., 276 U.S. 518, 533 (1928).

What was at stake in the abandonment of the rule of federal common law of *Swift v. Tyson* was primarily parameters of federal-state relationships and rights of private property. *Roe* has not only skewed legislative-judicial relationships, it has cost the rights of over 20 million potential citizens to have any say at all over their own life or death. The tragedy of *Roe* is certainly manifest in the loss of human life it has occasioned, but it is also manifest in the powerlessness to correct that situation which has been enforced on the voting citizens of this nation.

CONCLUSION

For the foregoing reasons, *amici curiae* request that this Court uphold Minnesota's parental notice law in its entirety and reexamine and overrule *Roe v. Wade* so that the states may be given greater flexibility to protect unborn human life.

Respectfully submitted,

*Maura K. Quinlan
Philip J. Murren
BALL, SKELLY, MURREN & CONNELL
511 North Second Street
P. O. Box 1108
Harrisburg, PA 17108
(717) 232-8731
Attorneys for *Amici Curiae*
**Counsel of Record*

September 29, 1989

APPENDIX

APPENDIX A

THE *AMICI CURIAE*

The *amici curiae* consist of members of the General Assembly of the Commonwealth of Pennsylvania, including the following:

Senators: D. Michael Fisher (R) Allegheny; Edward W. Helfrick (R) Westmoreland; J. William Lincoln (D) Fayette; Robert J. Mellow (D) Lackawanna; Raphael J. Musto (D) Luzerne; Terry L. Punt (R) Franklin; M. Joseph Rocks (R) Philadelphia; Frank A. Salvatore (R) Philadelphia; John J. Schumaker (R) Dauphin; William J. Stewart (D) Cambria.

House Members: John E. Barley (R) Lancaster; Fred Belardi (D) Lackawanna; Robert E. Belfanti, Jr. (D) Northumberland; Jerry Birmelin (R) Wayne; Kevin Blaum (D) Luzerne; Karl W. Boyes (R) Erie; Raymond Bunt, Jr. (R) Montgomery; James M. Burd (R) Butler; Alvin C. Bush (R) Lycoming; Thomas R. Caltagirone (D) Berks; Edgar A. Carlson (R) Tioga; Gaynor Cawley (D) Lackawanna; Richard J. Cessar (R) Allegheny; Mario J. Civero, Jr. (R) Delaware; Nicholas A. Colafella (D) Beaver; Anthony L. Colaizzo (D) Washington; Anthony M. DeLuca (D) Allegheny; Thomas W. Dempsey (R) Lycoming; Scott Dietterick (R) Luzerne; Rudolph Dininni (R) Dauphin; Jim Distler (R) Elk; Bernard J. Dombrowski (D) (Erie); Thomas J. Fee (D) Lawrence; Patrick E. Fleagle (R) Franklin; A. Carville Foster (R) York; Stephen F. Freind (R) Delaware; James J. Gallen (R) Berks; Ron Gamble (D) Allegheny; Frank J. Gigliotti (D) Allegheny; Leonard Q. Gruppo (R) Northampton; George C. Hasay (R) Luzerne; Arthur D. Hershey (R) Chester; Stanley J. Jarolin (D) Luzerne; Edwin G. Johnson (R) Blair; Ralph Kaiser (D) Allegheny; Ted V. Kondrich (R) Allegheny; Gerard A. Kosinski (D) Philadelphia; Susan Laughlin (D) Beaver; Dennis E. Leh (R) Berks; William R. Lloyd, Jr. (D)

Somerset; Edward J. Lucyk (D) Schuylkill; Joseph Markosek (D) Allegheny; Keith R. McCall (D) Carbon; Christopher K. McNally (D) Allegheny; Emil Mrkonic (D) Allegheny; Dennis M. O'Brien (R) Philadelphia; Richard D. Olasz (D) Allegheny; John M. Perzel (R) Philadelphia; Merle H. Phillips (R) Northumberland; Joseph R. Pitts (R) Chester; Jere W. Schuler (R) Lancaster; Frank A. Serafini (R) Lackawanna; Edward G. Stabeck (D) Lackawanna; Thomas B. Stish (D) Luzerne; Jere L. Strittmatter (R) Lancaster; Ted Stuban (D) Columbia; Leona G. Telek (R) Cambria; Thomas M. Tigue (D) Luzerne; Fred A. Trello (D) Allegheny; Peter R. Vroon (R) Chester; Christopher R. Wogan (R) Philadelphia; Frank W. Yandrisevits (D) Northampton.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JANE HODGSON, M.D., *et al.*,
Petitioners, Cross-Respondents,

v.

STATE OF MINNESOTA, *et al.*,
Resondents, Cross-Petitioners.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF THE ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS (AAPS) AS *AMICUS CURIAE* IN SUPPORT OF STATE OF MINNESOTA

Of Counsel:
KENT MASTERSON BROWN
1114 First National Bldg.
167 West Main Street
Lexington, KY 40507
(606) 233-7879

CLARKE D. FORSYTHE *
LEANNE McCOY
AMERICANS UNITED FOR LIFE
LEGAL DEFENSE FUND (AUL)
343 S. Dearborn Street #1804
Chicago, IL 60604
(312) 786-9494
Counsel for Amicus Curiae

* Counsel of Record

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

Nos. 88-1125, 88-1309

JANE HODGSON, M.D., *et al.*,
Petitioners, Cross-Respondents,

v.

STATE OF MINNESOTA, *et al.*,
Resondents, Cross-Petitioners.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF THE ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS (AAPS) AS *AMICUS CURIAE* IN SUPPORT OF STATE OF MINNESOTA

INTEREST OF THE *AMICUS CURIAE* *

The Association of American Physicians and Surgeons, Inc. (AAPS), a not-for-profit corporation, is the largest association of private practicing physicians in the United States. AAPS is comprised of active, practicing physicians and osteopaths of all specialties, from every state and territory in the United States and the District of

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* This brief is filed with the written consent of the parties, copies of which have been filed with the Clerk of this Court.

Columbia. One purpose of the AAPS is to protect and preserve the private practice of medicine in all of its aspects. AAPS supports the right of patients, both adults and minors, to be provided full and accurate medical information with which to render informed decisions pertaining to their medical treatment. The AAPS recognizes the importance of involving parents in the medical treatment of minors, particularly in the provision of surgical procedures. Many of the members of the AAPS are pediatricians and obstetricians/gynecologists who routinely provide medical services to minors. In addition, many AAPS members are family practitioners whose practices involve working with the family, as a unit, in the provision of medical treatment. For these reasons, the issues involved in this case are of acute interest to the Association.

SUMMARY OF ARGUMENT

In this challenge to the Minnesota parental notice of abortion law, as applied, Minnesota abortion clinics and physicians have launched a selective attack to overturn this Court's decisions in *H.L. v. Matheson*, 450 U.S. 398 (1981), *Bellotti v. Baird*, 443 U.S. 622 (1979), and *Planned Parenthood v. Ashcroft*, 462 U.S. 476 (1983), as well as the constitutional principle that parents have fundamental rights to rear and raise their minor daughters in the area of abortion decision-making. The clinics' record in this case focuses exclusively on a minute subsection of Minnesota teens—those who sought elective abortions through judicial bypass—constituting only 25% of all pregnant teens and never more than .34% of the entire population of Minnesota teens aged 10-17. The clinics attempt to establish the unremarkable proposition that parents and teenagers do not always see eye to eye on teens' activities, that some parents may be abusive, that parents may react with grief, fear, or anger when they suddenly discover that their minor, unwed daughter is unexpectedly pregnant, and that this discovery may

not improve but may harm the parent-teen relationship. The record contains several stories of sad and unfortunate relations between parents and their children. But these conflicts are part and parcel of the parent-child relationship throughout history, and, as part of that relationship, have defined parental authority throughout Anglo-American law. In this sense, adolescent pregnancy is no different than many other serious, adverse events in the lives of teenagers and their families—for example, drug abuse, juvenile delinquency, or failure in school. It is in these very circumstances that parental authority is defined by the law's reaffirmation and support.

If the clinics could show that the notice law resulted in tangible threats to the health of minors generally in Minnesota—above and beyond that normally posed by pregnancy and elective abortion themselves—that minors suffered increased abuse from parents, that physicians were prevented from providing prenatal care, or that minors were denied prenatal care, it would then be plausible for the clinics to claim that the notice law was not reasonably related to preserving parental authority or adolescent health. But this is not the case that the clinics have made.

Part of the impact of the notice law that the clinics have either selectively ignored, misconstrued, or incompletely presented is revealed through the official demographic data of the Minnesota Department of Health on adolescent pregnancy, abortion, and childbirth. These data show that teenage pregnancy, abortion, and birth rates declined markedly between 1980-1986; teens who decided to abort were not unusually delayed from having abortions until later times of pregnancy that might increase the risk of abortion; and complications from abortions performed on teens did not increase relative to other age groups. In addition, a comparison of the pregnancy, abortion, and birth rates provides strong support for the conclusion that the notice law effectively caused a

decrease in the pregnancy rate. Between 1980-1986, the birth rate throughout Minnesota fell 12.5% for 10-17 year olds and 28.4% for 18-19 year olds, the abortion rate fell 27.4% for 10-17 year olds and 20.7% for 18-19 year olds, and the pregnancy rate fell 20.5% for 10-17 year olds and 25.4% for 18-19 year olds. Since it seems undisputed that the notice law directly decreased abortion rates, while birth rates simultaneously decreased, this strongly suggests that the law decreased abortion rates by affecting pregnancy rates. This supports the conclusion that the notice law in fact changed adolescent behavior. These data indicate that the notice law is reasonably related to Minnesota's compelling interest in preserving parental authority and adolescent health.

ARGUMENT

I. THE PEOPLE OF MINNESOTA HAVE A COMPELLING INTEREST IN HELPING PARENTS AND FAMILIES TO REDUCE TEENAGE PREGNANCY AND TEENAGE ABORTION.

This Court's decisions in *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976), established a constitutional right to elective abortion for adolescent girls of any age that minors had not exercised at any time in the preceding history of this country. *See* Brief Amicus Curiae of the American Academy of Medical Ethics in Support of Cross-Petitioners in *Hodgson v. Minnesota*, No. 88-1125, 88-1309 at 2-23; Brief of Certain American State Legislators in Support of Appellants in *Webster v. Reproductive Health Services, Inc.*, No. 88-605. In the aftermath of those decisions, parents and public officials in every state have sought to adjust public policy on health care to take account of this new constitutional right while preserving other compelling, traditional social values. This Court has recently held that government has a "legitimate secular purpose" in reducing "the social and economic problems caused by

teenage sexuality, pregnancy, and parenthood." *Bowen v. Kendrick*, 108 S.Ct. 2562, 2571 (1988).

In 1985, approximately 26.3% of elective abortions were performed on minors age 18 or younger. Centers for Disease Control, *Abortion Statistics U.S., 1984-1985* (1989) (Table 1.). More than 40 percent of all teenagers who have known pregnancies obtain abortions. Henshaw, et al., *A Portrait of American Women Who Obtain Abortions*, 17 Fam. Plan. Persp. 90, 93 (1985); Russo, *Adolescent Abortion: The Epidemiological Context*, in G. Melton, ed., *Adolescent Abortion: Psychological & Legal Issues* 40, 49 (1986). In 1986, in Minnesota, approximately 49.3% of pregnancies for teens, age 10-17, ended in elective abortion. Table 1, *infra*. Nearly eighty percent (78%) of all abortions performed on teenagers are done in abortion clinics. Henshaw & O'Reilly, *Characteristics of Abortion Patients in the United States 1979-1980*, 15 Fam. Plan. Persp. 5, 11 (1983). One study found that less than half of the abortion clinics require parental notice, even for teenagers 15 years of age or younger; even fewer require parental notification before performing abortions on minors age 16 or older. Torres, et al., *Telling Parents: Clinic Policies and Adolescents' Use of Family Planning and Abortion Services*, 12 Fam. Plan. Persp. 284, 285 (1980) (Table 1). Yet, in this study of 1,170 unmarried teenage abortion patients, "[n]inety-one percent were living with their parents, four percent were living with relatives . . . ." *Id.* at 287.

A. Although Many States Have Enacted Parental Consent and Notice Laws, Minnesota Is Unique in Having Had A Parental Law In Effect Which Can Be Evaluated Through Demographic Data Collected By the Department of Health.

The States have sought to address the problem of teenage pregnancy and abortion in many different ways. They have instituted scores of public programs, includ-

ing family planning programs, adoption services, child care, school-based educational programs, and maternal and child health care programs. *See Teen Pregnancy: What is being Done? A State by State Look*, A Report of the House Select Committee on Children, Youth and Families, 99th Cong. 2d Sess. 56 & Appendix IV (Dec. 1986) [hereinafter *Teen Pregnancy*]. The States stress parental involvement in many of these programs. *Id.* at 67-70.

Over 30 states, including Minnesota, have passed parental consent or notice legislation in order to protect the health of minors and to protect parental authority in the area of adolescent health decisionmaking. *See* Appendix 1 to this Brief. As this Court has said, "parental consent and notice are qualifications that typically may be imposed by the State on a minor's right to make important decisions." *Bellotti v. Baird*, 443 U.S. 622, 640 (1979) (plurality op.). Because this Court's decisions in *Roe v. Wade* and *Danforth* constitutionalized this area of the law, states can ensure parental involvement only through positive legislation.

Very few of these state parental consent and notice statutes have been allowed to go into effect for any meaningful period of time. Many have been declared unconstitutional by federal courts. Statutes in almost a dozen states are currently enjoined in the midst of pending litigation. *See* Appendix 1. As the district court below acknowledged, it was the first district court "ever to examine a parental notification or consent substitute statute in actual operation." *Hodgson v. Minnesota*, 648 F.Supp. 756, 774 (D.Minn. 1986). And there is no other currently pending litigation in this country that is examining the effect of parental notice or consent legislation as applied.

Determining the effect of these parental laws has also been frustrated by the absence of state or federal laws

requiring the reporting of statistical data. Data collected from reporting provide demographic statistics that are critical for the study of maternal morbidity and mortality. *See e.g., Teen Pregnancy* at 1-19; Smith, et al., *An Assessment of the Incidence of Maternal Mortality in the United States*, 74 Am. J. Pub. Health 780 (1984). "No federal laws require reporting for abortion." *Teen Pregnancy* at 5. State reporting requirements for abortion are in effect in less than thirty states. Appendix 1. Many states do not have reporting for a wide array of demographic factors. *Teen Pregnancy* at 1-19. Many states do not, or cannot, require mandatory reporting of abortion statistics. Illinois, for example, has been prohibited by court order from collecting abortion data since 1984. *Herbst v. Daley*, No. 84 C 5602 (N.D.Ill. July 1, 1984). Reporting requirements are essential to determine the complete effect of these laws. Minnesota is virtually unique in having had a parental notice law and reporting statute in effect simultaneously for a meaningful period of time.

B. The Plaintiff Clinics Have Failed To Show That the Notice Law Adversely Impacts the Health of Teens, Adversely Impacts the Integrity of the Family, or Fails to Be Consistent With Parents' Rights to Rear and Counsel Their Children.

The clinics' attack on the Minnesota law falls into two broad categories: (1) testimony concerning various burdens imposed on pregnant teens by the notification requirement and the bypass procedure; (2) testimony questioning the necessity and effectiveness of the notification requirement and bypass procedure in furthering the statutory purposes of protecting parental authority and adolescent health. The clinics, and their *amicus*, contend that minors of any age are no less mature and no less capable of making important decisions than their adult parents.[1]

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[1] The American Psychological Association (APA), which has filed an *amicus curiae* brief in this case in support of Hodgson,

The clinics' claim that the notice law had an adverse effect on minors in Minnesota is exclusively focused on those minors who sought abortions. The clinics' challenge reflects a narrow, distorted focus on the impact of the notice law. Minors who sought abortions through the bypass procedure between 1981-1984 constitute less than 25% (23.5%) of the total number of minors (aged 10-17) who became pregnant. *Cf.* Table 1-2, J.A. 60. The clinics' case focuses on only half of the pregnant teens in Minnesota, and that half amounts to only .30% of all Minnesota teens aged 10-17 who were under the influence of the law. *Cf.* J.A. 60, Tables 1-2.[2] The clinics' case thus virtually ignored the impact on the half of the teens who became pregnant and did not abort in Minnesota (and their parents). And the clinics' record says nothing about the drop in the pregnancy rate and how the notice law influenced teens who did not become pregnant. It is, therefore, wholly inaccurate for the clinics to claim that their witnesses had "first-hand knowledge of nearly 100% of the minors who were affected by the statute." Pet.Br.

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has recently been criticized for filing briefs in this Court which overstate the extent to which "developmental theory and data confirm that adolescents and adults have equivalent decision-making capacities." Gardner, et al., *Asserting Scientific Authority: Cognitive Development and Adolescent Legal Rights*, American Psychologist 895 (June 1989). One of the Plaintiffs' experts, Lenore Walker, expounded this theory at trial and contributed to the APA brief. APA Brief at n.2.

[2] The 23.5% figure is derived from the estimated number of pregnancies in the 10-17 age group between August 1, 1981 and December 31, 1984 (10,872) compared with the stipulated number of bypass petitions filed during that same period (2,552). J.A. 60. (The 10,872 figure uses 5 mos. of the total number of pregnancies (3,714) in the 10-17 age group in Minnesota in 1981.) *See* Tables 1-2. It appears that 49.6% of the teens that aborted between Aug. 1, 1981 and December 31, 1984 sought judicial bypass. This is based on a comparison of the total of approximately 5,149 abortions for that time period for the 10-17 age group (5 mos. of 1981 total) with the stipulation of 2,552 bypass petitions in that period (J.A. 60).

at 29. By their challenge, the clinics would strip all Minnesota parents of the statutory protection of their constitutional rights, as well as all minors of the influence of the law in ensuring parental guidance, in order to remove the requirement of judicial bypass from .30% of Minnesota teens.

There is little, if any, evidence in the record on the experience of the 50% of the pregnant teens, aged 10-17 (or their families), who did not abort—no testimony from those teens or their parents (either custodial or non-custodial) or their doctors, no medical evidence of their pregnancy or current condition, no evidence of their experience in giving birth or caring for their newborn children, no evidence of their past history or future plans or aspirations, no evidence that any minor who carried her child to term later regretted it.

Even the experience of the 50% of the pregnant teens who aborted is presented in the record almost exclusively through the eyes of third parties (*not* parents)—abortion clinic personnel, court or administrative personnel, or experts apparently experienced with only teens who aborted.[3] These teens are "represented" only by three single mothers of pregnant daughters and eight teens as

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[3] The following are the Plaintiffs' witnesses, excluding some of the named Plaintiffs: Paul Wendt, Meadowbrook Clinic; Allen Oleisky, judge, Stanley Henshaw, statistician; Henry Albrecht, juvenile court judge; Edwin G. Widseth, asst. county atty.; Susanne Smith, supervisor, GAD program; Kathrine Welsh, Women's Health Center; Cynthia Daly, asst. public defender; Dr. Lenore Walker, psychologist; Gerald Martin, judge; Charlotte Baker, Midwest Health Center; Maria Honkala, medical asst.; Thomas P. Webber, Planned Parenthood administrator; Heather Sweetland, asst. public defender; Laura Hunter, abortion clinic counselor; Elissa Benedek, psychiatrist; William Sweeney, county judicial officer; Gary B. Melton, psychologist; George Petersen, district judge; Paul Garrity, judge; Steven Butzer, psychiatrist; Neil Riley, judge; Edward Ehlinger, health department administrator; Henry David, Trans. Family Research Inst.; Dr. Arthur Horwitz, Meadowbrook clinic.

named plaintiffs. Pet. Br. at 23 n.49. The experience of certain minors who were deposed is characteristic of the lifestyle of many teens, but there is no evidence that the notice law seriously exacerbated the parent-teen relationship for these teens or for any significant number of Minnesota teens. Most of the Plaintiffs' experts relied on "studies" and "the "literature"—none of which seem to involve Minnesota youth. District Court Transcript (T.) 1137, 1146. The exception seems to be Steven Butzer, who cited two cases of Minnesota adolescents he had counseled, but his experience seems to have been only with girls who sought abortion. J.A. 296-300. There is apparently no evidence of even a single report of child abuse caused by the parental notification, or a single report of medical complications caused by the law, or a single case of parental prevention or coercion of an abortion. Cross Petitioners' Brief (Cross Pet.Br.) at 10-11, 18.

The data collected by the Department of Health tell a broader public health story—not only about those teens who aborted (.60% in 1982) but also about those who never got pregnant (98.7%) and those who carried their children to term (.66%); and it is a story different from the one that the clinics present. The data collected and reported by Minnesota are unique in what they can tell public health researchers about the effect of the notice law. This analysis of the Department's data demonstrates that the notice law is reasonably related to protecting parents' constitutional rights and protecting the health of minors, because it requires parental notice without causing any increased health problems for minors and, in fact, possibly decreases adolescent pregnancy and abortion rates *without* causing increased birth rates. This is an extraordinary benefit for teens and their families in Minnesota—an impact which the clinics virtually ignored.

II. WHILE THE MINNESOTA PARENTAL NOTICE OF ABORTION LAW WAS IN EFFECT AND ENFORCED, TEENAGE ABORTION AND PREGNANCY DECLINED SUBSTANTIALLY AND TEENAGE BIRTHS DID NOT GENERALLY INCREASE COMPARED TO PREVIOUS YEARS.

The Minnesota notice law was only in effect from August 1, 1981 through March 2, 1986, when a preliminary injunction was entered against the entire statute, followed by a permanent injunction on November 6, 1986. Minn. Stat. Ann. 144.343(2)-(7) (West 1989); *Hodgson v. Minnesota*, 648 F.Supp. 756, 760, 781 (D.Minn. 1986), *cert. denied*, 107 S.Ct. 1333 (1987); *Hodgson v. Minnesota*, 853 F.2d 1452, 1455 (8th Cir. 1988); Cross Pet. Br. at 10. That injunction continued in effect throughout the appellate review. After the court of appeals *en banc* reversed the district court's decision on August 8, 1988 and upheld the notice law, the Eighth Circuit issued an order on October 7, 1988, staying the issuance of its mandate pending the filing of a writ of certiorari, or until such time as this Court acted on the petition for certiorari. That stay continues in effect.

During the time that the notice law was in effect, the Minnesota Department of Health, Center for Health Statistics (the Department) collected demographic data from Minnesota abortion providers under mandatory statutory reporting requirements. Minn. Stat. Ann. 145.413 (West 1989); T. 2069, 2076-79 (Dr. Paul Gunderson). The Department began to collect data in 1973. T. 2072. The data collected included :

- the number of teenage pregnancies, abortions, and births,
- complications incurred by teenagers during abortion, and
- the gestational age at which the abortion was performed.

The data relied upon in this brief are the Department's official data. As it has to other researchers (T. 660), the Department provided official data through computer disks and data tables on incidence and population in age specific groupings appropriate for an evaluation of the law—10-17 years, 18-19 years, 20-24 years, 25-54 years.[4] The surveillance of abortion data by the Department begins with age 10. T. 2082. And the Department collects abortion data using a category of 17 years and under. Defendants' Exhibit (D. Exh.) 35; J.A. 481. Official population estimates were also provided by the Department because this analysis was conducted prior to the 1990 census.

In this analysis, it was assumed that any change in the incidence of pregnancy, abortion, and childbirth because of the notice law would most heavily fall on teens 17 and below, who were directly affected by the notice law (Minn.Stat.Ann. 645.451 (West 1989)); less heavily on teens age 18-19 who would have recently been subject to the law; somewhat less on women age 20-24; and least on women age 25-54.[5] The notice law itself does not define "minor" by age, and thus it is quite possible that there was some confusion as to who, among 17-19 year olds, was covered by the law. Moreover, some teens who gave birth at 18 might have been 17 at the time they became pregnant and thus were directly affected by the law. Those who were 18 or 19 in 1983-1986 were subject to the law in 1981 (as, for example, Francis H. (J.A. 68-69)), and the group as a whole could reasonably have been influenced by the law through socialization, including schooling and peer contacts. Similarly, some in the 20-24 age group in later years would have been subject to the law in the earlier years of its enforcement. Women age 25-54 would never have been personally affected by the law. For these reasons, these four groups were considered separately.

[4] The data presented in this brief do not include either teens or adults whose ages were unknown or non-Minnesota residents.

[5] Plaintiffs' witness, Stanley Henshaw, of the Alan Guttmacher Institute, also distinguished between teens age 17 and below and teens age 18-19. J.A. 98. The Director of the Minnesota Center for Health Statistics, Dr. Paul Gunderson, also relied on a category of "17 and below" because the Center collects data for this category. D. Exh. 35; T. 2082-84, 2101-2102, 2104.

This brief presents and analyzes the number and rates of adolescent pregnancies, abortions, and births in Minnesota between 1975 and 1986, the last year for which complete statistics were available.[6] In addition, the study examines the impact of the notice law on medical complications and gestational age at the time of abortion. The examination of rates allows for and takes into account adjustments for changes in the population of Minnesota. The brief also examines the impact on all of these phenomena among women age 25-54, in order to assess law-specific and general population effects. Figures and Tables noted hereafter are included in the Appendix to this Brief.

A. During the Four Years that the Notice Law Was In Effect, Teenage Pregnancies, Abortions, and Births Declined Substantially.

1. *Pregnancies*[7]

The Department's official data show that pregnancies for Minnesota teens, age 10-17, declined between 1981-1986, while the notice law was in effect. Table 1 and Figure 1a show that the number of pregnancies rose from 3,958 in 1975 to 4,315 in 1980 and then decreased to a low of 2,987 in 1983 and to 3,133 in 1986. Thus, the number of pregnancies in this age group grew by 9.0%

[6] At the time of trial in 1986, the State only presented data for years 1980-1983 (D. Exh. 35; J.A. 481) and Planned Parenthood had only data up to 1982 and not beyond. T. 660-61.

[7] Pregnancies equal the sum of abortions, live births, and fetal deaths.

between 1975 and 1980 and fell by 27.4% from 1980 to 1986. In this age group, the highest number of adolescent pregnancies occurred in the year before the notice law went into effect.

Table 1 and Figure 1b show that the number of pregnancies for the 18-19 age group increased from 6,494 in 1975 to a high of 8,301 in 1980 and then declined to a low of 5,493 in 1986. The number of pregnancies in this age group increased by 27.8% between 1975 and 1980 and fell by 33.8% from 1980-1986.

Table 1 and Figure 1c show that the number of pregnancies for the age group 20-24 increased between 1975 and 1980 from 22,001 to 28,093 and then declined between 1980 to 1986 from 28,093 to 22,792—almost to the 1975 figure.

Table 1 and Figure 1d figures show that pregnancies for the 25-54 age group increased between 1975 and 1980 but then continued to increase between 1980 to their highest level in 1986. This group would be the least likely to be affected by the notice law, and the figures show that, in fact, pregnancies in this age group continued to rise throughout the effective period of the notice law.

2. *Abortions*

The Department's data also show that abortions for teenagers, aged 10-17, declined between 1980 and 1986, while the notice law was in effect. Table 1 and Figure 1a show that abortions in this age group rose from 1,507 in 1975 to a high of 2,327 in 1980, the year before the notice law took effect, and then fell to a low of 1,395 in 1984 before rising to 1,545 in 1986. Abortions for this age group increased 54.4% from 1975 through 1980 and fell by 33.6% from 1980 to 1986.

For the 18-19 age group, abortions grew markedly between 1975 and 1980 before decreasing between 1980-1986. Table 1 and Figure 1b show that abortions for this

age group rose substantially from 1,758 in 1975 to a high of 3,380 in 1980, the year before the notice law took effect, and then fell to a low of 2,372 in 1986. Abortions thus rose 92.3% between 1975 and 1980, before falling 29.8% between 1980 and 1986.

In the 20-24 age group, Table 1 and Figure 1c show that abortions grew 124.1% from 2,702 to 6,054 between 1975 and 1980, the last year before enforcement of the notice law, and then remained relatively stable between 1980 and 1986, falling 5.5%.

For the 25-54 age group, abortions did not decline between 1980 and 1986, as Table 1 and Figure 1d show. Abortions in this age group increased 179.3% from 2,161 in 1975 to a high of 6,035 in 1986. Abortions thus rose 118.2% between 1975 and 1980 and rose 28.0% between 1980 and 1986.

3. *Births*

The Department's data show that births for teens age 10-17 declined while the notice law was in effect. In the 10-17 age group, as Table 1 and Figure 1a show, the number of births fell from 2,427 in 1975 to 1,974 in 1980, but continued to decline between 1980-1986, to 1,573 in 1986. Births for teens age 10-17 thus dropped by 18.7% from 1975 to 1980 but dropped 20.3% from 1980 to 1986.

For the 18-19 age group, Table 1 shows that births rose from 4,693 in 1975 to a high of 4,883 in 1980, the year before the notice law went into effect, and then declined to a low of 3,096 in 1986. For this age group, births increased by 4.0% from 1975 to 1980, but decreased by 36.6% from 1980 to 1986. In reviewing this age group, it must be remembered that some girls who became pregnant at 17 would give birth after they were 18. Thus, some girls who gave birth while they were 18 may well have been influenced by the law.

In the 20-24 age group, as Table 1 and Figure 1c show, births increased 14.4% from 1975-1980 but then de-

clined 22.6% between 1980-1986, from 21,899 to 16,959. In the 25-54 age group, as Figure 1d shows, births increased from 1975-1980, increased slightly between 1980-1982, and continued to increase 1982-1986. Births rose from 28,746 in 1975 to a high of 42,269 in 1986.

4. *Migration*

Migration out of Minnesota for abortions was apparently not conducted on any significant scale. Four states border Minnesota: North Dakota, South Dakota, Iowa, and Wisconsin. North Dakota has had a parental consent law in effect since at least 1981. N.D. Cent. Code 14-02.1-03.1 (1981 & 1989 Supp.).[8] South Dakota reports 5, 19, 20, 30, 20, and 17 abortions performed on Minnesota teen residents, 19 years and under, during 1981 through 1986, respectively. *South Dakota Vital Statistics* (1982-1987). Iowa has no parental or reporting law in effect. Wisconsin had no mandated reporting before 1987. One researcher, Robert Blum, concluded that "[i]n contradistinction to the Massachusetts data, there is little evidence to indicate large numbers of Minnesota youth are leaving the state for abortion. . . ." Blum, et al., *The Impact of a Parental Notification Law on Adolescent Abortion Decision-Making*, 77 Am. J. Pub. Health 619, 620 (1987).

One study by Cartoof and Klerman purported to find significant migration out of Massachusetts in their study of the impact of the Massachusetts parental consent law. Cartoof & Klerman, *Parental Consent for Abortion: Impact of the Massachusetts Law*, 76 Am. J. Pub. Health 397 (1986). Nevertheless, as in the case where migration occurs between states with differences in the drinking age

[8] Stanley Henshaw suggested that there was migration to North Dakota based merely on the fact that a clinic opened up in Fargo in 1981. J.A. 99-101; Henshaw T. at 32. But he then chose to exclude North Dakota from his regional assessment of birth rates because of its parental consent law. Henshaw T. at 39-40.

for teenagers, the solution to migration is not to abolish the public health standards of stricter states but to strengthen the standards in the more permissive states. *Cf. South Dakota v. Dole*, 107 S.Ct. 2793 (1987); 23 U.S.C. 158 (1982 ed. and Supp. III). Regardless of the Massachusetts scenario, however, the facts indicate that Minnesota's experience is different. Massachusetts is geographically a small state bordered by several other states without parental involvement legislation that may be more easily reached by car or public transportation (e.g., Maine, New York). Thus, the conclusions of Cartoof and Klerman simply do not apply to Minnesota.

B. During the Four Years that the Notice Law Was In Effect, Teenage Pregnancy, Abortion, and Birth Rates Declined Substantially.

Because raw figures do not take account of possible changes in Minnesota's population for a particular age group from year to year, rates for pregnancies, abortions, and births were also calculated based on the Department's data. Rates, in this study, equal the occurrence (incidence) of a phenomenon per 1000 females. *Cf.* T. 664-65. The numerator is the number reflecting the phenomenon for females in that age category; the denominator is the population number for females in that age category (in thousands). The data in this brief rely on the Department's data for the entire population of Minnesota, not just on a sample. Table 2 contains rates for abortion, births and pregnancy for the various age groups between 1975-1986.

1. *Pregnancy Rate for 10-17 Year Olds*

The pregnancy rate equals the number of pregnancies in the particular age group divided by the population of females in that age group in thousands (pregnancies/population). Table 2 and Figure 2a show that the pregnancy rate for the 10-17 age group rose from 12.7 (12.7

per 1000) in 1975 to a high of 15.6 in 1980, the year before the notice law took effect, and then declined to a low of 11.3 in 1983 and 12.4 in 1986. Thus, even though the population of 10-17 year olds declined between 1975 and 1986, the pregnancy rate declined, as well, by 20.5% between 1980-1986.

2. *Pregnancy Rate for 18-19 Year Olds*

Table 2 and Figure 2b show that the pregnancy rate for the 18-19 age group rose substantially from 75.5 (75.5 per 1000) in 1975 to a high of 98.5 in 1980, the year before the notice law went into effect, but then fell after 1980 to 96.0 in 1981 and to 73.5 in 1986, below the 1975 level. Again, even though the population in Minnesota in the 18-19 age group fell from a high of 86,924 in 1976 to 74,689 in 1986, the pregnancy rate also declined 25.4% between 1980-1986.

3. *Abortion Rate for 10-17 Year Olds*

The abortion rate equals the number of abortions in the selected age group divided by the population of the females in that age group in thousands (abortions/population). Table 2 and Figure 2a show that the abortion rate for the 10-17 age group rose from 4.9 in 1975 to a high of 8.4 in 1980, the year before the notice law became effective, and then fell to 6.8 in 1981, to a low of 5.4 in 1983 and 6.1 in 1986.[9] The abortion rate thus rose 71.4% between 1975-1980 and then fell 27.4% between 1980-1986.

4. *Abortion Rate for 18-19 Year Olds*

The Department's data also show that the abortion rate for the 18-19 age group in Minnesota fell during the time

[9] Stanley Henshaw suggested that the rate of abortions for teens age 15-17 has declined, in part, because they passed themselves off as 18. Henshaw T. 61. This is implausible because it would result in an increase in the abortion rate for 18-19 year olds, which plainly did not occur.

that the notice law was in effect. Table 2 and Figure 2b show that the abortion rate rose from 20.4 in 1975 to a high of 40.1 in 1980, the year before the notice law became effective. The abortion rate then fell 4.8% to 38.20 in 1981 and a further 16.8% to a low of 31.80 in 1986. The abortion rate thus rose 96.6% between 1975-1980 and fell 20.7% between 1980-1986.

5. *Birth Rate for 10-17 Year Olds*

The birth rate equals the number of births in the selected age group divided by the population of females in that age group in thousands (births/population). Figure 2a and Table 2 show that the birth rate for the 10-17 age group in Minnesota fell from 7.8 (7.8 per 1000 teens) in 1975 to 7.2 in 1980, and that it continued to fall to 7.0 in 1981, to a low of 5.8 in 1983 and then to 6.3 in 1986. The birth rate therefore fell 7.7% between 1975-1980 but fell 12.5% between 1980-1986.

6. *Birth Rate for 18-19 Year Olds*

The Department's data show that the birth rate for the 18-19 age group in Minnesota fell during the time the notice law was in effect. Table 2 and Figure 2b show that the birth rate for the 18-19 age group rose from 54.6 in 1975 to 58.0% in 1980 (+6.2%), the last full year before the notice law took effect. The birth rate in this age group then fell to 57.4 in 1981 and to a low of 41.5 in 1986. Thus, the birth rate fell 28.4% between 1980-1986.

In sum, the Department's data refute the clinics' contention that the notice law increased the birth rate for teenagers in Minnesota. Between 1980-1986, the birth rate fell 12.5% for 10-17 year olds, 28.4% for 18-19 year olds, and 23.6% for 20-24 year olds.[10] In contrast,

[10] Stanley Henshaw acknowledged the decline in Minnesota birth rates for 15-17 and 18-19 year olds, but attributed this to a regional decline. J.A. 100.

the birth rate for 25-54 year olds increased 6.1% between 1980-1986. The Minneapolis birth rate data is separately examined in Section III below.

C. The Data Are Strong Evidence that the Notice Law Effectively Reduced Teen Pregnancy Rates in Minnesota During Its Effective Period.

The comparison of the pregnancy, abortion, and birth rates in Minnesota between 1981-1986 strongly supports the conclusion that the notice law effectively caused a decrease in the pregnancy rate in those years. Since the abortion rate fell 27.4% for 10-17 year olds and 20.7% for 18-19 year olds, while the birth rate throughout Minnesota simultaneously fell 12.5% for 10-17 year olds and 28.4% for 18-19 year olds, the pregnancy rate must have declined, as the data confirm, supporting the conclusion that the notice law in fact changed adolescent behavior. In other words, since it seems undisputed that the notice law did directly decrease abortion rates, while birth rates simultaneously decreased, the law must have decreased abortion rates by affecting pregnancy rates.

In addition, the number of teens, aged 10-17, who aborted as a percentage of all pregnant teens (including fetal deaths), aged 10-17, did not decline markedly between 1980-1986. The figures are, respectively, for those years: 53.9%, 49.0%, 47.3%, 47.9%, 46.0%, 50.3%, 49.3%. This is further evidence that the impact of the notice law was to reduce teen pregnancies generally, rather than to compel teens to give birth rather than abort.

On the other hand, it may not be possible, examining the pregnancy and abortion rates in Minnesota alone, to conclude with certainty that the notice law itself caused lower pregnancy rates by inducing minors to change their behavior. But the Department's data at least make clear that the notice law did not cause higher birth rates in Minnesota and was enforced during an unprecedented pe-

riod when pregnancy and abortion rates declined for teens aged 10-17.

D. Minnesota Teenagers Did Not Have Abortions at Significantly Later Points in Pregnancy Relative to Other Age Groups While the Notice Law Was in Effect.

The plaintiff clinics claim that the notice law delayed minors from having abortions, pushing them into later gestational periods, with the implication that this increased the risk of abortion. Pet. Br. at 13-14; T. 2088; J.A. 347. For this claim, they rely, in part, on a report by the Meadowbrook Women's Clinic, one of the plaintiffs, that "as of December 1985, over 30% of their minor patients seeking abortions were in the second trimester." Pet. Br. at 14 n.29. But this bare statistic from one clinic, presented in isolation, says virtually nothing. Moreover, the Department's data bely these claims generally. *See also* Cross Pet. Br. at 19; J.A. 346-49, 474, 481.

Table 3 and Figure 3a show the number of abortions performed at [greater than] 12 weeks gestational age for all age groups between 1975-1986.[11] For the 10-17 age group, the number of abortions performed after 12 weeks grew from 403 in 1978 to 510 in 1980, jumping substantially between 1979-1980, but *declined* sharply (28.4%) from 1980-1981. Between 1981-1986, the number of abortions performed in this age group after 12 weeks continued to decline 8.8% to 333 in 1986.

Table 3 and Figure 3b show the percentage of abortions performed after 12 weeks. For the 10-17 age group,

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[11] The 12-week point was used because 12 weeks is generally used as the line between the first and second trimesters and because the clinics' allegation is that the proportion of minors who had "second trimester abortions increased dramatically." Pet. Br. at 13-14. Dr. Paul Gunderson also used a 12 week cutoff. T. 2103-2104.

the percentage of abortions performed after 12 weeks grew 22.3% from 1975-1980, declined between 1980-1982, increased between 1982-1984 and then declined between 1984 and 1986, with the result that the percentage of abortions performed after 12 weeks in 1985 was nearly the same as the percentage in 1980. For 1980-1986, the percentage of abortions performed at [greater than] 12 weeks for 10-17 year olds dropped 1.4%.

The figures for the 10-17 age group, however, cannot properly be viewed in isolation but must be compared with the figures for the other three age groups in Minnesota between 1975-1986. The percentage of abortions performed after 12 weeks for the 18-19 age group declined from 16.6% in 1980 to 15.2% in 1982, and then increased from 1982 to 1984 before dropping between 1984-86, a total increase between 1980-86 of 10.3%. A similar pattern occurred for the 20-24 and the 25-54 age groups. The 20-24 age group shows a 9.8% increase from 1975-80 in the percentage of abortions performed after 12 weeks. But there is a significant increase in 1984 before a drop to 1986, with a resulting increase of 4.5% between 1980-86. For the 25-54 age group, the percentage of abortions performed after 12 weeks decreased 2.3% between 1975-80 and then increased 1.2% between 1980-86.

Three primary characteristics should be noted for all age groups. First, the percentage of abortions performed after 12 weeks is consistently related to age differences, both before and after the enactment of the notice law. The percentage of abortions after 12 weeks for the 10-17 age group is consistently higher than the 18-19 age group, which is consistently higher than the 20-24 age group, which is consistently higher than the 25-54 age group for all years from 1975-1986. Second, as Figure 3b shows, for all groups there appears to be a cyclical trend with "peaks" every four years, which the notice law has not interrupted. Third, after the notice law became effective

in 1981, the percentage of abortions after 12 weeks dropped for all age groups between 1980-1981, rose slightly from 1981-1982, and rose after 1982. The fact that the number and percentage of abortions performed after 12 weeks in the 10-17 age group dropped between 1980 and 1981, and the fact that the number of abortions for all age groups performed after 12 weeks increased after 1982, provide strong evidence that the notice law did not selectively increase the gestational age at which teens obtained abortion.

E. Minnesota Teenagers Did Not Have Increased Complications From Induced Abortion Relative to Other Age Groups While the Notice Law Was in Effect.

The plaintiff clinics also claim that complications from induced abortions incurred by teens subjected to the notice law increased because of the law. This claim is based entirely on journal publications about general rates of complications and not on any specific medical evidence in the record. *See* Pet. Br. at 14; J.A. 347-48.[12] By relying on general rates of complications, which generally increase with gestational age, the clinics' argument assumes the validity of their claim that the law caused adolescents to have later abortions. But this assumption has been contradicted by the Department's data. Independent of the gestational age data, the Department's data indicate that the claim of increased complications is unfounded. *See* Cross Pet. Br. at 19, 39-40; J.A. 347-48.

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[12] Plaintiffs' counsel told the district court: "In Plaintiffs' Exhibits 1 through 9 and also in Dr. Hodgson's testimony there is a claim that the risk increases through delay, specifically the types of risks such as laminaria due to cervical—lack of laminaria use which relates to cervical injury, but we haven't demonstrated or said on any particular patients those risks have occurred except those who haven't been able to get it, who have gone to childbirth, which of course is much more dangerous." T. 2088; J.A. 347. When asked by the court whether the claim was that the notice law "resulted in an increase in complications to minors" rather than an increase in "risk," counsel for plaintiffs replied, "No." *Id.*

For purposes of this analysis, it must be understood that between 1982-1984, the Department changed and broadened its definition of "complication" for purposes of the reporting statute. T. 2090-2094. This broader definition encompassed more specific instances of morbidity that were required to be reported as complications of abortion. Specifically, the Department changed their reporting form to include more examples of complications (from 8 categories to 12 categories), including a distinction between "minor" complications (not requiring hospitalization) and "major" complications (requiring hospitalization) (e.g., pelvic infection, hemorrhage, and others). In the aftermath, the Department found increased reporting of "minor" complications.

Table 4 and Figures 4a-4b show the number and percentage of abortions with reported complications for all age groups in Minnesota, 1975-1986. The rate of complications is determined by dividing the number of complications by the number of abortions. For the 10-17 age group, the number of complications declined from 16 in 1975 to 6 in 1980, and then declined to 0 in 1981, before jumping to 10 in 1982 and dropping to 8 in 1986, the same as the 1978 figure. Figure 4b shows that, for the 10-17 age group, the percentage of abortions with reported complications increases 56.3% between 1982-1984 but then declines 48.0% between 1984-1986. For the 18-19 age group, the percentage increases 211.1% between 1982-1984 and then declines 43.8% between 1984-1986. For the 20-24 age group, the percentage increases 60.9% between 1982-1984 and then declines 18.4% between 1984-1986. Finally, for the 25-54 age group, the percentage increases 33.7% between 1982-1984 and continues to increase 3.4% between 1984-1986.

In sum, the Department's data show that reported complications increased for all age groups between 1975-1986. This is entirely consistent with the Department's findings after the change in its definition of complications. Between 1982-1984, the percentage of complications *increased more* for the 18-19 and 20-24 age groups than for the 10-17 group. And, between 1984-1986, the percentage of complications *fell less* for all other groups than the 10-17 age group. These facts provide strong evidence that the notice law caused no increased complications for teens age 10-17 who were subject to the law.

III. THE CONTENTION THAT THE NOTICE LAW INCREASED BIRTHS TO TEENS IS BASED ON STATISTICS FOR ONLY THE LIMITED AREA OF THE MINNEAPOLIS CITY LIMITS AND THESE MUST BE VIEWED WITHIN THE CONTEXT OF OTHER DEMOGRAPHIC PHENOMENA IN MINNEAPOLIS AND THROUGHOUT THE STATE.

The plaintiff clinics claim that the notice law caused a 38.4% increase in the birth rate to teens age 15-17 by relying on a 38.4% increase in the birth rate for teens age 15-17 in Minneapolis between 1980-84. Pet.Br. at 12. Plaintiffs, purporting to quote Edward Ehlinger of the Minneapolis Dept. of Health, argue that the notice law "was the only factor that uniquely affected the fifteen to seventeen year old age group which could explain the difference." Pet.Br. at 12. Ehlinger, in fact, did not say that it was the "only" factor; he said merely that it "would be an important factor." T. 2030-31.

As this Court stated recently in *Webster v. Reproductive Health Services, Inc.*, 109 S.Ct. 3040, 3050 (1989), the states may "make a value judgment favoring childbirth over abortion." Thus, the fact that the notice law may have increased births to teens affected by the law is not a constitutional indictment against the law. Such a fact would merely imply that parental influence, as required by the law, had encouraged teens to give birth rather than abort. Such parental guidance is hardly a result which violates the Constitution. But, in fact, the data undermine the claim that the notice law caused in-

creased births to teens either in Minnesota generally or in Minneapolis specifically.

The clinics' assertion rests entirely on data gathered from the Minneapolis Department of Health concerning residents of the City of Minneapolis only. *See* P. Exh. 116; T. 2072 (Dr. Paul Gunderson). The data *do* show an increase of 38.4% between 1980-84 in births to teens between the age of 15-17 who are residents of Minneapolis. *See* Table 5. For 1980-87, the birth rate of Minneapolis teens aged 15-17 is 39.1, 41.2, 42.7, 47.3, 54.1, 58.2, 62.2, 64.5, respectively. When seen within the context of demographic statistics throughout Minnesota and within demographic changes in Minnesota in the 1980's, however, the allegation that the increase is due to the notice law is doubtful.

Initially, it is important to realize that teens who are residents of Minneapolis make up roughly only 6% of the teen population of Minnesota. In 1981, the 15-17 year old female population for Minnesota was 107,784, while the female population in Minneapolis for ages 15-17 was only 6,548. Thus, the 38.4% increase in the birth rate in Minneapolis was limited to 6% of the state's population of 15-17 year olds.

Statistics throughout Minnesota show that the 38.4% increase in the birth rate to Minneapolis residents age 15-17 between 1980 and 1984 was unique to Minneapolis and did not occur in metropolitan Minneapolis or in Minnesota in general, as Table 5 and Figure 5a show. *See also* T. 2073-74 (Dr. Paul Gunderson). The birth rates for ages 15-17 in years 1980-1986 in metropolitan Minneapolis are 17.4, 17.2, 17.2, 15.1, 17.4, 16.5, 17.8. And the birth rate for ages 15-17 between 1980-86 in Minnesota as a whole is 17.5, 17.5, 16.6, 14.6, 16.1, 15.1, 15.6. In addition, Minneapolis differs in birth rate from other geographic regions in Minnesota for other age groups besides 15-17, particularly for ages 10-14, 18-19, and 25-34, as Table 5 and Figures 5b-5e show. Finally, the Minneapolis birth rate for 15-17 year olds continues

to climb throughout 1986 and 1987, even after the notice law was enjoined in March, 1986.

The number of births to teens as a percentage of all births in Minneapolis must also be considered. In Table 7 and Figure 7a, it is apparent that the percentage of births to minors in Minneapolis is lower than that found in the nation generally, but exhibits a remarkably parallel trend to the national trend over time. The selective increase in birth rate in Minneapolis is reflected in the Minneapolis line in Figure 7a, insofar as the percentage of total births to teen births in Minneapolis rises contrary to the national and statewide trend between 1985-1987. But this increase occurs later than we would expect were it a result of a law enacted in 1981. The real increase in the percent of births to minors does not happen until several years later: 1985, 1986, and 1987, when the law was no longer in effect. The increase in the 15-17 year old Minneapolis birth rate during 1981-83 is *not* accompanied by an increase in births to minors as a percentage of total births. This clearly parallels both the Minnesota and national trends in its decline during 1981-83. The opposing trends in Minneapolis in birth rate to minors 15-17 (Figure 5a) and percent of births to minors (Figure 7a) indicate that birth rates must have been increasing in general in Minneapolis from 1981-83, regardless of age. This indicates that the increase in birth rates in Minneapolis to minors during the enactment period of the notice law was merely part of a larger trend effecting all minors and adult women, including those not subject to the law.

Moreover, the increase in births for Minneapolis teens age 15-17 leads to a different conclusion when the Minneapolis population is examined in more detail. When the Minneapolis births are broken down by race, and compared with data from the National Center for Health Statistics, the increase in births to girls under 18 is seen to be largely confined to the minority population, spe-

cifically the population of Asian-Pacifics. Figure 7b is a breakdown by race of the Minneapolis and national trend lines in Figure 7a. The Asian-Pacific Island percentage of births to minors deviates from the national trend and increases dramatically. All other races roughly parallel national trends in their decline, at least until 1986, when the notice law was enjoined. This would suggest that Asian-Pacifics are disproportionately impacting the birth rate for teens age 15-17 in Minneapolis. It is implausible that the notice law would selectively impact Asian-Pacifics more than other races in Minneapolis. Therefore, other explanations for the Minneapolis increase in birth rate should be explored.

Figure 8 suggests one possible explanation—a substantial increase in the population of Asian-Pacific teens. Figure 8 shows the percent of minority enrollment in the Minneapolis Public School District from 1971 to 1987. This Figure shows that the percentage of Asian enrollment sharply increases between 1980-1981 and continues to increase from 1981-1987. It is precisely during this time that the percent of all births to minors for the Asian-Pacific population experienced the greatest increase. These statistics show an unusual increase in both the Asian-Pacific population in Minneapolis and in the percentage of births to minors for this population.

This increase in births to Asian-Pacific minors must be compared with the abortion behavior of this population. The abortion rate is important to consider because the clinics' challenge to the notice law is predicated on the assumption that it keeps minors from getting abortions. The notice law can directly influence only the abortion rate and the birth rate is influenced by a reduction in the number of abortions. This implies that as the influence of the notice law on the abortion rate decreases, its potential influence on the birth rate should also decline. Yet, Dr. Paul Gunderson testified to the virtual nonexistence of abortion to the Asian-Pacific population. *See*

T. 2076 (Dr. Paul Gunderson commenting on the low abortion rate of Asians in Minnesota). It is improbable, therefore, that a group with an extremely low abortion rate before the law went into effect would be the most effected by the law in terms of birth rate. Some other factor(s), and not the notice law, must explain this increase.

In summary, the Minneapolis data do not support the contention that birth rates for teens in Minneapolis increased because of the notice law. When viewed in conjunction with the data from other regions of Minnesota, it appears that the notice law did not increase births to teens in Minneapolis. Together with the marked decrease in pregnancy rates and abortion rates in Minnesota, these data demonstrate that the notice law, as applied, is reasonably related to preserving parental authority and protecting the health of minors.

CONCLUSION

The judgment of the United States Court of Appeals for the Eighth Circuit should be affirmed.

Respectfully submitted,

Of Counsel:
KENT MASTERSON BROWN
1114 First National Bldg.
167 West Main Street
Lexington, KY 40507
(606) 233-7879

CLARKE D. FORSYTHE *
LEANNE McCOY
AMERICANS UNITED FOR LIFE
LEGAL DEFENSE FUND (AUL)
343 S. Dearborn Street #1804
Chicago, IL 60604
(312) 786-9494
Counsel for Amicus Curiae

* Counsel of Record

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APPENDIX

APPENDIX 1:

STATE REPORTING REQUIREMENTS AND PARENTAL CONSENT OR NOTICE OF ABORTION STATUTES

ALABAMA: Parental consent statute enacted in 1987; in effect and enforced since September 23, 1987. Ala. Code sec. 26-21-3 (Supp. 1988); *Ex parte: State of Alabama* and *Ex parte: Anonymous*, 531 So.2d 901 (Ala. 1988).

No reporting statute.

ALASKA: Parental consent statute enacted in 1970. Alaska Stat. sec. 18.16.010(a)(3) (1987). On October 21, 1976, an opinion of the Attorney General declared that this subsection is "clearly unconstitutional."

No reporting statute.

ARIZONA: Parental notice statute enacted in 1982; Ariz. Rev. Stat. Ann. sec. 36-2152 (1986); enjoined by federal court. New parental consent statute enacted May 22, 1989, with an intended effective date of September 15, 1989; preliminarily enjoined by federal court on September 15, 1989, and injunction extended on September 22, 1989. *Planned Parenthood v. Neeley*, No. CIV 89-489 TUC ACM (D.Ariz. 1989).

Reporting statute in effect from January 1, 1968. Ariz. Rev. Stat. Ann. sec. 36-340 and 341 (1986).

ARKANSAS: Parental consent statute enacted in 1969. Ark. Stat. Ann. sec. 41-2555 (Supp. 1985). Enjoined by federal court in 1980. *Smith v. Bentley*, 493 F.Supp. 916 (E.D. Ark. 1980). New parental notification statute enacted in 1989. Ark. Acts 270.

Reporting statute in effect from February 19, 1981. Ark. Stat. Ann. sec. 20-18-603 (1987).

CALIFORNIA: Parental consent statute enacted in 1987, with intended effective date of January 1, 1988.

Cal. Health & Safety Code sec. 25958 (Supp. 1988). Continuing state court injunction since December 28, 1987, entered on facial challenge to parental consent statute. *American Academy of Pediatrics v. Van de Kamp*, No. 884574 (Cal. Super. Ct. Dec. 28, 1987), *appeal docketed*, No. A040911 (1st Cir. Cal. App. argued August, 1989).

Reporting statute was added by statutes in 1971, amended and effective on June 30, 1973, and operative on July 1, 1973. Cal. Health & Safety Code sec. 25955.5 (1984).

COLORADO: No parental or reporting statute.

CONNECTICUT: No parental or reporting statute.

DELAWARE: Parental notice statute enacted on June 17, 1969, but not presently operative. Del. Code Ann. tit. 24, sec. 1790(b)(3) (1981).

Reporting statute enacted on June 17, 1969. Del. Code Ann. tit. 24, sec. 1790(c) (1981).

DISTRICT OF COLUMBIA: No parental or reporting statute.

FLORIDA: Parental consent statute enacted in 1979. Fla. Stat. Ann. sec. 390.001(4)(a) (West Supp. 1985). Enjoined by federal court on July 10, 1979, and subsequently declared unconstitutional; *Scheinberg v. Smith*, 482 F.Supp. 529 (S.D. Fla. 1979), *aff'd*, 659 F.2d 476 (5th Cir. 1981); parental consent statute enacted on June 15, 1988, with intended effective date of October 1, 1988; enjoined by federal court injunction on facial challenge on October 6, 1988, which was dissolved on February 13, 1989. *Jacksonville Clergy Consultation v. Martinez*, 707 F. Supp. 1301 (M.D. Fla. 1989), *appeal docketed*, No. 89-3127 (11th Cir.). Declared unconstitutional on May 12, 1989. *In re T.W.*, 543 So.2d 837 (Fla. App. 5 Dist. 1989).

Reporting statute in effect as of August 5, 1979. Fla. Stat. Ann. tit. 29, sec. 390.002 (1986).

GEORGIA: Parental notice statute enacted on April 14, 1987, with intended effective date of July 1, 1987. Ga. Code Ann. sec. 24A-4401 (Supp. 1988). Enjoined by federal injunction on June 30, 1987. *Planned Parenthood v. Harris*, 670 F. Supp. 971 (N.D. Ga. 1987). Amended parental notice statute enacted on March 31, 1988, with intended effective date of July 1, 1988; enjoined by continuing federal injunction on July 11, 1988. *Planned Parenthood v. Harris*, 691 F.Supp. 1419 (N.D. Ga. 1988).

There are two reporting statutes in the Georgia Code of 1981, which became effective or November 1, 1982. Ga. Code Ann. sec. 31-10-19, 16-12-141 (1988).

HAWAII: No parental or reporting statute.

IDAHO: Parental notice statute enacted in 1973; Idaho Code sec. 18-609(6) (1985).

No reporting statute.

ILLINOIS: Parental consent statute (Ill. Ann. Stat. ch. 38, para. 81-51 *et seq.* (Smith-Hurd 1989)) enacted in 1977 with an effective date of Jan. 1, 1978; enjoined by federal court in *Wynn v. Scott*, 448 F.Supp. 997 (N.D. Ill. 1978), *aff'd* 582 F.2d 1375 (7th Cir. 1978); *see also Wynn v. Carey*, 559 F.2d 193 (7th Cir. 1979). Parental notice statute enacted on November 2, 1983, with intended effective date of January 31, 1984; Ill. Rev. Stat. ch. 38, para. 81-65 (1988); enjoined by continuing federal court injunction since January 26, 1984. *Hartigan v. Zbaraz*, 584 F.Supp. 1452 (N.D. Ill. 1984), *aff'd*, 763 F.2d 1532 (7th Cir. 1985), *aff'd by equally divided court*, 108 S.Ct. 479 (1989).

Reporting statute amended in 1984. Ill. Rev. Stat. ch. 38, para. 81-30 (1989). Enjoined by continuing federal court temporary restraining order since 1984 from gathering abortion statistics, *Herbst v. Daley*, No. 84 C 5602 (N.D. Ill. July 1, 1984).

INDIANA: Parental consent statute enacted in 1974; enjoined by federal court. *Gary-Northwest Women's Serv. Inc. v. Bowen*, 418 F.Supp. 9 (N.D. Ind. 1976), *aff'd on other grounds*, 429 U.S. 1067 (1977). Parental notification statute enacted in 1982, with intended effective date of Sept. 1, 1982; Ind. Code Ann. sec. 35-1-58.5-2.5 (Burns Supp. 1986). Enjoined by federal court in *Indiana Planned Parenthood v. Pearson*, 716 F.2d 1127 (7th Cir. 1983); New parental consent statute enacted in 1984; enforced since September 1, 1984.

Reporting statutes in effect as of July 26, 1973. Ind. Code Ann. sec. 35-1-58.5-3 and sec. 35-1-58.5-5 (Burns Supp. 1988).

IOWA: No current parental involvement or reporting statute.

KANSAS: No parental involvement statute.

Reporting statute in effect as of July 1, 1975. Kan. Stat. Ann. sec. 65-445 (1985).

KENTUCKY: Parental consent statute enacted in 1982 with intended effective date of July 15, 1982. Ky. Rev. Stat. Ann. sec. 311-732 (1983). A temporary restraining order was entered against Kentucky's entire abortion statute on July 9, 1982, and the entire Act was declared unconstitutional on September 11, 1984. See *Eubanks v. Brown*, 604 F. Supp. 141 (W.D. Ky. 1984). The parental consent statute was amended in 1984 and again in 1986 with an intended effective date of July 15, 1986; temporary restraining order entered on July 10, 1986, on facial challenge and order lifted in approximately March of 1989. On Aug. 23, 1988, the district court partially enjoined the law, but upheld it as modified. See *Eubanks v. Wilkinson*, No. C82-0360-L(A), slip op. at 35-36 (W.D. Ky. Aug. 23, 1988), *appeal docketed*, No. 88-6085 (6th Cir. Sept. 22, 1988), No. 89-5353 (6th Cir. Mar. 21, 1989).

Reporting statute intended to be in effect as of July 15, 1982, but a temporary restraining order was entered against the State's entire abortion Act on July 9, 1982, and then the Act was declared unconstitutional on September 11, 1984. See *Eubanks v. Brown.*

LOUISIANA: Parental consent statute enacted in 1978, amended in 1980 and amended and reenacted in 1981 with this most recent version going into effect on July 23, 1981; La. Rev. Stat. Ann. sec. 40:1299.35.5 (West Supp. 1988); upheld by federal court in *Margaret S. v. Treen*, 597 F. Supp. 636 (E.D. La. 1984).

Reporting statute enacted in 1978. La. Rev. Stat. Ann. sec. 40:1299.35.10, 40:1299.35.11 (1989). Constitutionality upheld except to the extent that the statute requires doctors to provide the zip code or residence of the pregnant woman. *Margaret S. v. Edwards*, 488 F. Supp. 181 (E.D. La. 1980). Related reporting statute enacted in 1979. La. Rev. Stat. Ann. sec. 40:48 (1989).

MAINE: Parental notice statute enacted in 1979 with an intended effective date of Sept. 14, 1979, but it was enjoined on Sept. 13, 1979. Me. Rev. Stat. Ann. tit. 22, sec. 1597 (1980 and Supp. 1988); *Women's Community Health Center v. Cohen*, 477 F. Supp. 542 (D.Me. 1979).

Reporting statute in effect as of March 31, 1978. Me. Rev. Stat. Ann. tit. 22, sec. 1596 (1980).

MARYLAND: Parental notice statute enacted in 1982; Md. Health-Gen. Code Ann. sec. 20-103 (1987). Attorney General issued opinion that it is unconstitutional. 70 Op. Atty. Gen. (Dec. 31, 1985).

Reporting statute in effect since 1968. Md. Health-Gen. Code Ann. sec. 20-208(c) (1987).

MASSACHUSETTS: Parental consent statute enacted on August 2, 1974, with intended effective date of October 31, 1974; Mass. Ann. Laws ch. 112, sec. 12 (Michie/Law. Co-op. 1985); enjoined by federal court on October

30, 1974; constitutionality upheld. The Massachusetts statute was enjoined and never enforced until after this Court's decision in 1981. *Bellotti v. Baird*, 443 U.S. 622, 625 n.1 (1979); constitutionality upheld. *Planned Parenthood v. Bellotti*, 641 F.2d 1006 (1st Cir. 1981).

Reporting statute was in effect as of 1974. Mass. Ann. Laws ch. 112, sec. 12R (Michie/Law. Co-op. 1985).

MICHIGAN: No parental statute.

Reporting statute enacted in 1978. Pub. Act 368 of 1978. Mich. Stat. Ann. sec. 14.15 (2835) (Callaghan 1988).

MISSISSIPPI: Parental consent statute enacted in 1986, with intended effective date of July 1, 1986; Miss. Code Ann. sec. 41-41-53 (1988); enjoined by continuing, preliminary federal injunction since July 2, 1986, on facial challenge. *Barnes v. Mississippi*, No. J86-0458 (w) (S.D. Miss. 5/13/87).

No reporting statute.

MISSOURI: Parental consent statute enacted on June 14, 1974, with intended effective date of June 14, 1974; upheld by federal court on January 31, 1975. *Planned Parenthood v. Danforth*, 392 F. Supp. 1362 (1975); parental consent statute enacted in 1979 with intended effective date of June 29, 1979; Mo. Ann. Stat. sec. 188.028 (Vernon Supp. 1989); enjoined by federal court injunction from time of enactment until 1985. *See Planned Parenthood v. Ashcroft*, 483 F. Supp. 679, 683 (W.D. Mo. 1980); constitutionality upheld in *Planned Parenthood v. Ashcroft*, 462 U.S. 476 (1983); subject to renewed challenge; injunction lifted in 1986. *T.L.J. v. Webster*, 792 F.2d 734 (8th Cir. 1986).

Reporting statutes have been in effect since June 29, 1979. Mo.Ann. Stat. sec. 188.052 and 188.055 (Vernon Supp. 1989); upheld in *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976).

MONTANA: Parental notice statute enacted in 1974, but not presently operative. Mont. Code Ann. sec. 50-20-107 (1987).

Reporting statute in effect since 1974. Mont. Code Ann. sec. 50-20-110 (1987).

NEBRASKA: Parental notice statute enacted in 1981 with effective date of May 29, 1981; Neb. Rev. Stat. sec. 28-347 (1985); enjoined on September 16, 1983, in *Orr v. Knowles*, No. 81-0-301 (D.Neb. Sept. 16, 1983).

Reporting statute in effect as of July 1, 1978. Neb. Rev. Stat. sec. 28-343, 344, 345 (1985). Declared unconstitutional and enjoined insofar as statute requires physicians to make an official report of "prescribed" abortions. *Women's Services, P.C. v. Thone*, 483 F. Supp. 1022 (D. Neb. 1979).

NEVADA: Parental notice statute enacted on June 14, 1985, with intended effective date of July 1, 1985; Nev. Rev. Stat. sec. 442.255 (1986 & Supp. 1988); enjoined by continuing federal injunction since June 28, 1985, entered on facial challenge; appeal pending before Ninth Circuit since July 24, 1985. *Glick v. McKay*, 616 F. Supp. 322 (D. Nev. 1985), *appeal docketed*, No. 85-2335 (9th Cir. 1985).

Reporting statute in effect as of 1973. Nev. Rev. Stat. sec. 442.260 (1986).

NEW HAMPSHIRE: No parental or reporting statute.

NEW JERSEY: No parental or reporting statute.

NEW MEXICO: No parental statute.

Reporting statute enacted in 1977. N.M. Stat. Ann. sec. 24-14-18 (1986).

NEW YORK: No parental statute.

Reporting statute enacted in 1953 and most recently amended in 1987, effective Jan. 1, 1988. N.Y. Pub. Health Law sec. 4160, 4161 (McKinney 1989).

NORTH CAROLINA: No parental or reporting statute.

NORTH DAKOTA: Parental consent statute enacted in 1981; N.D. Cent. Code sec. 14-02.1-03.1 (Supp. 1987).

Reporting statute in effect since 1975; N.D. Cent. Code sec. 14-02.1-07; upheld in *Leigh v. Olson*, 497 F. Supp. 1340 (D. N.D. 1980).

OHIO: Parental notice statute enacted on November 20, 1985, with intended effective date of March 24, 1986; Ohio Rev. Code Ann. sec. 2151.85, 2919.12, and 2505.73 (Page Supp. 1985); enjoined by continuing federal injunction on facial challenge since March 31, 1986 (TRO), which became a preliminary injunction on April 22, 1986; *Akron Center for Reproductive Health v. Slaby*, 633 F. Supp. 1123 (N.D. Ohio 1986), *aff'd*, 854 F.2d 852 (6th Cir. 1988), *prob. juris. noted sub nom., Ohio v. Akron Center for Reproductive Health, Inc.*, U.S. No. 88-805.

No reporting statute.

OKLAHOMA: No parental law.

Reporting statute in effect as of October 1, 1978. Okla. Stat. Ann. tit. 63, sec. 1-738, 1-739 (West 1984).

OREGON: No parental law.

Reporting statute enacted in 1983. Or. Rev. Stat. Ann. sec. 435.496 (1987).

PENNSYLVANIA: Parental consent statute enacted in 1982; Pa. Stat. Ann. tit. 18, sec. 3206 (Purdon 1983); parental consent statute amended on March 25, 1988, with intended effective date of April 24, 1988; enjoined by continuing federal injunction since April 21, 1988, on May 23, 1988. *Planned Parenthood v. Casey*, 686 F.Supp. 1089 (E.D. Pa. 1988).

Reporting statute enacted in 1982. Pa. Stat. Ann. tit. 18, sec. 3214 (Purdon 1983). Partially enjoined in

American College of Obstetricians and Gynecologists v. Thornburgh, 613 F.Supp. 656 (E.D. Penn. 1985). The statute was amended on March 3, 1988, with an intended effective date of April 24, 1988. On April 21, 1988, a federal court granted a temporary restraining order and enjoined public disclosure of reports filed pursuant to sec. 3214(f). *Planned Parenthood v. Casey*, 686 F.Supp. at 1092. Then, the court permanently enjoined certain provisions of the reporting statute on May 23, 1988. *Id.* at 1129-1134.

RHODE ISLAND: Parental consent law enacted in 1982; R.I. Gen. Laws sec. 23-4.7-6 (Supp. 1985).

No reporting statute.

SOUTH CAROLINA: Parental consent statute was enacted in 1974; S.C. Code Ann. sec. 44-41-30 (Law. Co-op. 1985); enjoined by federal court; *Floyd v. Anders*, 440 F.Supp. 535 (D.S.C. 1977).

Reporting statute in effect as of 1975. S.C. Code Ann. sec. 44-41-60 (Law. Co-op. 1985).

SOUTH DAKOTA: Parental consent statute was enacted in 1973, but it is not presently operative. S.D. Codified Laws Ann. sec. 34-23A-7 (1986).

Reporting statute in effect as of 1973. S.D. Codified Laws Ann. sec. 34-23A-19 (1986).

TENNESSEE: Parental consent statute enacted in 1978; Tenn. Code Ann. sec. 39-4-202 (1982); enjoined by federal court in 1979; *Planned Parenthood v. Alexander*, No. 79-843 (Tenn. Ch. Ct. Oct. 24, 1979); parental consent statute enacted May 12, 1988, with intended effective date of July 1, 1989; enjoined by continuing federal injunction on facial challenge on June 30, 1989; and ruled unconstitutional on July 24, 1989, in *Planned Parenthood v. McWherter*, 716 F.Supp. 1064 (M.D. Tenn. 1989), *appeal docketed*, No. 89-6026 (6th Cir. Aug. 15, 1989).

Reporting statute in effect as of 1973. Tenn. Code Ann. sec. 39-4-203 (1982).

TEXAS: No parental or reporting statute.

UTAH: Parental notice statute enacted in 1974; Utah Code Ann. sec. 76-7-304 (1978); enjoined by federal court injunction; *L.R. v. Hanson*, No. 80-78 (D. Utah Feb. 8, 1980); constitutionality upheld in *H.L. v. Matheson*, 450 U.S. 398 (1981); subject to renewed challenge in 1986; *H.B. v. Wilkinson*, 639 F.Supp. 952 (D. Utah 1986). Upheld and in effect.

Reporting statute in effect from 1974 and amended in 1981. Utah Code Ann. sec. 76-7-313 (1978).

VERMONT: No parental or reporting statute.

VIRGINIA: No parental or reporting statute.

WASHINGTON: Parental consent statute enacted in 1970 with effective date of May 14, 1970; Wash. Rev. Code sec. 9.02.070 (1974). Enjoined on January 7, 1975, in *State v. Koome*, 84 Wash.2d 901, 530 P.2d 260 (1975).

No reporting statute.

WEST VIRGINIA: Parental notice statute enacted in 1984; W. Va. Code sec. 16-2F-3 (1985).

No reporting statute.

WISCONSIN: No parental statute.

Reporting statute enacted in 1985 and in effect as of Nov. 1, 1986. Wis. Stat. Ann. sec. 69.186 (West 1989).

WYOMING: Parental consent and notice statute enacted in 1989 with an effective date of June 8, 1989. Wyo. Stat. sec. 35-6-118 (1989).

Reporting statute in effect after May 27, 1977. Wyo. Stat. sec. 35-6-107 and 108 (1988).

Table 1
Abortions, Births, and Pregnancies*

YEAR	AGE	ABORTIONS	BIRTHS	(FETAL DEATHS)	PREGNANCIES
1973	10-17	.	2406	24	.
	18-19	.	4509	46	.
	20-24	.	18276	123	.
	25-54	.	27211	277	.
1974	10-17	.	2330	35	.
	18-19	.	4649	37	.
	20-24	.	19096	174	.
	25-54	.	28198	267	.
1975	10-17	1507	2427	24	3958
	18-19	1758	4693	43	6494
	20-24	2702	19137	162	22001
	25-54	2161	28746	238	31145
1976	10-17	2060	2309	22	4391
	18-19	2511	4469	37	7017
	20-24	3643	18630	158	22431
	25-54	2895	29678	264	32837
1977	10-17	2274	2280	19	4573
	18-19	2693	4604	50	7347
	20-24	4528	19863	133	24524
	25-54	3529	32492	261	36282
1978	10-17	2186	2069	16	4271
	18-19	3054	4644	40	7738
	20-24	5066	19851	141	25058
	25-54	3872	33710	267	37849
1979	10-17	2308	2035	21	4364
	18-19	3293	4720	44	8057
	20-24	5683	20938	126	26747
	25-54	4355	35823	245	40423

* Source: Raw data provided by the Minnesota Department of Health. Reported abortions, births, (fetal deaths) and pregnancies are those occurring in Minnesota, with non-residents and women of unknown age excluded. Pregnancies = abortions + births + fetal deaths. Assumes negligable occurrence of abortion to those of age 9 and below and age 55 and above. Abortion data unavailable for 1973 and 1974.

Table 1 (Continued)
Abortions, Births, and Pregnancies

YEAR	AGE	ABORTIONS	BIRTHS	(FETAL DEATHS)	PREGNANCIES
1980	10-17	2327	1974	14	4315
	18-19	3380	4883	38	8301
	20-24	6054	21899	140	28093
	25-54	4716	37236	246	42198
1981	10-17	1820	1876	18	3714
	18-19	3064	4602	31	7697
	20-24	6047	21638	135	27820
	25-54	4881	38654	269	43804
1982	10-17	1564	1727	16	3307
	18-19	2799	4216	37	7052
	20-24	5963	21161	132	27256
	25-54	5180	39581	242	45003
1983	10-17	1432	1538	17	2987
	18-19	2547	3641	35	6223
	20-24	5487	19319	137	24943
	25-54	5012	39308	260	44581
1984	10-17	1395	1617	19	3031
	18-19	2586	3502	24	6112
	20-24	6032	18864	136	25032
	25-54	5525	40941	282	46748
1985	10-17	1570	1537	15	3122
	18-19	2531	3401	26	5958
	20-24	6087	18409	109	24585
	25-54	5812	42157	281	48250
1986	10-17	1545	1573	15	3133
	18-19	2372	3096	25	5493
	20-24	5724	16959	109	22792
	25-54	6035	42269	240	48544

* Source: Raw data provided by the Minnesota Department of Health. Reported abortions, births, (fetal deaths) and pregnancies are those occurring in Minnesota, with non-residents and women of unknown age excluded. Pregnancies = abortions + births + fetal deaths. Assumes negligable occurrence of abortion to those of age 9 and below and age 55 and above. Abortion data unavailable for 1973 and 1974.

Figure 1a
Abortions, Births, and Pregnancies
Ages 10–17

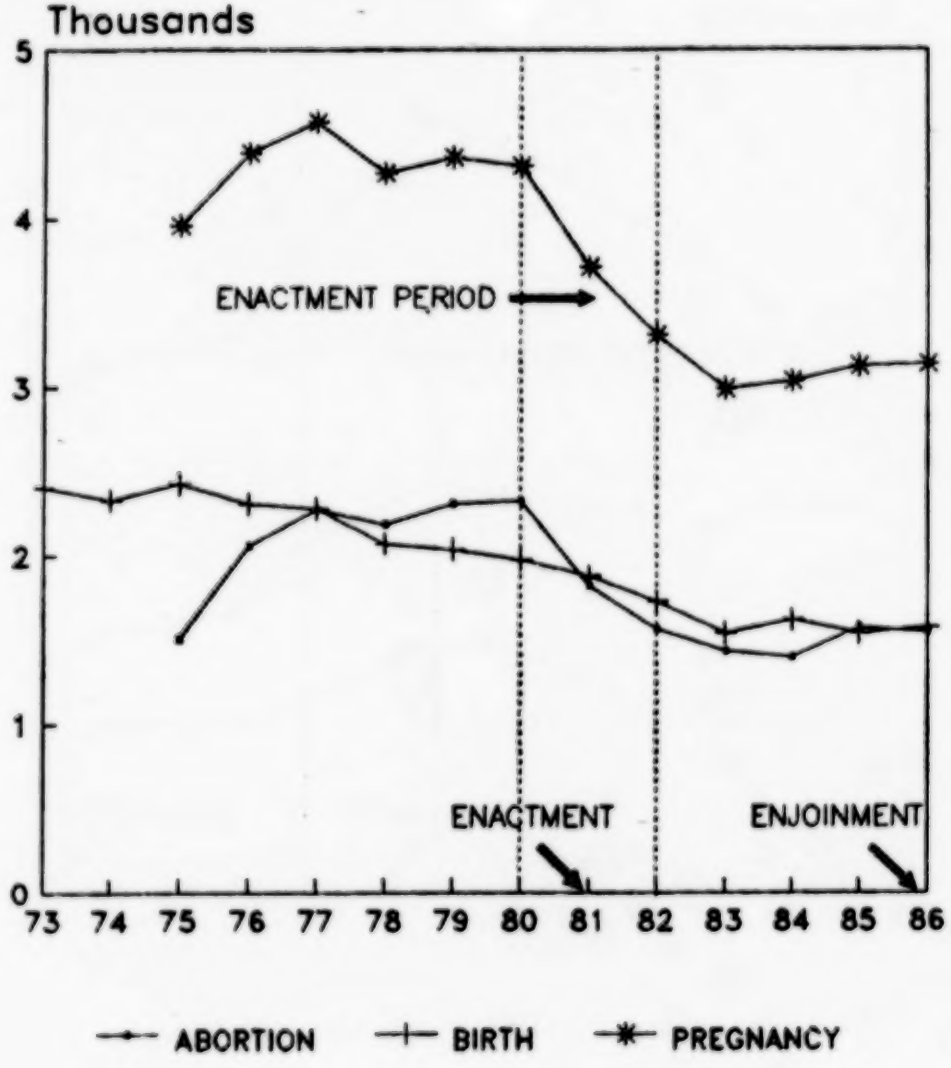


Figure 1b
Abortions, Births, and Pregnancies
Ages 18–19

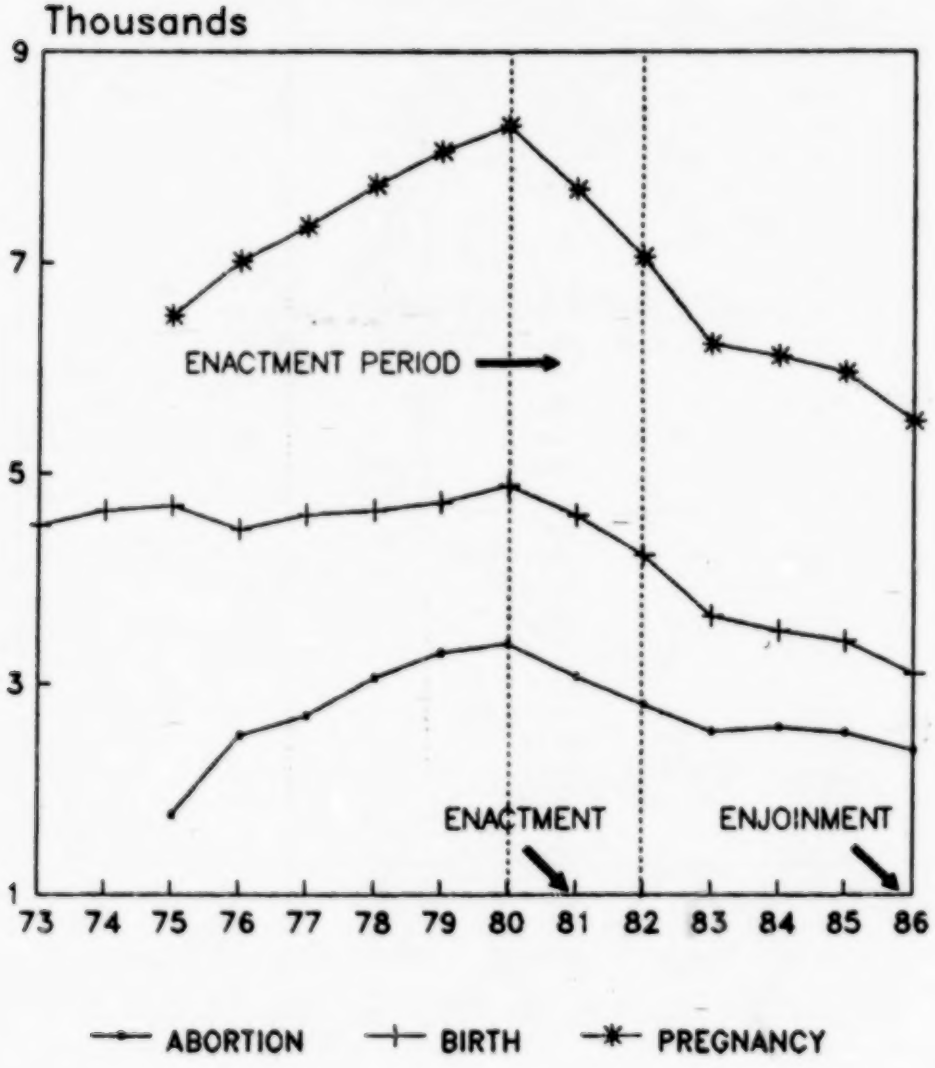


Figure 1c
Abortions, Births, and Pregnancies
Ages 20–24

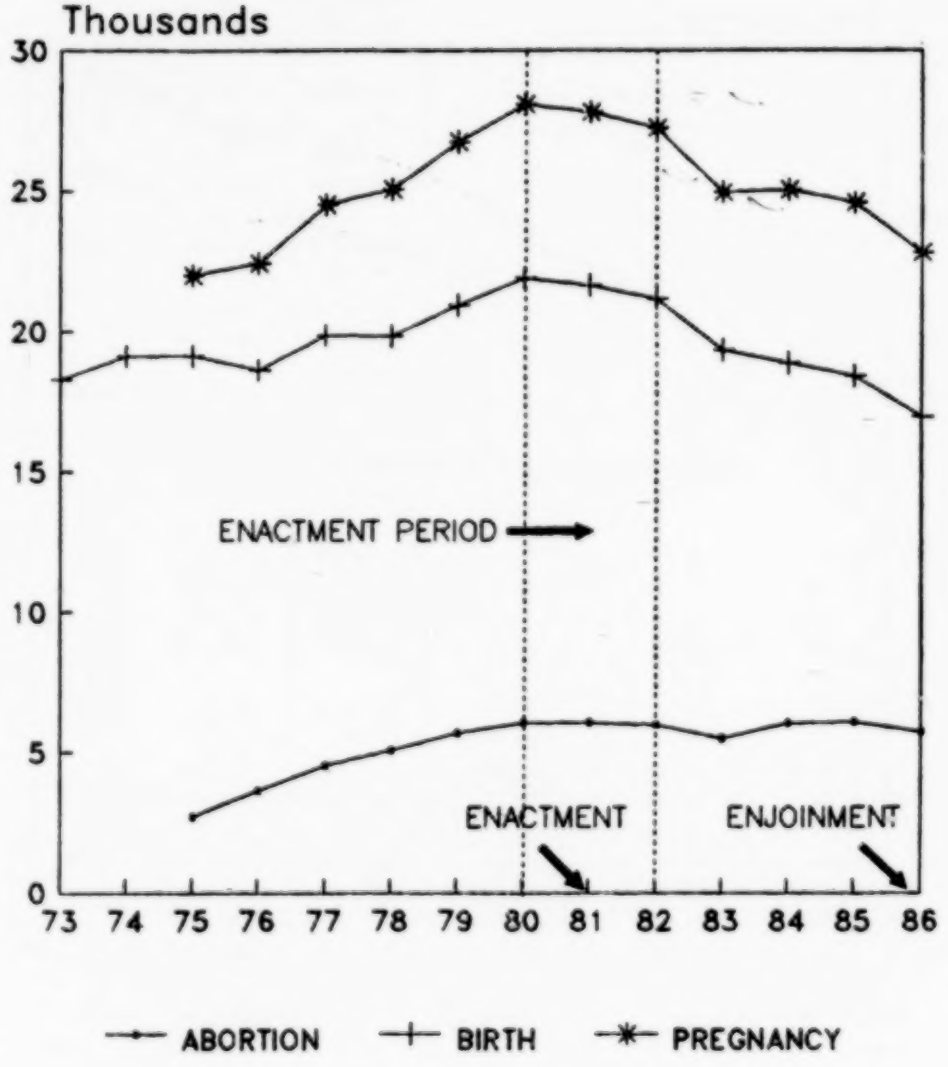


Figure 1d
Abortions, Births, and Pregnancies
Ages 25–54

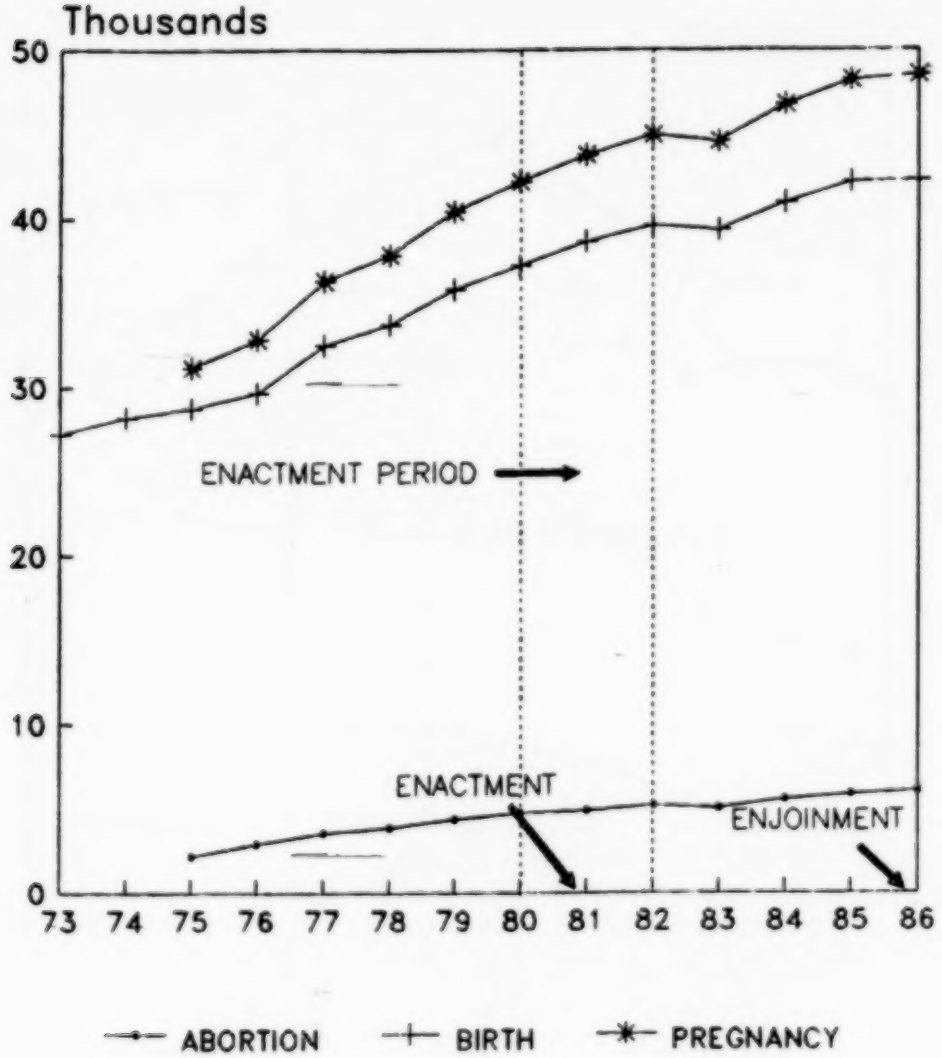


Table 2
Abortion, Birth, and Pregnancy Rates*

YEAR	AGE	POPULATION	ABORTION RATE	BIRTH RATE	PREGNANCY RATE
1973	10-17	319596	.	7.5	.
	18-19	72982	.	61.8	.
	20-24	177400	.	103.0	.
	25-54	652953	.	41.7	.
1974	10-17	318010	.	7.3	.
	18-19	73248	.	63.5	.
	20-24	179011	.	106.7	.
	25-54	659470	.	42.8	.
1975	10-17	310605	4.9	7.8	12.7
	18-19	85997	20.4	54.6	75.5
	20-24	178645	15.1	107.1	123.2
	25-54	683332	3.2	42.1	45.6
1976	10-17	305394	6.8	7.6	14.4
	18-19	86924	28.9	51.4	80.7
	20-24	183437	19.9	101.6	122.3
	25-54	699068	4.1	42.5	47.0
1977	10-17	296203	7.7	7.7	15.4
	18-19	86249	31.2	53.4	85.2
	20-24	187586	24.1	105.9	130.7
	25-54	709131	5.0	45.8	51.2
1978	10-17	288244	7.6	7.2	14.8
	18-19	85698	35.6	54.2	90.3
	20-24	192125	26.4	103.3	130.4
	25-54	724824	5.3	46.5	52.2
1979	10-17	282243	8.2	7.2	15.5
	18-19	85227	38.6	55.4	94.5
	20-24	196312	29.0	106.7	136.3
	25-54	744422	5.9	48.1	54.3

* Rate per 1000 female population. Source: Raw data provided by the Minnesota Department of Health. Rates reflect abortions, births, (fetal deaths), and pregnancies occurring in Minnesota, with non-residents and women of unknown age excluded. Assumes negligable occurrence of abortion to those of age 9 and below and age 55 and above. Abortion data unavailable for 1973 and 1974.

Table 2 (Continued)
Abortion, Birth, and Pregnancy Rates*

YEAR	AGE	POPULATION	ABORTION RATE	BIRTH RATE	PREGNANCY RATE
1980	10-17	276088	8.4	7.2	15.6
	18-19	84247	40.1	58.0	98.5
	20-24	198731	30.5	110.2	141.4
	25-54	754692	6.3	49.3	55.9
1981	10-17	267488	6.8	7.0	13.9
	18-19	80222	38.2	57.4	96.0
	20-24	198269	30.5	109.1	140.3
	25-54	770544	6.3	50.2	56.9
1982	10-17	262199	6.0	6.6	12.6
	18-19	77282	36.2	54.6	91.3
	20-24	197924	30.1	106.9	137.7
	25-54	787094	6.6	50.3	57.2
1983	10-17	263225	5.4	5.8	11.4
	18-19	77506	32.9	47.0	80.3
	20-24	198460	27.7	97.3	125.7
	25-54	789802	6.4	49.8	56.5
1984	10-17	249162	5.6	6.5	12.2
	18-19	74080	34.9	47.3	82.5
	20-24	199312	30.3	94.7	125.6
	25-54	798979	6.9	51.2	58.5
1985	10-17	251107	6.3	6.1	12.4
	18-19	74610	33.9	45.6	79.9
	20-24	200994	30.2	91.6	122.3
	25-54	806028	7.2	52.3	59.9
1986	10-17	251825	6.1	6.3	12.4
	18-19	74689	31.8	41.5	73.5
	20-24	201415	28.4	84.2	113.2
	25-54	808824	7.4	52.3	60.0

* Rate per 1000 female population. Source: Raw data provided by the Minnesota Department of Health. Rates reflect abortions, births, (fetal deaths), and pregnancies occurring in Minnesota, with non-residents and women of unknown age excluded. Assumes negligable occurrence of abortion to those of age 9 and below and age 55 and above. Abortion data unavailable for 1973 and 1974.

Figure 2a
Abortion, Birth, and Pregnancy Rates
Ages 10–17

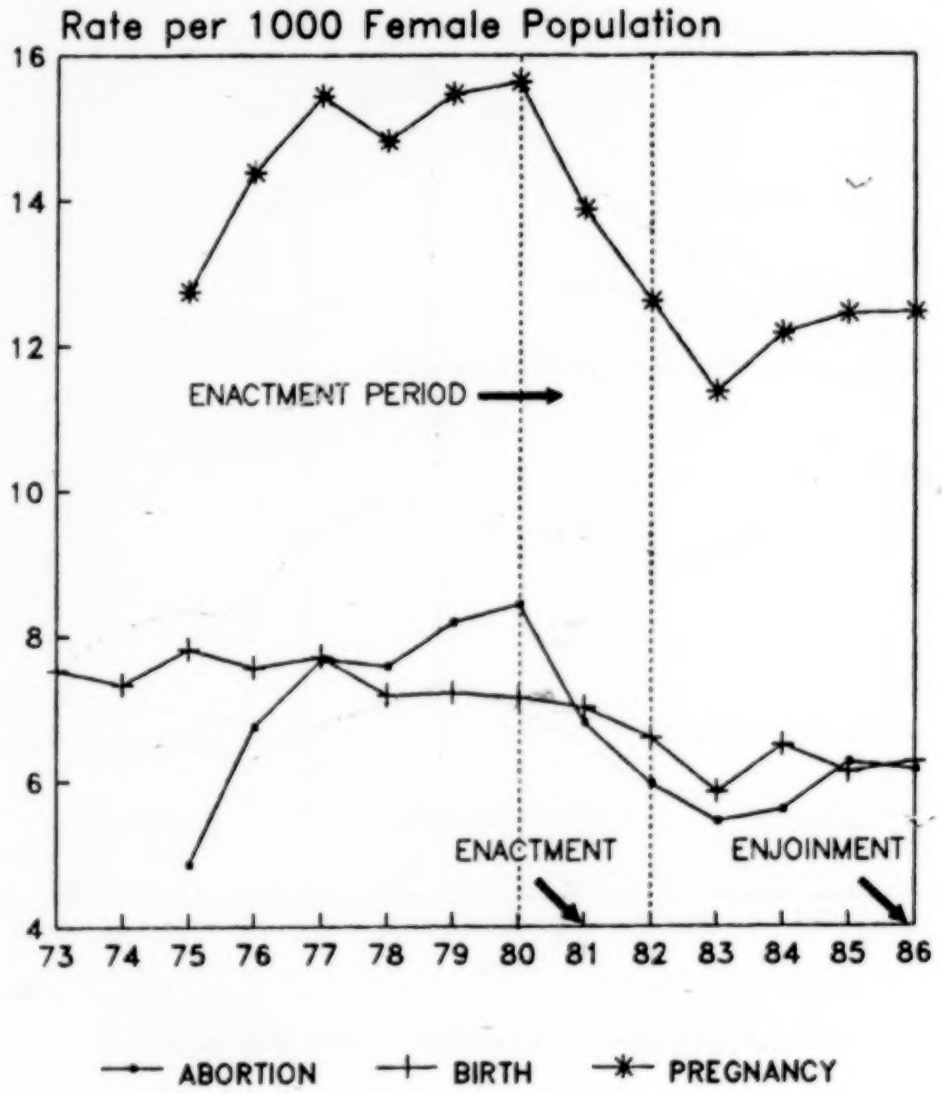


Figure 2b
Abortion, Birth, and Pregnancy Rates
Ages 18–19

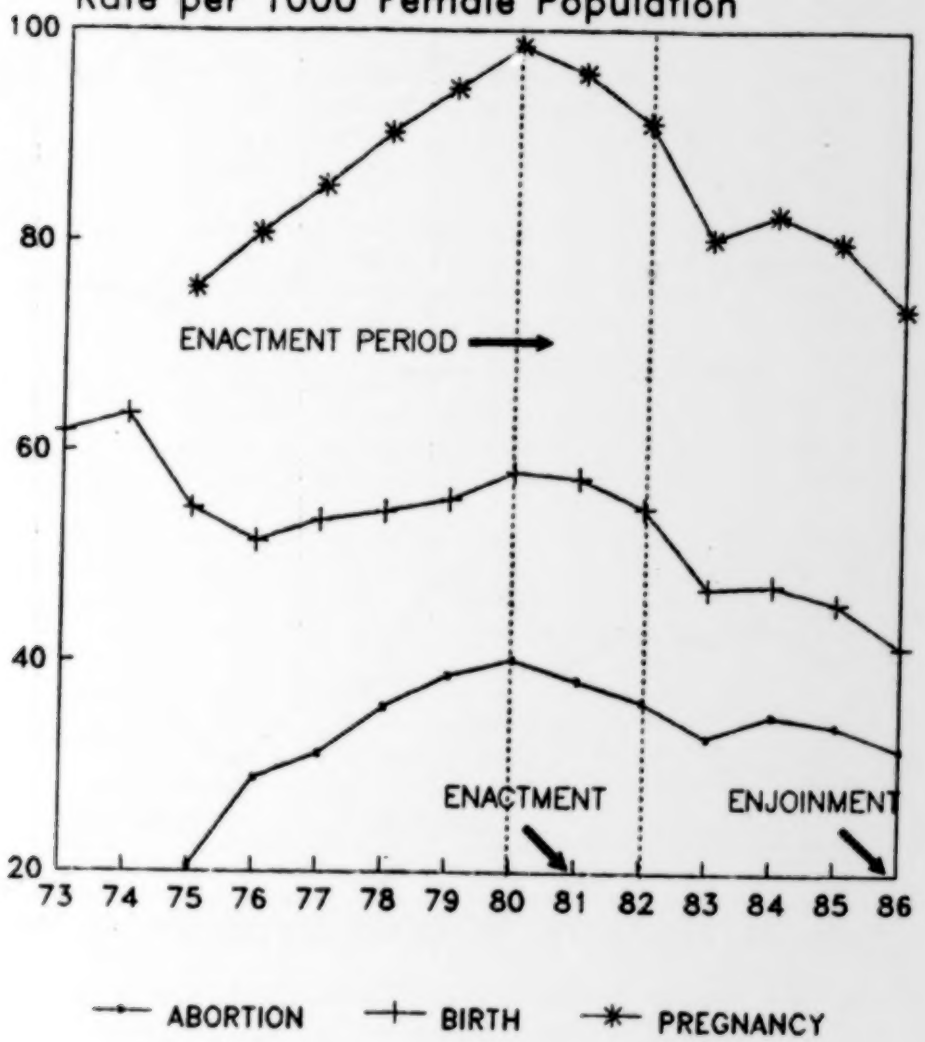


Figure 2c
Abortion, Birth, and Pregnancy Rates
Ages 20–24

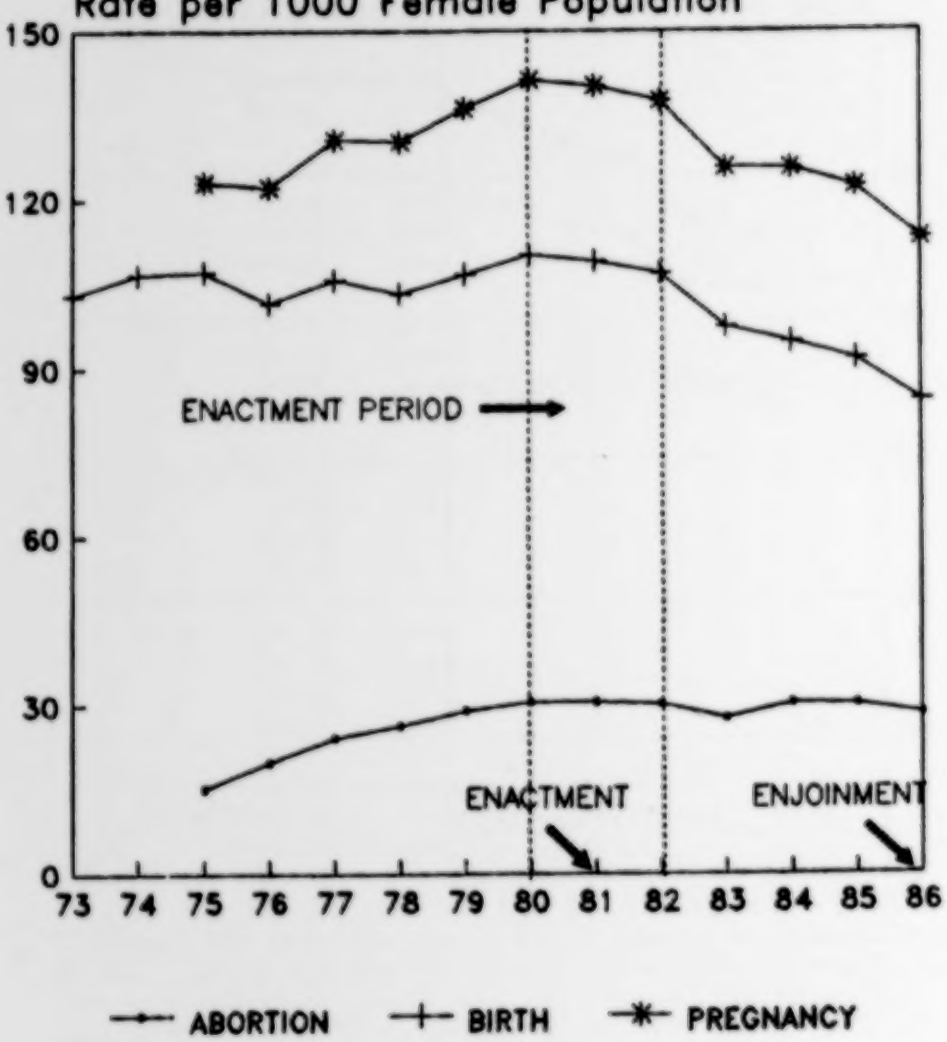


Figure 2d
Abortion, Birth, and Pregnancy Rates
Ages 25–54

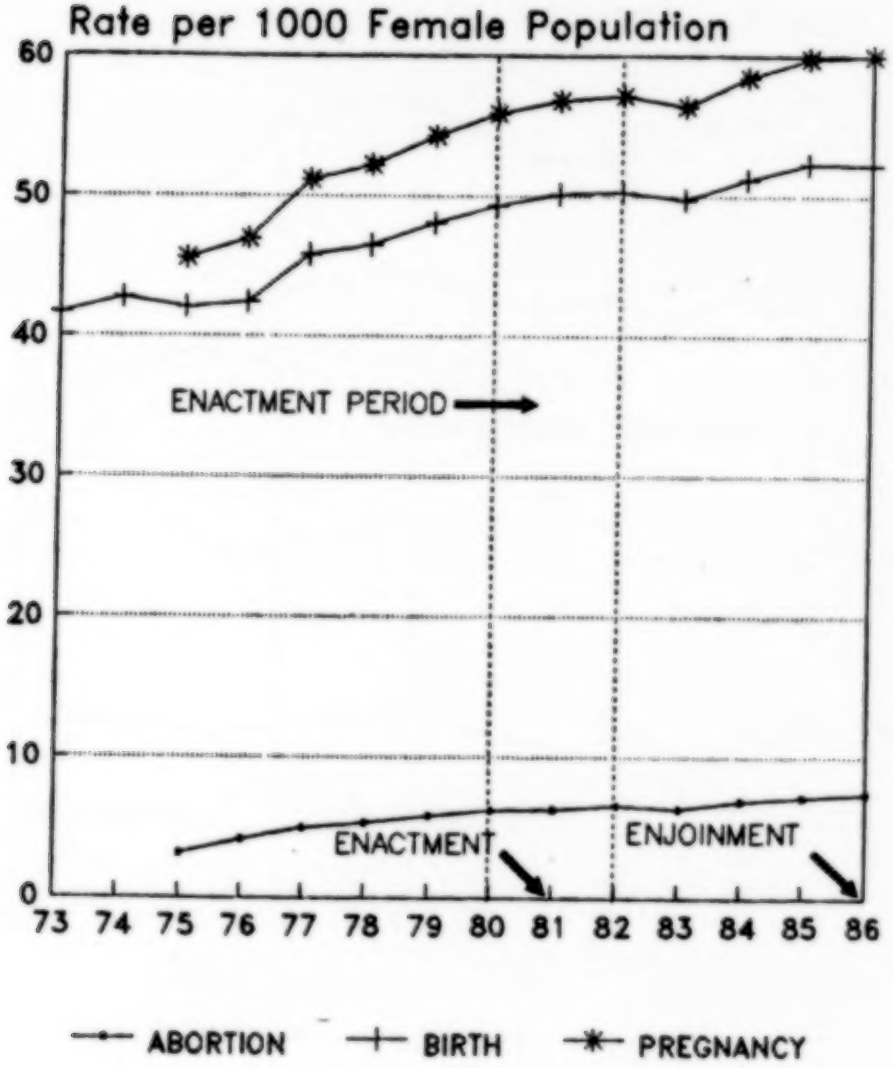


Table 3
Number and Percentage of Abortions with Gestation Age > 12 Weeks*

YEAR	AGE	TOTAL NUMBER OF ABORTIONS	ABORTIONS PERFORMED AT > 12 WKS GESTATION	PERCENTAGE OF ABORTIONS PERFORMED AT > 12 WKS GESTATION
1975	10-17	1507	270	17.9
	18-19	1758	228	13.0
	20-24	2702	275	10.2
	25-54	2161	189	8.7
1976	10-17	2060	470	22.8
	18-19	2511	428	17.0
	20-24	3643	446	12.2
	25-54	2895	306	10.6
1977	10-17	2274	474	20.8
	18-19	2693	464	17.2
	20-24	4528	512	11.3
	25-54	3529	368	10.4
1978	10-17	2186	403	18.4
	18-19	3054	449	14.7
	20-24	5066	505	10.0
	25-54	3872	302	7.8
1979	10-17	2308	432	18.7
	18-19	3293	460	14.0
	20-24	5683	591	10.4
	25-54	4355	327	7.5
1980	10-17	2327	510	21.9
	18-19	3380	562	16.6
	20-24	6054	681	11.2
	25-54	4716	403	8.5

* Source: Raw data provided by the Minnesota Department of Health. Table reflects abortions occurring in Minnesota, with non-residents and women of unknown age excluded. Assumes negligable occurrence of abortion to those of age 9 and below and age 55 and above.

Table 3 (Continued)
Number and Percentage of Abortions
with Gestation Age > 12 Weeks*

YEAR	AGE	TOTAL NUMBER OF ABORTIONS	ABORTIONS PERFORMED AT > 12 WKS GESTATION	PERCENTAGE OF ABORTIONS PERFORMED AT > 12 WKS GESTATION
1981	10-17	1820	365	20.1
	18-19	3064	462	15.1
	20-24	6047	625	10.3
	25-54	4881	363	7.4
1982	10-17	1564	322	20.6
	18-19	2799	425	15.2
	20-24	5963	631	10.6
	25-54	5180	412	8.0
1983	10-17	1432	334	23.3
	18-19	2547	419	16.5
	20-24	5487	626	11.4
	25-54	5012	370	7.4
1984	10-17	1395	360	25.8
	18-19	2586	489	18.9
	20-24	6032	786	13.0
	25-54	5525	461	8.3
1985	10-17	1570	361	23.0
	18-19	2531	441	17.4
	20-24	6067	723	11.9
	25-54	5812	458	7.8
1986	10-17	1545	333	21.6
	18-19	2372	435	18.3
	20-24	5724	668	11.7
	25-54	6035	516	8.6

* Source: Raw data provided by the Minnesota Department of Health. Table reflects abortions occurring in Minnesota, with non-residents and women of unknown age excluded. Assumes negligable occurrence of abortion to those of age 9 and below and age 55 and above.

Figure 3a
Number of Abortions
with Gestation Age > 12 Weeks

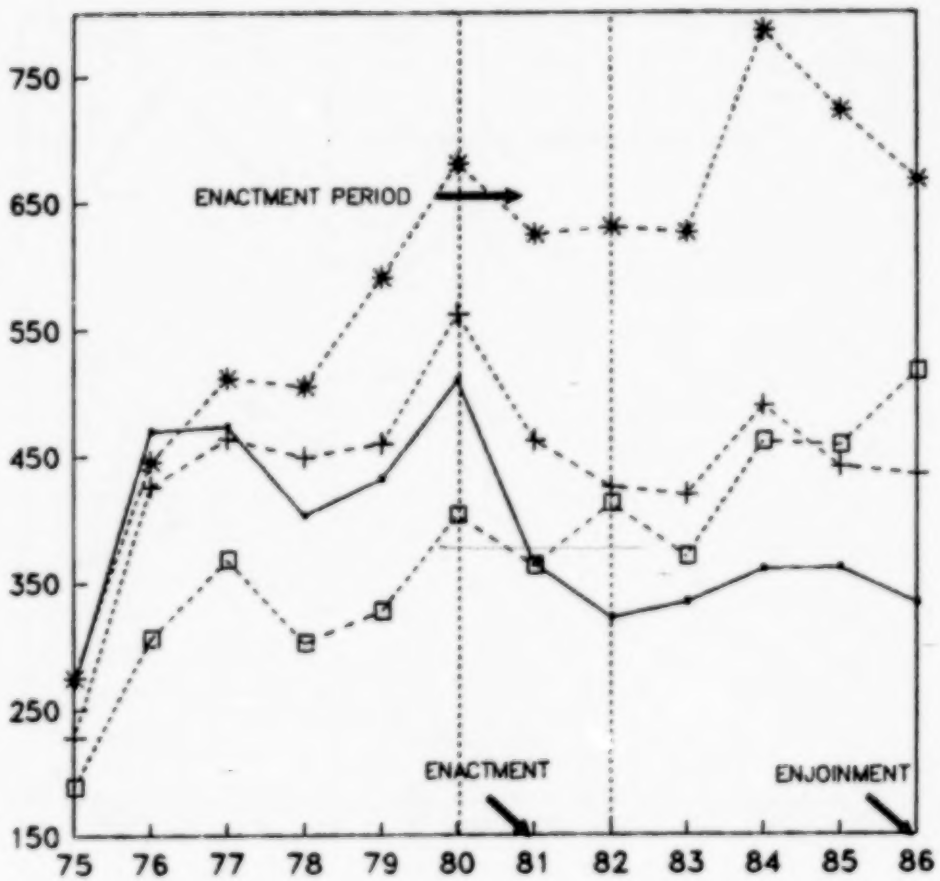


Figure 3b
Percentage of Abortions with Gestation Age > 12 Weeks

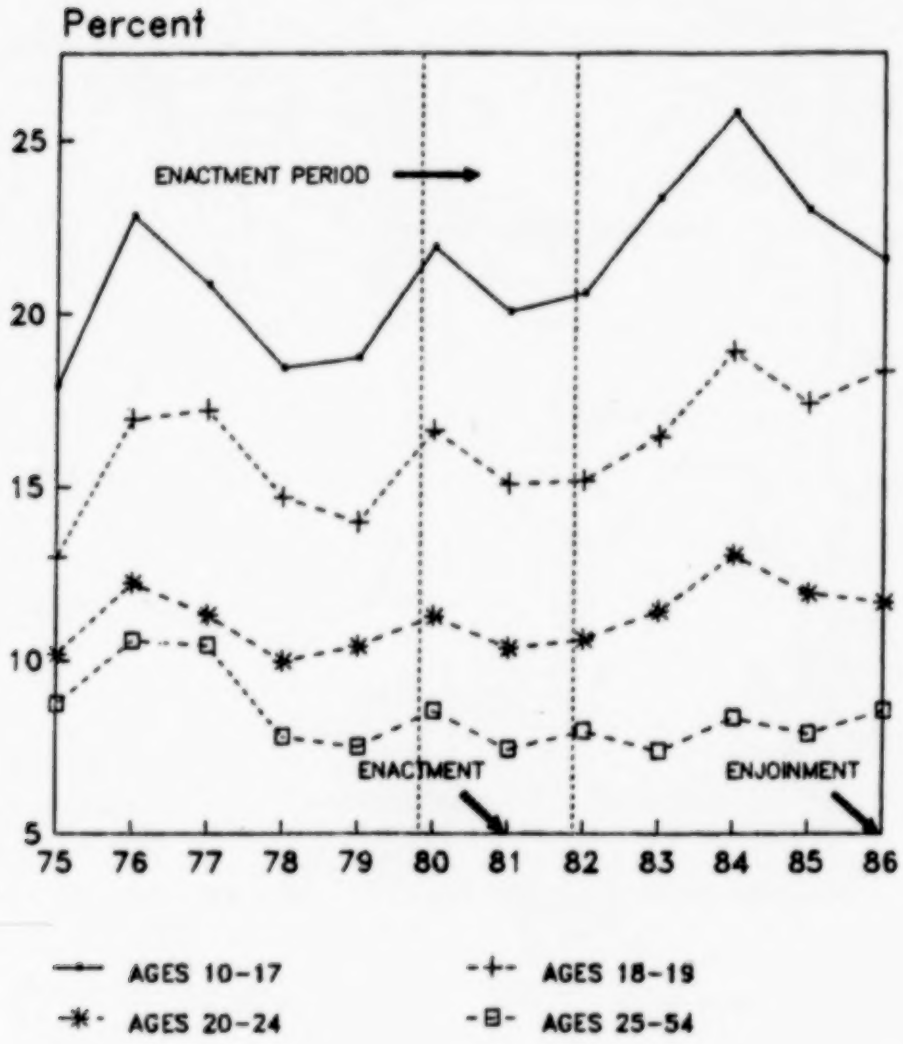


Table 4
Number and Percentage of Abortions with Reported Medical Complications*

YEAR	AGE	TOTAL NUMBER OF ABORTIONS	ABORTIONS WITH MEDICAL COMPLICATIONS	PERCENTAGE OF ABORTIONS WITH MEDICAL COMPLICATIONS
1975	10-17	1507	16	1.06
	18-19	1758	25	1.42
	20-24	2702	32	1.18
	25-54	2161	26	1.20
1976	10-17	2060	11	0.53
	18-19	2511	7	0.28
	20-24	3643	20	0.55
	25-54	2885	21	0.73
1977	10-17	2274	5	0.22
	18-19	2693	6	0.22
	20-24	4528	14	0.31
	25-54	3529	11	0.31
1978	10-17	2186	8	0.37
	18-19	3054	19	0.62
	20-24	5066	26	0.51
	25-54	3872	19	0.49
1979	10-17	2308	3	0.13
	18-19	3293	2	0.06
	20-24	5683	8	0.14
	25-54	4355	5	0.11
1980	10-17	2327	6	0.26
	18-19	3380	10	0.30
	20-24	6054	8	0.13
	25-54	4716	14	0.30

* Source: Raw data provided by the Minnesota Department of Health. Table reflects abortions occurring in Minnesota, with non-residents and women of unknown age excluded. Assumes negligable occurrence of abortion to those of age 9 and below and age 55 and above.

Table 4 (Continued)
Number and Percentage of Abortions with Reported Medical Complications*

YEAR	AGE	TOTAL NUMBER OF ABORTIONS	ABORTIONS WITH MEDICAL COMPLICATIONS	PERCENTAGE OF ABORTIONS WITH MEDICAL COMPLICATIONS
1981	10-17	1820	0	0.00
	18-19	3064	8	0.26
	20-24	6047	21	0.35
	25-54	4881	11	0.23
1982	10-17	1564	10	0.64
	18-19	2799	10	0.36
	20-24	5963	38	0.64
	25-54	5180	46	0.89
1983	10-17	1432	10	0.70
	18-19	2547	20	0.79
	20-24	5487	49	0.89
	25-54	5012	51	1.02
1984	10-17	1395	14	1.00
	18-19	2586	29	1.12
	20-24	6032	62	1.03
	25-54	5525	66	1.19
1985	10-17	1570	13	0.83
	18-19	2531	12	0.47
	20-24	6067	76	1.25
	25-54	5812	60	1.03
1986	10-17	1545	8	0.52
	18-19	2372	15	0.63
	20-24	5724	48	0.84
	25-54	6035	74	1.23

* Source: Raw data provided by the Minnesota Department of Health. Table reflects abortions occurring in Minnesota, with non-residents and women of unknown age excluded. Assumes negligable occurrence of abortion to those of age 9 and below and age 55 and above.

Figure 4a
Number of Abortions with Reported Medical Complications

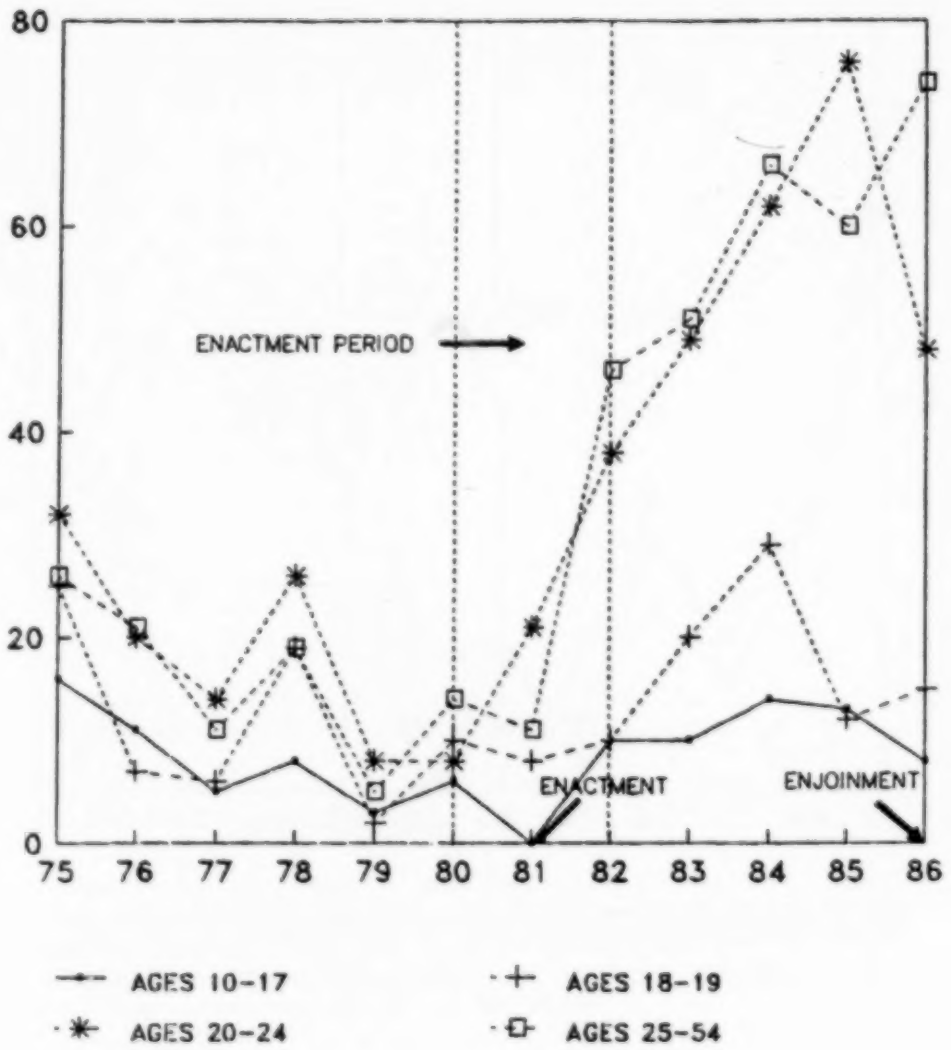


Figure 4b
Percentage of Abortions with Reported Medical Complications

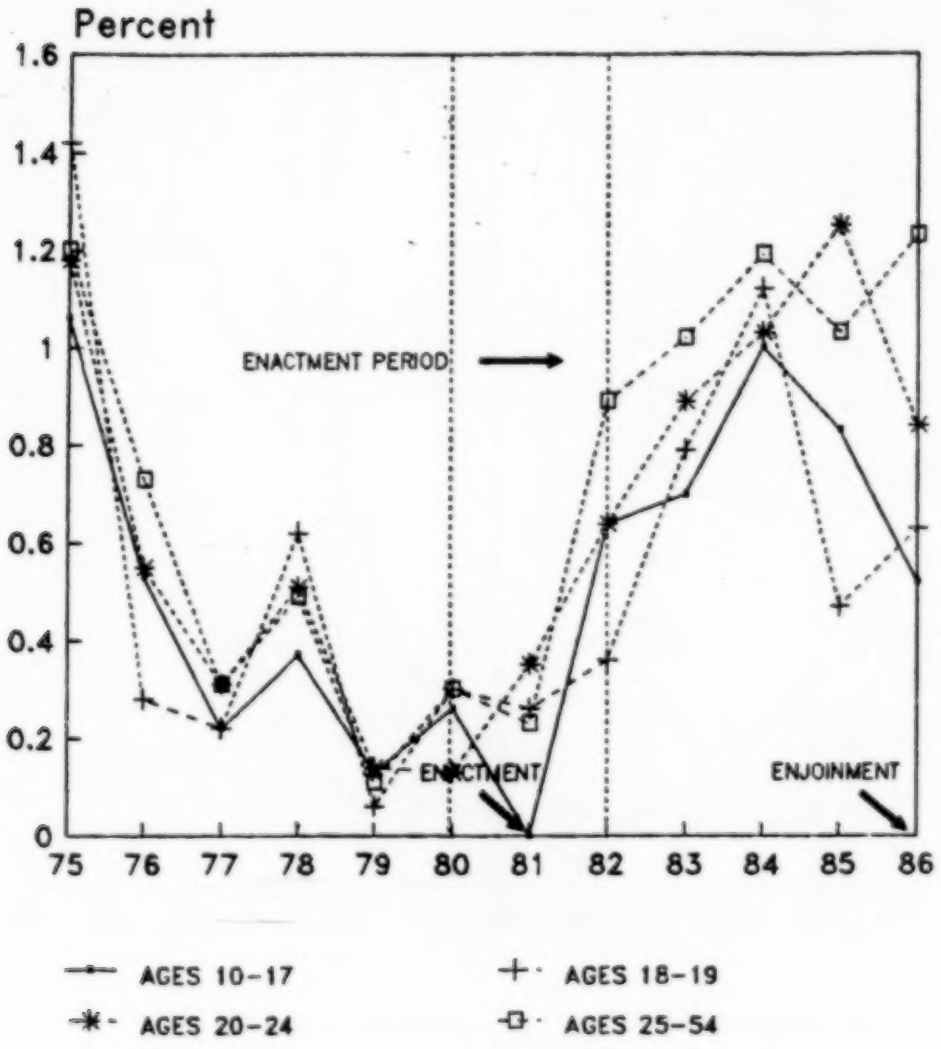


Table 5
Birth Rate
for Different Regions of Minnesota*

YEAR	AGE	MINNESOTA	METROPOLITAN MINNEAPOLIS**	MINNEAPOLIS
1973	10-14	0.4	0.4	.
	15-17	20.4	20.4	.
	18-19	63.7	53.9	.
	20-24	106.0	96.1	.
	25-34	95.4	82.2	.
1974	10-14	0.3	0.3	.
	15-17	19.1	19.1	.
	18-19	64.5	57.4	.
	20-24	109.3	106.0	.
	25-34	97.8	83.3	.
1975	10-14	0.4	0.4	.
	15-17	21.0	18.7	.
	18-19	56.1	48.7	.
	20-24	110.2	91.3	.
	25-34	93.9	86.9	.
1976	10-14	0.4	0.4	1.7
	15-17	19.7	18.2	36.7
	18-19	52.9	47.0	48.8
	20-24	104.5	85.0	62.9
	25-34	93.6	85.8	67.9
1977	10-14	0.3	0.3	1.1
	15-17	19.6	18.3	39.4
	18-19	55.1	48.1	58.1
	20-24	108.1	88.5	64.4
	25-34	98.6	89.6	72.9

* Rate per 1000 female population. Sources: Raw data provided by the Minnesota and Minneapolis Departments of Health. Non-residents and women of unknown age are excluded. Minneapolis data were provided in a form unsuitable for figuring rates for ages 35-44 or above.

** Metropolitan Minneapolis is defined as a seven-county region including Anoka, Carver, Dakota, Hennepin, Ramsey, Scott, and Washington Counties.

Table 5 (Continued)
Birth Rate
for Different Regions of Minnesota*

YEAR	AGE	MINNESOTA	METROPOLITAN MINNEAPOLIS**	MINNEAPOLIS
1978	10-14	0.4	0.4	1.3
	15-17	17.8	16.0	35.4
	18-19	55.6	51.7	61.5
	20-24	106.6	85.3	63.2
	25-34	100.3	90.0	73.7
1979	10-14	0.3	0.4	1.7
	15-17	17.8	17.6	39.7
	18-19	56.9	52.6	56.3
	20-24	110.0	88.4	67.8
	25-34	102.8	91.9	74.6
1980	10-14	0.3	0.4	1.6
	15-17	17.5	17.4	39.1
	18-19	59.3	53.8	62.9
	20-24	113.4	92.3	71.3
	25-34	104.7	95.3	77.5
1981	10-14	0.3	0.4	1.3
	15-17	17.5	17.2	41.2
	18-19	59.1	53.9	65.0
	20-24	112.4	94.0	71.5
	25-34	105.8	98.9	82.7
1982	10-14	0.4	0.5	2.2
	15-17	16.6	17.2	42.7
	18-19	56.2	52.1	65.9
	20-24	109.9	88.8	69.8
	25-34	104.6	97.3	84.6

* Rate per 1000 female population. Sources: Raw data provided by the Minnesota and Minneapolis Departments of Health. Non-residents and women of unknown age are excluded. Minneapolis data were provided in a form unsuitable for figuring rates for ages 35-44 or above.

** Metropolitan Minneapolis is defined as a seven-county region including Anoka, Carver, Dakota, Hennepin, Ramsey, Scott, and Washington Counties.

Table 5 (Continued)
Birth Rate
for Different Regions of Minnesota*

YEAR	AGE	MINNESOTA	METROPOLITAN MINNEAPOLIS**	MINNEAPOLIS
1983	10-14	0.3	0.5	1.9
	15-17	14.6	15.1	47.3
	18-19	48.5	45.4	58.1
	20-24	100.0	80.1	64.3
	25-34	103.3	97.3	83.2
1984	10-14	0.3	0.5	1.3
	15-17	16.1	17.4	54.1
	18-19	48.7	45.7	63.1
	20-24	97.4	79.5	66.4
	25-34	106.6	102.3	85.9
1985	10-14	0.4	0.6	2.1
	15-17	15.1	16.5	58.2
	18-19	47.0	45.8	73.4
	20-24	94.4	80.1	69.7
	25-34	108.6	108.1	89.8
1986	10-14	0.4	0.5	2.0
	15-17	15.6	17.8	62.2
	18-19	42.6	44.0	81.2
	20-24	86.6	74.2	70.6
	25-34	107.6	108.3	87.5
1987	10-14	.	.	2.2
	15-17	.	.	64.5
	18-19	.	.	92.2
	20-24	.	.	67.5
	25-34	.	.	84.2

* Rate per 1000 female population. Sources: Raw data provided by the Minnesota and Minneapolis Departments of Health. Non-residents and women of unknown age are excluded. Minneapolis data were provided in a form unsuitable for figuring rates for ages 35-44 or above.

** Metropolitan Minneapolis is defined as a seven-county region including Anoka, Carver, Dakota, Hennepin, Ramsey, Scott, and Washington Counties.

Figure 5a
Birth Rate
for Different Regions of Minnesota
Ages 15–17

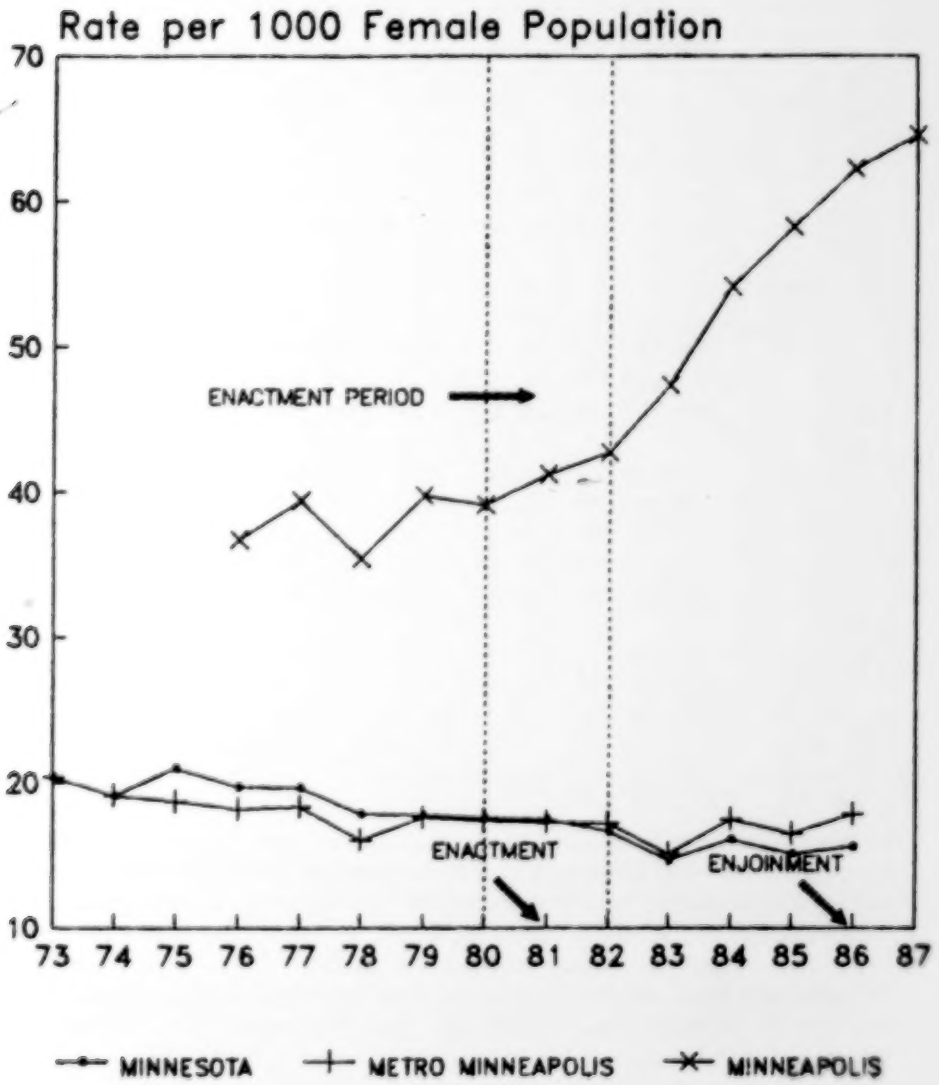


Figure 5b
Birth Rate
for Different Regions of Minnesota
Ages 10–14

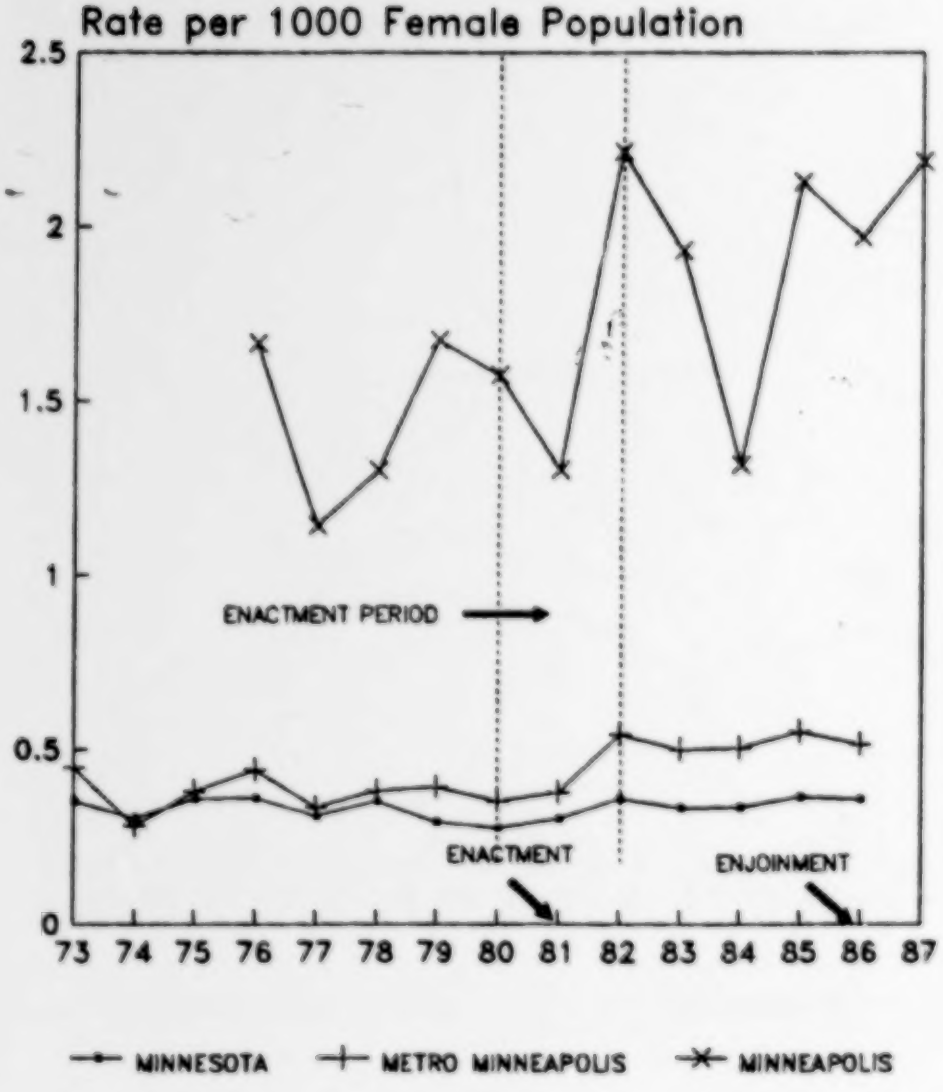


Figure 5c
Birth Rate
for Different Regions of Minnesota
Ages 18–19

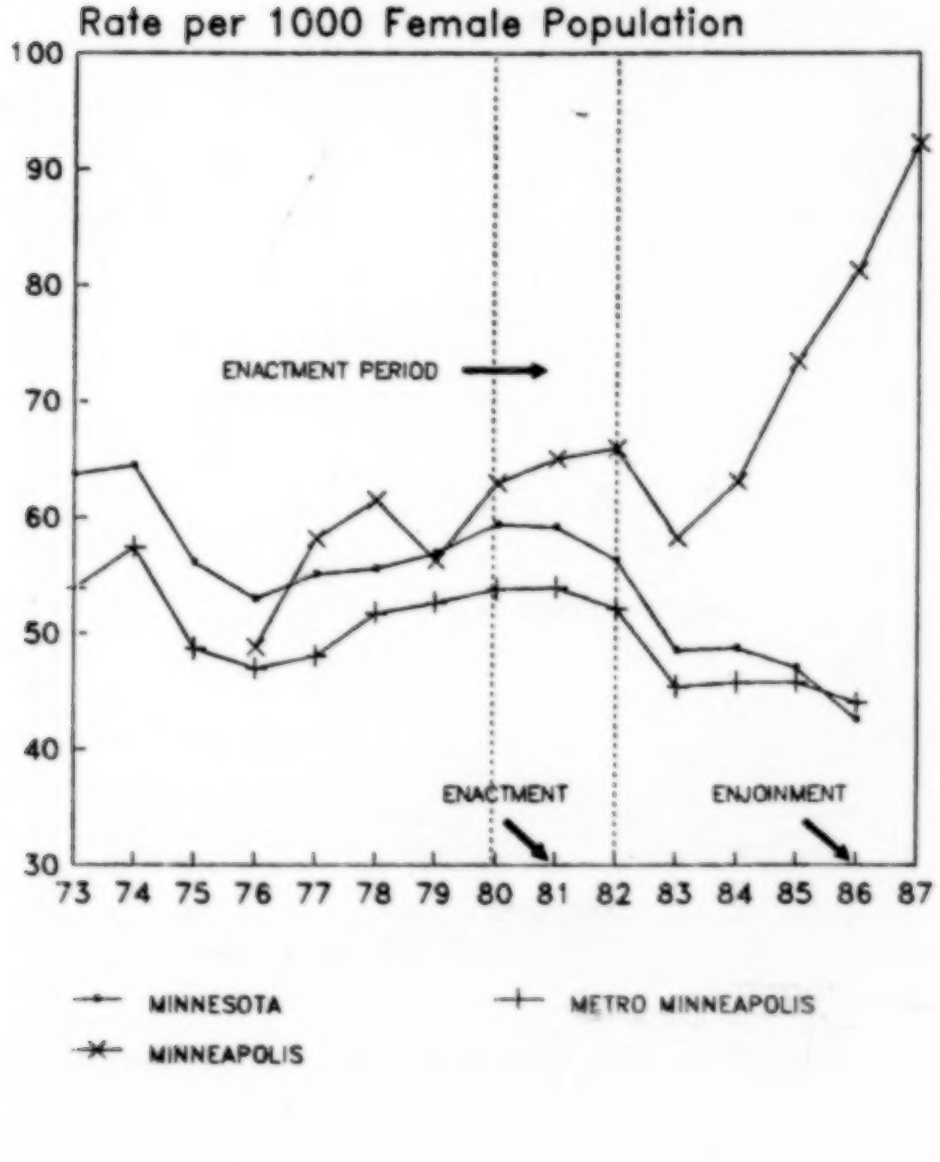


Figure 5d
Birth Rate
for Different Regions of Minnesota
Ages 20–24

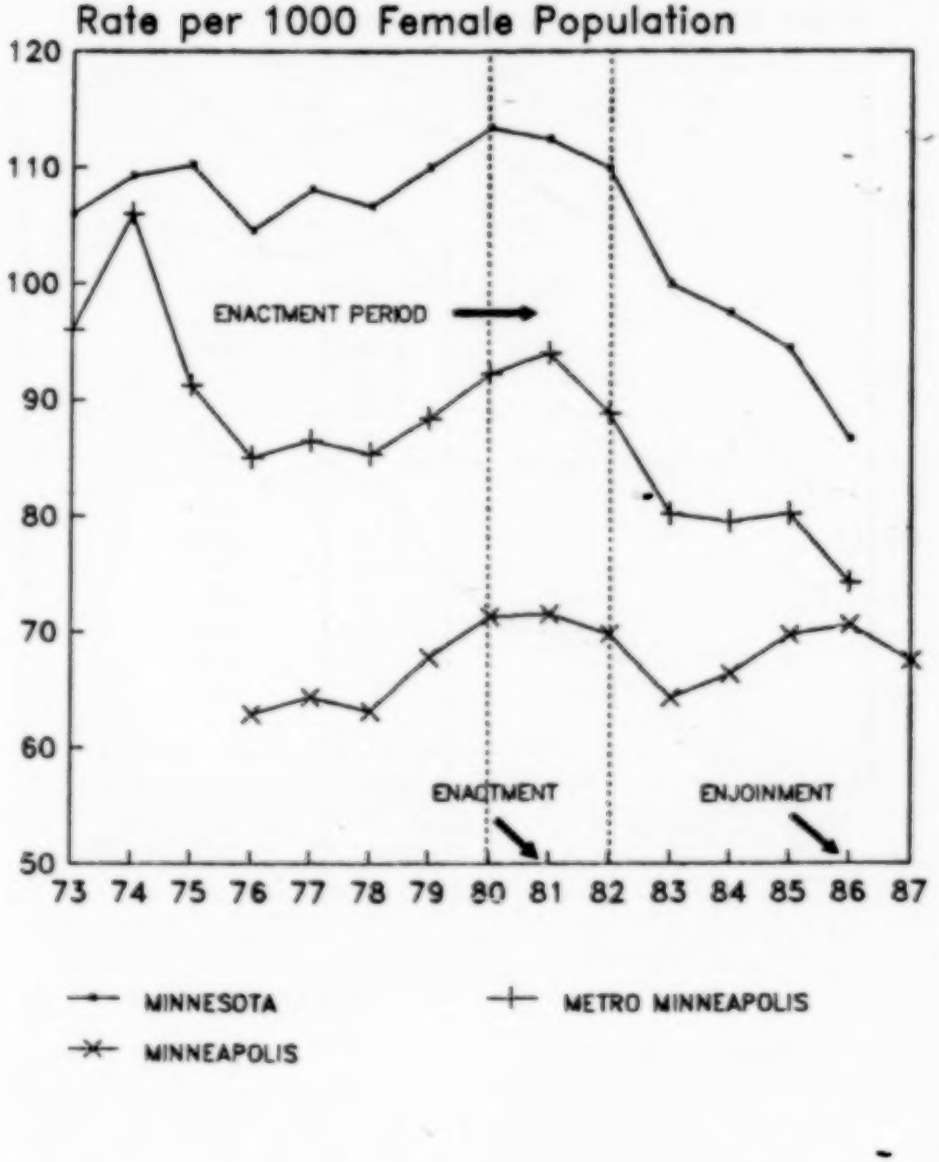


Figure 5e
Birth Rate
for Different Regions of Minnesota
Ages 25–34

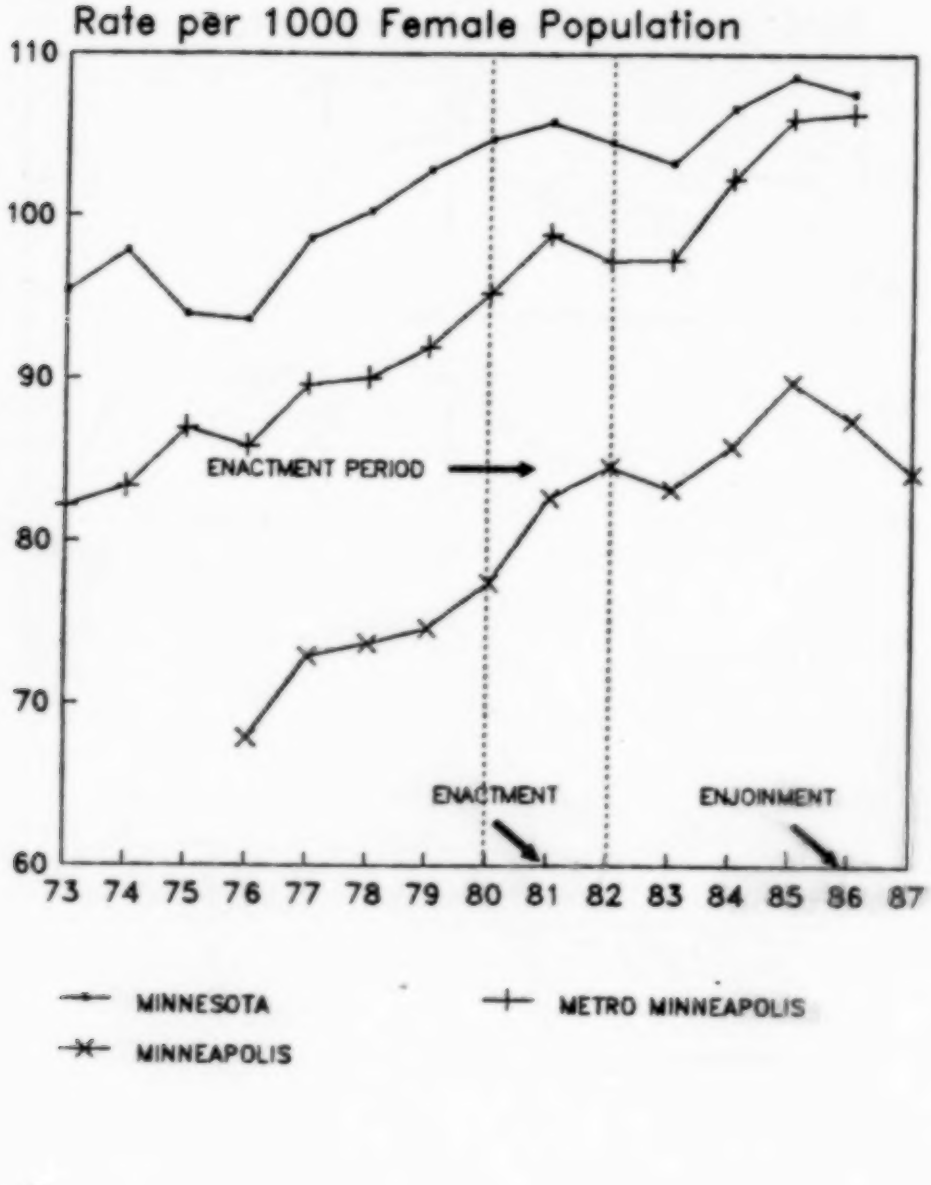


Table 6
Birth Rate for Minneapolis Residents by Age Group[6]

YEAR	AGES 10-14	AGES 15-17	AGES 18-19
1976	1.7	36.7	48.8
1977	1.1	39.4	58.1
1978	1.3	35.4	61.5
1979	1.7	39.7	56.3
1980	1.6	39.1	62.9
1981	1.3	41.2	65.0
1982	2.2	42.7	65.9
1983	1.9	47.3	58.1
1984	1.3	54.1	63.1
1985	2.1	58.2	73.4
1986	2.0	62.2	81.2
1987	2.2	64.5	92.2

YEAR	AGES 20-24	AGES 25-34
1976	62.9	67.9
1977	64.4	72.9
1978	63.2	73.7
1979	67.8	74.6
1980	71.3	77.5
1981	71.5	82.7
1982	69.8	84.5
1983	64.3	83.2
1984	66.4	85.9
1985	69.7	89.8
1986	70.6	87.5
1987	67.5	84.2

[6] Rate per 1000 female population. Source: Raw data provided by the Minneapolis Department of Health. Data provided in a from unsuitable for figuring rates for ages 35-44 or above.

Figure 6
Birth Rate for Minneapolis Residents by Age Group

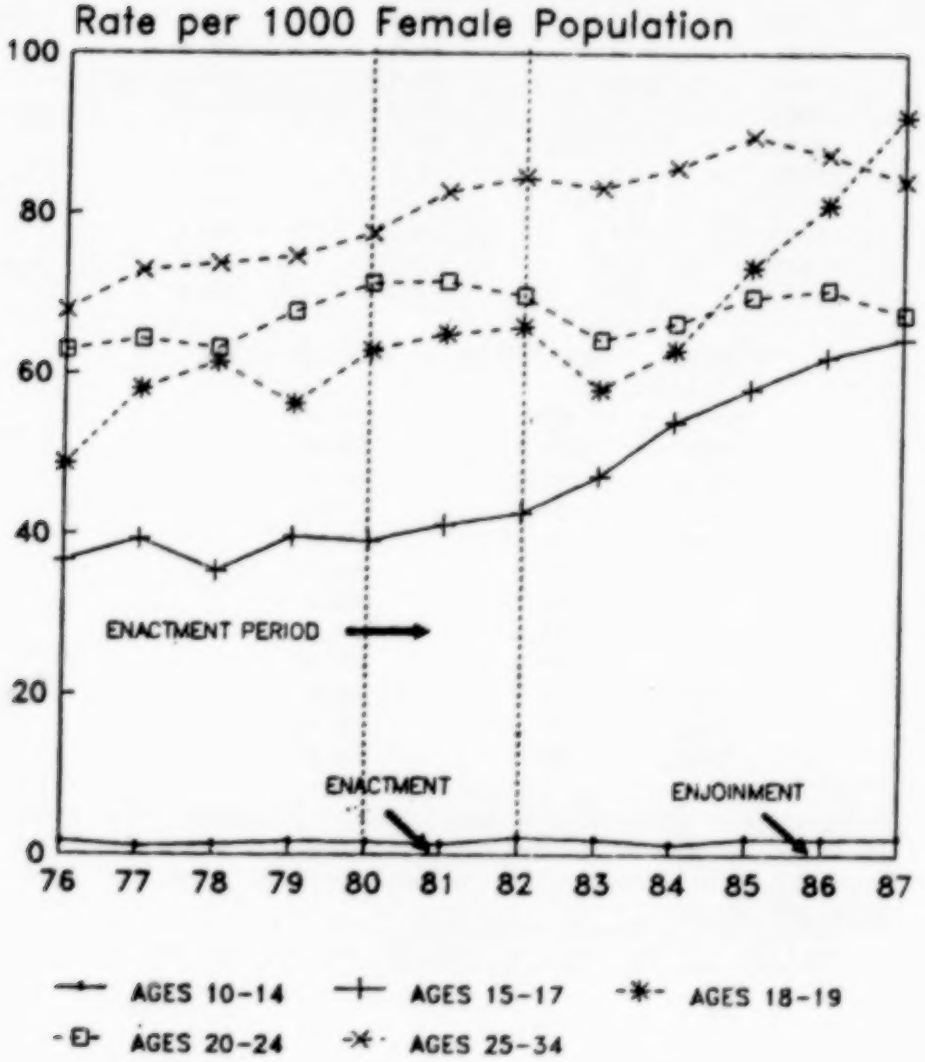


Table 7
Births to Mothers < 18 Years of Age as Percentage of Total Births*

	MINNEAPOLIS	U.S.	MINNESOTA
1970		6.3	
1973			4.6
1974			4.2
1975		7.6	4.4
1976	6.2		4.2
1977	5.9		3.9
1978	5.1		3.4
1979	5.3		3.2
1980	4.7	5.8	3.0
1981	4.5	5.4	2.8
1982	4.3	5.2	2.6
1983	4.4	5.0	2.4
1984	4.4	4.8	2.5
1985	4.5	4.7	2.3
1986	4.8	4.8	2.5
1987	5.1		2.4

MINNEAPOLIS BY RACE

	WHITE	BLACK	ASIAN/PACIFIC ISLAND	AMERICAN INDIAN
1976	4.0	15.3	0.0	18.9
1977	4.1	13.7	1.4	13.9
1978	3.4	11.5	0.0	12.9
1979	2.9	13.5	3.0	15.3
1980	2.9	11.4	1.7	13.3
1981	2.6	11.4	4.6	13.0
1982	2.3	11.0	5.0	11.0
1983	2.2	11.0	4.9	13.7
1984	2.3	10.6	6.5	11.2
1985	2.2	10.4	7.1	11.1
1986	2.3	11.9	5.8	9.3
1987	1.9	12.4	6.5	10.8

* Sources: National Center for Health Statistics: *Health, United States, 1988.* DHHS Pub. No. (PHS) 89-1232. Public Health Service. Washington. U.S. Government Printing Office, Mar. 1989. p.47. Minneapolis raw data provided by the Minneapolis Department of Health. Data for some years not available.

Table 7 (Continued)
Births to Mothers < 18 Years of Age
as Percentage of Total Births*

UNITED STATES BY RACE

	WHITE	BLACK	ASIAN/PACIFIC ISLAND	AMERICAN INDIAN
1970	4.8	14.7	3.3	7.5
1975	6.0	16.1	2.7	11.0
1980	4.5	12.2	1.7	8.8
1981	4.3	11.4	1.8	8.5
1982	4.1	11.1	1.8	8.0
1983	3.9	10.9	1.7	7.9
1984	3.7	10.6	1.8	7.4
1985	3.7	10.3	1.8	7.1
1986	3.7	10.4	1.9	7.4

* Sources: National Center for Health Statistics: *Health, United States, 1988*. DHHS Pub. No. (PHS) 89-1232. Public Health Service. Washington. U.S. Government Printing Office, Mar. 1989. p.47. Minneapolis raw data provided by the Minneapolis Department of Health. Data for some years not available.

Figure 7a
Births to Mothers < 18 Years of Age
as Percentage of Total Births
Minneapolis, Minnesota, and U.S.

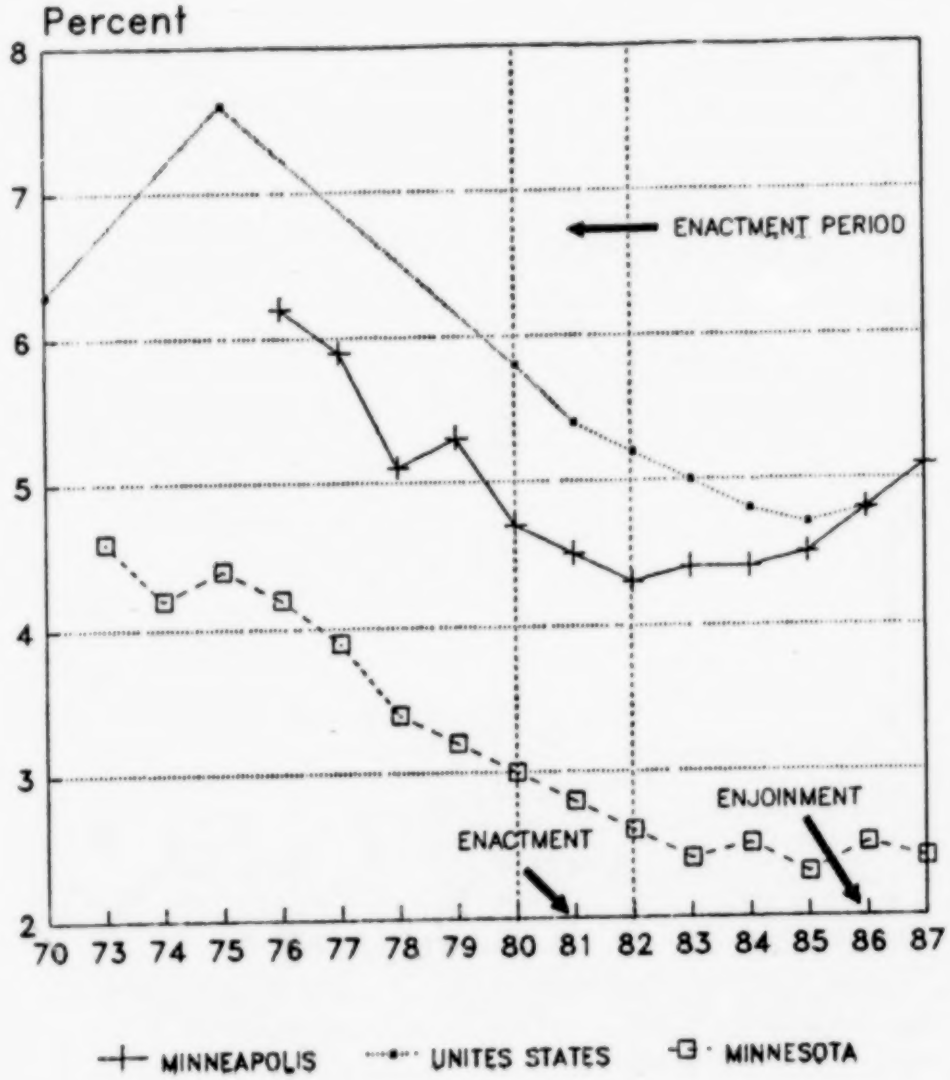


Figure 7b
Births to Mothers < 18 Years of Age as Percentage of Total Births by Race/Ethnicity
Minneapolis and U.S.

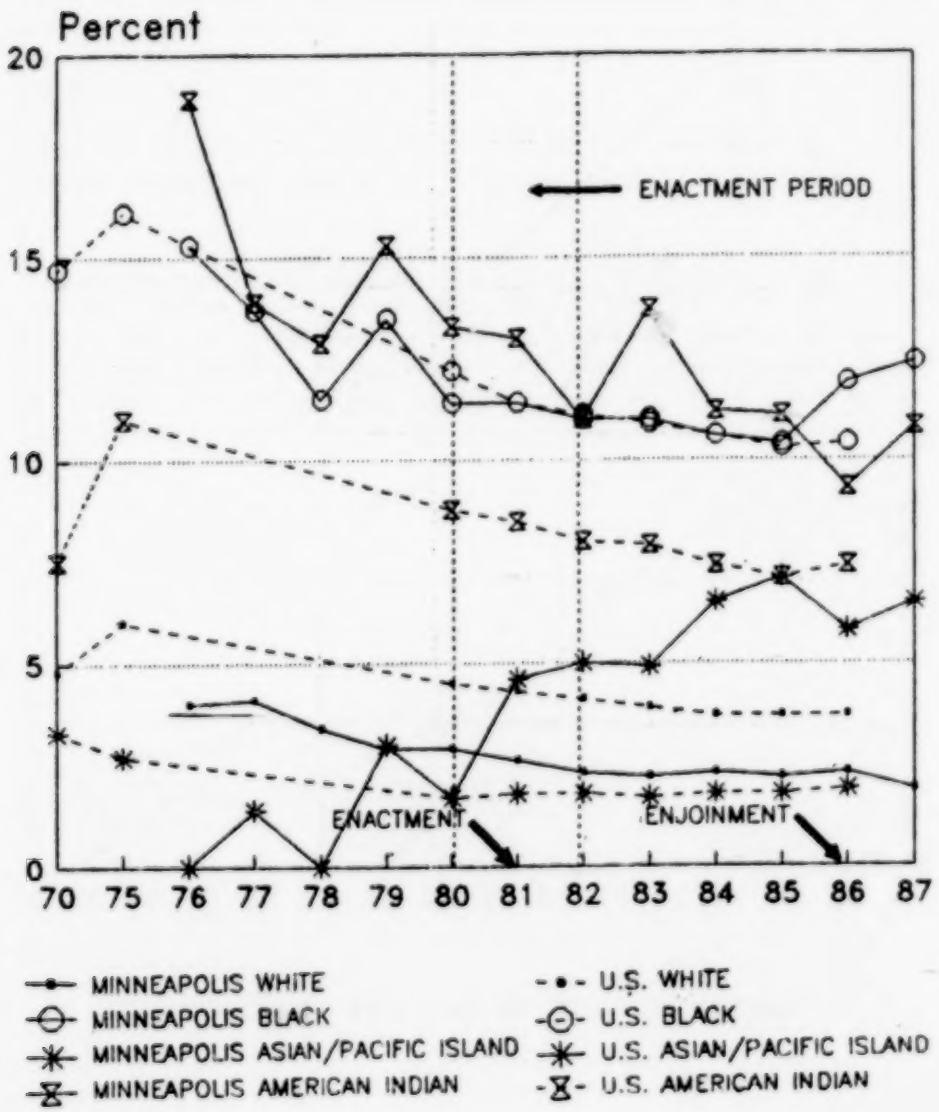
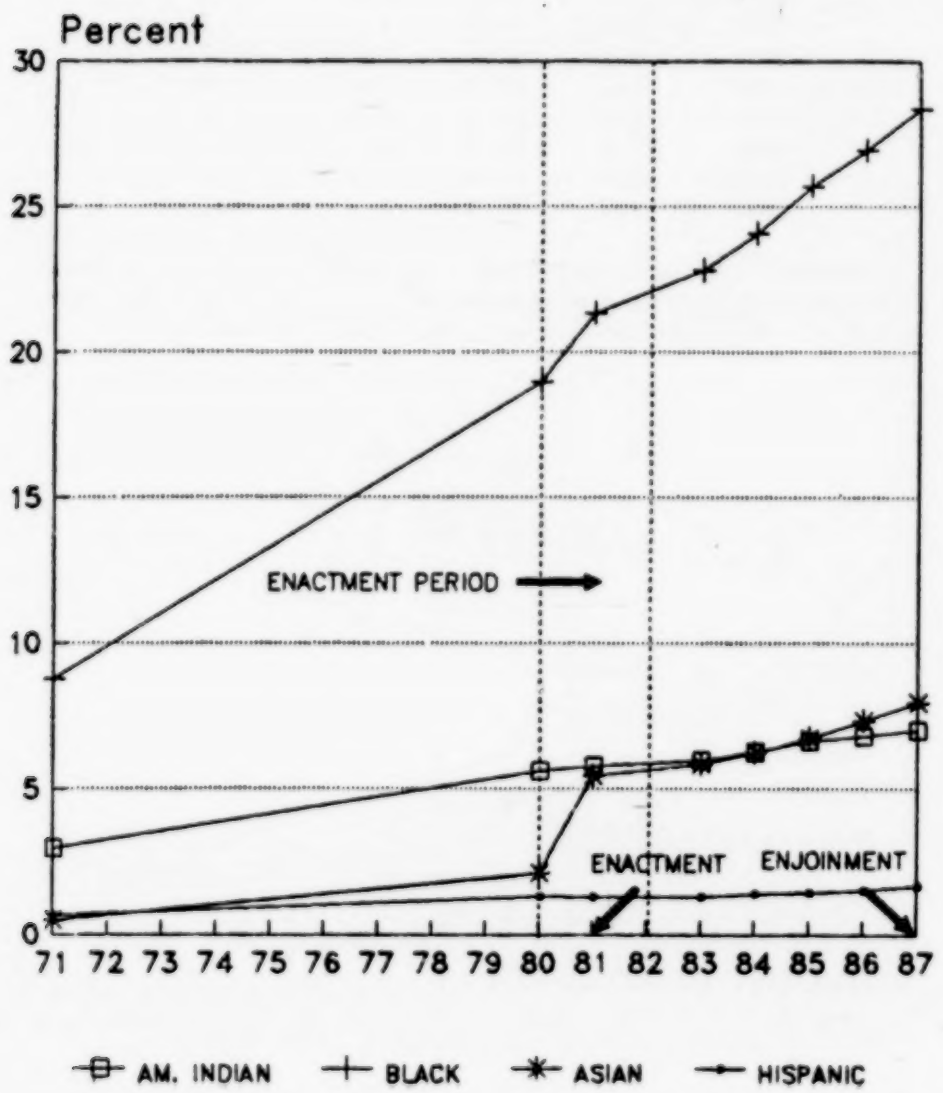


Table 8
Percent Racial/Ethnic Enrollment
Minneapolis Public School District*

	AMERICAN INDIAN	BLACK	ASIAN	HISPANIC
1971	3.0	8.8	0.5	0.7
1980	5.6	19.0	2.1	1.3
1981	5.8	21.3	5.4	1.3
1983	6.0	22.8	5.8	1.3
1984	6.3	24.1	6.2	1.4
1985	6.6	25.7	6.7	1.4
1986	6.8	26.9	7.3	1.5
1987	7.0	28.4	8.0	1.7

* Source: Raw data provided in *Racial-Ethnic Enrollment Trends in Twin Cities Area Schools, 1986-1987*. Pub. No. 620-88-115. Metropolitan Council, St. Paul, Minnesota.

Figure 8
Percent Racial/Ethnic Enrollment
Minneapolis Public School District



Supreme Court, U.S.
FILED
SEP 25 1989
JOSEPH F. SPANIOL, JR.
CLERK

Case No. 88-1125

Supreme Court Of The United States

October Term 1989

JANE HODGSON, M.D.; ARTHUR HOROWITZ, M.D.; NADINE T., JANET T., ELLEN Z., HEATHER P., MARY J., SHARON L., KATHY M., AND JUDY M., individually and on behalf of all other persons similary situated; DIANE P., SARAH L., and JACKIE H.; MEADOWBROOK WOMEN'S CLINIC, P.A.; PLANNED PARENTHOOD OF MINNESOTA, a nonprofit Minnesota corporation; MIDWEST HEALTH CENTER FOR WOMEN, P.A., a nonprofit Minnesota corporation; WOMEN'S HEALTH CENTER of DULUTH, P.A., a nonprofit Minnesota corporation.

Petitioners,

vs.

STATE OF MINNESOTA, Rudy Perpich as Governor of the State of Minnesota, Hubert H. Humphrey, III, as Attorney General of the State of Minnesota.,

Respondents.

On Petition for Writ of *Certiorari* from the United States Court of Appeals For the Eighth Circuit

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BRIEF OF JAMES JOSEPH LYNCH, JR., AS *AMICUS CURIÆ* IN SUPPORT OF RESPONDENTS

JAMES JOSEPH LYNCH, JR.
Attorney at Law
P.O. Box 15766
Sacramento, CA 95852
(916) 448-7871

Attorney for *Amicus Curiæ*

QUESTIONS PRESENTED

By *Amicus Curiæ*:

(1) Should *Roe v. Wade*, 410 U.S. 113 (1973) be reconsidered and discarded in favor of finding that a fetus is a member of Posterity, and therefore a person in the Constitutional sense, and thus entitled to the protection of the Constitution?

As framed by the parties (57 LW 3560):

(2) Did Eighth Circuit err in holding constitutional requirement that both biological parents be notified prior to minor's abortion, regardless of whether they had ever married, or were separated or divorced, unless minor obtained order from State Court?

(3) Did Eighth Circuit err in holding that imposition of mandatory 48-hour waiting period, after constructive notification to both parents, was constitutional?

(4) Did Eighth Circuit err in *holding* that *Planned Parenthood v. Ashcroft*, 462 U.S. 476 (1983), precludes invalidation of Minnesota parental notification/judicial bypass statute as unconstitutional in its entirety despite factual findings that after five years of operation it failed to promote any state interests, and, in fact, undermined family integrity, communication, and privacy interests for many minors?

(3) Did Eighth Circuit err in holding that statute is consistent with Equal Protection Clause?

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Case No. 88-1125

Supreme Court Of The United States

October Term 1989

JANE HODGSON, M.D.; ARTHUR HOROWITZ, M.D.; NADINE T., JANET T., ELLEN Z., HEATHER P., MARY J., SHARON L., KATHY M., AND JUDY M., individually and on behalf of all other persons similarly situated; DIANE P., SARAH L., and JACKIE H.; MEADOWBROOK WOMEN'S CLINIC, P.A.; PLANNED PARENTHOOD OF MINNESOTA, a nonprofit Minnesota corporation; MIDWEST HEALTH CENTER FOR WOMEN, P.A., a nonprofit Minnesota corporation; WOMEN'S HEALTH CENTER of DULUTH, P.A., a nonprofit Minnesota corporation.

Petitioners,

vs.

STATE OF MINNESOTA, Rudy Perpich as Governor of the State of Minnesota, Hubert H. Humphrey, III, as Attorney General of the State of Minnesota.,

Respondents.

On Petition for Writ of *Certiorari* from the United States Court of Appeals For the Eighth Circuit

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BRIEF OF JAMES JOSEPH LYNCH, JR., AS *AMICUS CURIÆ* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIÆ*

Amicus is an attorney admitted to practice law in the highest court of the State of California, and a member of the Bar of this Court. He has taken an oath to uphold and defend the Constitution of the United States and to defend the poor, down trodden, and oppressed. He also presented a similar *Amicus Curiæ* Brief in *Webster v. Reproductive Health Services*, No. 88-605, decided in this court on July 3, 1989, in support of appellant, and has been granted permission to file a similar brief in behalf of one other state.[1]. He is a former professor of Law, University of Northern California, Lorenzo Patiño School of Law. He is affiliated with, but does not represent, a number of pro-life groups and has himself concentrated his practice in the areas of Civil Rights Law, Human Rights Activities, Constitutional Law, and Criminal Defense. He has written and copy righted one article on Abortion entitled *Abortion and Inalienable Rights in American Jurisprudence: A Prospective Policy*. He lived four years in England where he engaged in a self directed study of the English Political System from the inception of the *Magna Carta* (1215). He is a graduate of McGeorge School of Law (1978).

This case touches and concerns the continuing validity of *Roe v. Wade*, and its progeny, and, as such, a decision herein will affect not only the Laws of the State of Minnesota, but the State of California wherein *amicus* resides, because it effects the rights of persons residing in California, the liability of the state, and its taxpayers, may, or may not, be liable for damages depending upon the scope of rights belonging to a fetus, which in *amicus*' belief constitutes human life protected by the Constitution. It must be remembered that under Nazi Germany, nearly 9 million innocent lives were lost in a holocaust because no one, at the outset had the courage to say no.[2]. If, as contended here, a fetus is a human life, then

[1] *Ragsdale v. Turnock*, No. 88-790.

[2] It is certain that the atrocities began at least as early as 1938. 6 Enclopedia Britanica 253a (1971). World War II did not start until September 1, 1939, by the Nazi, with United States entry on December 8,

amicus has an interest as a taxpayer to insure that his state's procedures are neither *contra bono mores*, nor illegal.

Amicus is also concerned about the rights of that class of persons recognized in the Preamble of the Constitution denominated "posterity", and its subclass "fetus" and is concerned, and has been concerned for some time, that fetuses, have been unrepresented or under-represented in any court in the years of litigation which has followed since *Roe v. Wade* was decided in this court in 1973. *Amicus* was convinced then, and remains convinced, that the court was misled as to the meaning of personhood in that arguably a fetus is a member of Posterity found in the Preamble of the Constitution, and that it is imperative, for the preservation of a basic respect for human life, and the values enshrined in the Constitution of the United States that fetuses be recognized as a member of Posterity, but, until *Webster*, due to the inherent nature of our adversary process, has been limited to writing articles concerning the topic.

It is *amicus*' desire, *pro bono publico*, to present to this court, from the fetus' point of view, the rights of the fetus, as it appears to be found in the term Posterity in the Preamble of the Constitution of the United States of America.

STATEMENT OF THE CASE

Minnesota Statute §§ 144.343(2)-(7) (1987) requires a minor to notify both parents at least 48 hours before a planned abortion or demonstrate to a court in an expedited confidential proceeding either that she is "mature and capable of giving informed consent" or that the performance of an abortion without such notification would be in her "best interests." The district court held that the judicial by-pass procedure was unconstitutional because the two-parent notice requirement failed to serve the state's interest in protecting

1941 and then only because of events in Hawaii. 22 Id 681b, following.

pregnant minors or promoting family communication and that the 48-hour waiting period requirement was unreasonable under conditions existing in Minnesota. A panel of the Eighth Circuit affirmed, and the Eighth circuit granted a hearing *en banc*. The court, en banc, held that the notice by-pass provisions were constitutional, but left in tact the holding that the 48 hour provision was unconstitutional.[3] *Hodgson v. Minnesota*, 853 F.2d 1452, 1453 (1988)

The statute, Minn.Stat.Ann. 144.343 (1981) deals with a minor's consent to treatment for pregnancy, venereal disease, and alcohol and drug abuse. Subd. 2 provides that no abortion may be performed upon an unemancipated minor until at least 48 hours after written notice to her parents, and provides the mechanics for giving notice. Subd. 6 provides that if the notification procedures of subd. 2 is restrained by judicial order, then a pregnant minor has the choice of either providing notice in subd. 2 or submitting to a court by-pass procedure. The by-pass procedure provides for an expedited procedure wherein a judge may authorize an abortion without consent to the parent if the judge determines that "the pregnant woman is mature and capable of giving informed consent," or an abortion without notice would be in her "best interests." "Parent" is defined in subd. 3 as "both parents of the pregnant woman if they are both living, one parent of the pregnant woman if only one is living, or if the second one cannot be located through reasonable diligent effort, or the guardian or conservator if the pregnant woman has one." Subd. 5 is a penalty provision which subjects anyone performing an abortion in violation of the statute to criminal penalties and civil liability. There are exceptions to the notice requirement and a severability provision.

The statute was to become effective on August 1, 1981, but enjoined on July 30, 1981 by the trial court at the request of

[3] Defendants, respondents in this court, have cross petitioned in *v. Minnesota v. Hodgson*, 88-1309

Plaintiffs, petitioner in this court,[4] which consist six class action minors seeking abortions who claim to be mature and that notification of one or both of their parents of their desire to have an abortion would not be in their best interests; a mother of one of the minor plaintiffs alleging that notification of the father was not in the minor's best interests; and four clinics and two physicians performing abortions in Minnesota.

The court of appeals upheld the trial court's finding that subd. 2 was unconstitutional because an alternative to parental notification was required by precedents of this court, but that the judicial by-pass procedures were good. 853 F.2d, at 1456, citing principally *Bellotti v. Baird* (*Bellotti II*), 443 U.S. 622, 633-39 (1979) and *Planned Parenthood v. Ash-croft*, 462 U.S. 476, 490-93 (1983). Turning to the trial court's finding that the two-parent notification requirement was burdensome, and therefore the statute as a whole was unconstitutional, the court of appeals reversed finding that while the two-parent notification requirement was somewhat of a burden, the burden was relieved by the judicial by-pass procedures, and therefore valid. 853 F.2d at 1462. Similarly, the court of appeals rejected the trial court's finding that the 48-hour waiting period resulted in too long a wait, up to a week, by noting that most abortions are not scheduled for at least two or three days, and there was no limitations on sending the notice the same date that an abortion is scheduled. 853 F.2d 1465.

Petitioners seek review of that portion of the Eight Circuit opinion reversing the trial Court and urge that this court reverse the Eight circuit in its entirety, to find that the statute as a whole is either burdensome, or unduly impairs the privacy rights of the minor.

SUMMARY OF ARGUMENT

[4] Respondent in No. 88-1309.

1. This Court has recognized that unconstitutional conduct which has been widespread and in long use cannot stand, and that with respect to the Constitution, *stare decisis* is of less importance than in other cases, and therefore the holding of *Roe v. Wade* is not necessarily binding on this Court, and in fact should be rejected for reasons set forth hereinafter.

2. While the Preamble of the Constitution does not create any rights, it defines for whom the rights were created - Ourselves and Our Posterity, and a construction that Posterity includes fetuses is consistent with the intent of the framers and the common law understanding that a fetus was a person in being, such that a fetus is a person in the Constitutional sense, and because this was not brought to this Court's attention in *Roe v. Wade*, *Roe v. Wade* must be overruled as unsound and contrary to the intent of the framers.

3. Because a fetus is human life and a person in the constitutional sense, and the state has a valid and legitimate right to protect human life, recognized as an international duty, and imposed as a duty in the Constitution of the United States, the statute as a whole is reasonably necessary by the state for the protection of both the mother and the fetus by insuring there exists a mechanism for compelling the report of statutory rape or incest.

Based upon the foregoing, this court should *overrule Roe v. Wade*, 410 U.S. 113 (1973) prospectively, *affirming* that portion of the decision of the Eighth Circuit at 853 F.2d 1452 finding that Minnesota Statute §§ 144.343 (1987) as a whole is constitutional, and remand for further proceedings not inconsistent with this Court's opinion.

ARGUMENT

I

STARE DECISIS IS LESS BINDING ON THIS COURT

ON CONSTITUTIONAL ISSUES EVEN IN THE FACE OF LONG STANDING AND WIDESPREAD PRACTICE

Statutes or practices inconsistent with the Constitution, however numerous, can create neither a power which the Constitution does not bestow nor furnish a construction which the Constitution does not warrant.[5] *Field v. Clark*, 143 U.S. 649, 691 (1891); 3 Rotunda, Treatise on Constitutional Law § 23.33, p. 512 (1986). This court, with characteristic good grace, invalidated its own Rules of Court, in part, based on a Congressional Statute requiring attorney's to take an oath with respect to their activities before the civil war, when it was pointed out that the provision was in fact unconstitutional. *Ex Parte Garland*, 4 Wall. 333 (1867). Faced with the Constitutionality of "separate but equal facilities, a practice in existence throughout the south for nearly 60 years, and sanctioned by this Court, this Court *overruled*, and rightfully so, *Plessy v. Ferguson*, 163 U.S. 537 (1896) in *Brown v. Bd. of Education*, 347 U.S. 483 (1954) (*Brown III*). *Accord*, *Bolling v. Sharpe*, 347 U.S. 497 (1954). Moreover, where the importance of the question is great, and touches sensitive issues which need to be resolved once and for all, this court has not allowed the fact that some issues were not properly addressed in the courts below from ordering further argument on the omitted issues so that the continuing controversy could be settled. *Brown III*, 347 U.S., at 488-89, 496 (1953); *Brown v. Board of Ed.*, 349 U.S. 289, 294, 298 (Nature of remedy to be utilized).

Such is the case at bench. This court can judicially notice its own docket, which has been impacted by abortion cases. Similarly, it is common news that throughout the country,

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[5] As this court noted in *Webster v. Reproductive Health Services*, No. 88-605 (1980), Slip Opinion p. 19: "Stare decisis is a cornerstone of our legal system, but it has less power in constitutional cases, where, save for constitutional amendments, this Court is the only body able to make needed changes. [cites.] We have not refrained from reconsideration of a prior construction of the Constitution that has proved "unsound in principal and unworkable in practice." [cites.]"

abortion controversy has led to disorder in the streets."

This court, with the characteristic good grace it exhibited in *Garland*, should now recognize, for reasons which will become apparent hereinafter, that in *Roe v. Wade*, 410 U.S. 113 (1973) it was misled, *overrule* it prospectively,[7] and remand for further proceedings in light of the fact that the fetus is, by virtue of the term Posterity, found in the Preamble of the Constitution, a person in the Constitutional sense.

II

A FETUS IS A PERSON IN THE CONSTITUTIONAL SENSE BY VIRTUE OF THE TERM POSTERITY IN THE PREAMBLE OF THE CONSTITUTION

A. Introduction - *Roe v. Wade* Did Not Consider Posterity.

This court in *Roe v. Wade*, 410 U.S. 113 (1973), *held* that a state had no right to regulate abortions in the first trimester of pregnancy in view of the right of privacy of the mother, could provide some regulation in the second trimester, and had the right to full regulation in the third trimester. In reaching this result, the court noted that Texas had failed to demonstrate where in the Constitution the fetus was a person in the Constitutional sense. 410 U.S., at 157-59. A reading of the Petition, Response, and Briefs on the merits by the parties

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" It is not suggested that the disorder is the reason for overruling Roe. Quite the contrary, the reason is because a fetus is a person in the Constitutional sense by virtue of the term Posterity found in the Preamble. The notation of the problem is put a recognition that the problem must be resolved.

[7] The Eighth Circuit found that certain issues were moot and did not reach them. However, it is evident that Appellants were forced to concede they were foreclosed from enforcing the Statutes and regulations based on decisions relying primarily on *Roe v. Wade*. Therefore, this court should disapprove of all of those cases found at 841 F.2d, at 1364-66 which have held that Illinois cannot enforce its statutes on the same basis, and remand for reconsideration of this Court's opinion, or outright.

and *amicus* in *Roe v. Wade*, shows that the primary focus of argument was on the term person as found in the 5th and 14th Amendments of the Constitution. 75 Landmark Briefs and Arguments of the Supreme Court of the United State. The opinion itself does not address the Preamble, nor any of the terms found in the preamble.

This court has used the term "posterity" on one prior occasion, *United States v. Cruikshank*, 92 U.S. (2 Otto) 542, 550 (1876), but has never before been called upon to define the term, and to, or for, whom it was intended to include.

In at least one subsequent opinion, this court has held that the right of privacy cannot be used by consenting adults in the privacy of their own bedroom to engaged in homosexual conduct forbidden by State Law. *Bowers v. Hardwick*, 478 U.S. 186 (1986). No reported case has ever held that a female, based on her right to privacy, can do whatever she wishes with her body, including acts of prostitution in the privacy of her own bedroom in violation of state law. *A fortiori*, if the fetus is a person in the Constitutional sense, it does not seem reasonably possible that a woman can, absent justification or excuse of taking the life of a fetus in violation of state law.

This court, just this term, *Webster v. Reproductive Health Services*, 88-605 (July 3, 1989), held that the statutes therein which withheld public funds, employees, and facilities from use in non-therapeutic abortions did not offend the Constitution. The plurality opinion noted that *Roe* "has proved "unworkable in principal and unworkable in practice."" Slip Opinion, p. 20. A concurring opinion noted that the decision all but wipes *Roe* off the books as an unconditional right to an abortion. Id, slip opinion, concurring Opinion of Scalia, J., p. 1.

B. While the Preamble Does not Create Rights, it does define for Whom the Rights were Created

The Preamble's true office is to expound the nature and extent and application of the powers actually conferred by the Constitution, and not substantively to create them. *United States v. Boyer*, 85 F.425 (D.C., Mo., 1898) (Quoting Mr. Justice Storey on the Constitution, Section 462). *Cf., Hockett v. State Liquor Licensing Board*, 110 N.E. 485, 91 Ohio St. 176, L.R.S. 1971B, 7. That aside, it does define for whom the constitution was created, and where sovereignty resides. *Scott v. Sanford*, 60 U.S. (19 How.) 404 (1857);[8] *Cruikshank*, *supra*, 92 U.S. (2 Otto), at 549.

C. The Constitution was Established "By The People"[9]

The Constitution,[10] in the Preamble, declares that "We the

[8] The 13th & 14th Amendments do not overrule this proposition. Rather, they redefine citizen (See, Article I, § 2, cl 3; § 9, cl. 1), and thus enlarge the class of persons who are citizens.

[9] Recorded history first notes that a sovereign rules with the consent of the governed in I Sam. 16, II Sam. 5, 9-20, I Kings 1-2. There, David as a youth was anointed as the successor to Jesse, his father. When his father died, he ruled over the seven tribes of Judah for seven years. At that time, when the rest of Israel were doing poorly, they noted that Judah prospered under David, so they asked that he rule them as well. Thereafter David ruled over all of Israel and Judah for forty years. But there is nothing to indicate the right to rule was in writing. Other codes, most notably the Code of Hammurabi, were in writing, but were unilateral acknowledgments of human rights. Thus, the *Magna Carta*, *infra*, appears to be the first written document executed by both the sovereign and its subjects. The U.S. Constitution abolished traditional concepts of sovereignty, placed sovereignty in the People, signed by their representative, and ratified by them according to their respective state procedures. *Infra*.

[10] In the solution of constitutional questions the same rule of interpretation, and sources of judicial information, may be resorted to as in the construction of statutes and other instruments granting power. *Adams v. Storey*, 1 Paine (U.S.) 79, 1 Fed. Cas. page 141, 145 (1817). The constitution and the law are to be expounded without leaning one way or the other, according to those general principles which usually govern the construction of fundamental or other laws. *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 85 (1809). No word or clause can be rejected as superfluous or unmeaning, but each must be given its due force and appropriate meaning.

People" do ordain and establish this Constitution. "Here, in strictness, the people surrender nothing; and as they retain every thing they have no need of particular reservation. 'We, THE PEOPLE of the United States, to secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.' Here is a better recognition of popular rights than volumes of those aphorisms which make the principle figure in several of our State bills of rights and which would sound much better in a treatise of ethics than a constitution of government." Hamilton, The Federalist Papers, No. 84.; Preamble, *Amicus* Appendix, p. A8.

The words "people of the United States" and "citizens" are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold power and conduct the government through their representatives. They are what we familiarly call the "sovereign people" and every citizen is one of these people, and constituent member of this sovereignty. *Scott v. Sanford*, 60 U.S. (19 How.) 404 (1857);[11] *Cruikshank*, *supra*, 92 U.S. (2 Otto), at 549.

D. The Preamble Creates Two Classes of Persons, on an Equal Footing - "Ourselves" and "Posterity"

Wright v. United States, 302 U.S. 583, 588 (1938); *Knowlton v. Moore*, 178 U.S. 87 (1900). Words and terms are to be taken in the sense they were used and understood at common law and at the time the constitution and the amendment were adopted. *Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533, 542 (1869); *Locke v. New Orleans*, 71 U.S. (4 Wall.) 172 (1866); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 188-189 (1824); *United States v. Harris*, 1 Abb. (U.S.) 110, 26 Fed. Ca. No. 15, 312 (1866); *United States v. Block*, 4 Sawy. (U.S.) 211, 24 Fed.Cas. 14,609 (1877); Pardoning Power of the President, 5 Opinion U.S. Atty. Gen. 532, 535 (1852). Where there are several possible meanings of the words of the constitution, that meaning which will defeat rather than effectuate the constitutional purpose cannot rightly be preferred *United States v. Classic*, 313 U.S. 299, 316 (1941).

[11] The 13th & 14th Amendments do not overrule this proposition. Rather, they redefine citizen (See, Article I, § 2, cl 3; § 9, cl. 1), and thus enlarge the class of persons who are citizens.

There being no debate, and the question of the meaning "to ourselves and our Posterity" being one of first blush, we must turn to the meaning commonly understood at the time of the adoption to determine its extent and application. *Veazie Bank v. Fenno*, 75 U.S. (8 Wall) 533, 542 (1869); *Locke v. New Orleans*, 71 U.S. (4 Wall) 172 (1866); *Gibbons v. Ogden*, 22 U.S. (9 Weat.) 1, 188-189 (1824); *United States v. Harris*, 1 Abb. (U.S.) 110, 26 Fed. Ca. No. 15, 312 (1866); *United States v. Block*, 4 Sawy. (U.S.) 211, 24 Fed.Cas. 14,609 (1877); Pardoning Power of the President, 5 Opinion U.S. Atty. Gen. 532; 535 (1852).

The phrase in question begins with the preposition "to". As so used, it marks the object for which the purposes were secured. Webster's Dictionary of the English Language, 1968.

"Ourselves" is a pronoun, the plural of "oursell", and when used in the objective, as here, it simply serves as the reflexive pronoun corresponding to "we" or "us". *Ibid.* "We", in this case, appears at the beginning of the preamble and is defined by the parenthetical statement immediately following "the People of the United States." "Ourselves" is therefore synonymous with "the people of the United States" and hence also "citizen". *Scott v. Sanford*, *supra*, 60 U.S. (19 How.) 404; *Cruikshank*, *supra*, 92 U.S. (2 Otto), at 549.

"And" is a particle joining words and sentences, and expressing the relations of connection or addition. Webster's, op. cit. In this case, its purpose is to add to the object for which the purposes were secured. "Our" means of, or belonging to, "us", i.e., to the speaker (in this case "We, the People of the United States), or to the speaker and the person or persons whom he speaks for or includes. It is a possessive adjective corresponding to "We", "Us"; expressing the genitive of possession; also, the objective genitive, as in "our defense", "our Maker", "our persecutors". Oxford English Dictionary, Compact Edition, 1971. (Hereinafter, OED). Its purpose is to include "Posterity" on an equal footing with, and the same

rights as, "our selves" as evidenced by the parallel structure of the phrase. Therefore, "posterity" is synonymous with "citizen". *Scott v. Sanford*, *supra*, 60 U.S. (19 How.) 404; *Cruikshank*, *supra*, 92 U.S. (2 Otto), at 549.

E. Posterity Was Understood At the Time of Adoption to Include All Future Generations

Posterity, as it appears in the Preamble, has not been defined by the Supreme Court, therefore we must turn to what the framer's understood it to mean at the time the constitution was adopted in 1789. *Ante*, footnote 10, and the citations therein. "Posterity", at the time of the Framers, was defined as "1. The descendants collectively of any person; all who have proceeded from a common ancestor. 2.+.a. A later generation (with plural). obs. b. All succeeding generations (collectively)." OED, op. cit. *Accord, Breckenridge v. Denny*, 71 Ky (8 Bush.) 523. The Preamble is not concerned with an individual in particular, as in 1. Nor in the sense of 2.a, which in any event is obsolete. 2b appears to be the sense which the framers had in mind. Samuel Johnson, "Idler No. 3", p. 5, used it in that sense in 1758 when he wrote, "The Ocean and sun will last our time, and we may leave posterity to shift for themselves." It was again used in that sense by Colquhounn in Commentaries on the Thames, ix, 284 when he wrote in 1800 "They will deserve the Thanks of the Nation, and the gratitude of Posterity." OED, op. cit.

The Constitution was signed on September 17, 1787, and Congress on February 18, 1791 formally recognized that the states had ratified the Constitution and therefore it was in effect. 3 Rotunda, Treatises on Constitutional Law, pp. 663-64, note 1. Thus it may be assumed the same sense was intended. *Ante*, footnote 10, and the citations therein.

F. That a Fetus was intended as a member of Posterity is Consistent with Common Law Tradition.

The Framers used the term Posterity without qualification. In 1644, in a well known pamphlet, it was argued that Parliament can no more censure the issue of the mind than it can the issue of the womb." Milton, John, "Aeropagitica" (1644).[12] At common law, it was understood that certain members of future generations, fetuses,[13] were a life in being for the purposes of the Rule Against Perpetuities. Gray, The Rule Against Perpetuities (4th Ed.); *Alamo School District v. Jones*, 182 Cal.App.2d 180, 6 Cal.Rptr. 272 (1960). Moreover, prenatal injuries, were to a limited extent, recognized at Common Law. "To kill a child in its mother's womb is now no murder, but a great misprision: but if the child be born alive and death by reason of the potion or bruises it received in the womb, it is murder in such as administered or gave them." Lord Coke, repeated by Blackstone at Book IV, p. 198.[14] And common law does not appear to have barred tort actions for prenatal injuries. *Sinkler v. Kneale*, 401 Pa 267, 164 A.2d 93, 94 (1960).

It thus appears that the framer's intended that "All succeeding generations (collectively)" include common law concepts of the rights of a fetus and to be synonymous with "citizen". *Scott v. Sanford*, *supra*, 60 U.S. (19 How.) 404; *Cruikshank*, *supra*, 92 U.S. (2 Otto), at 549.

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[12] Milton went on to observe that he did not believe that his remarks applied to Catholics. While this Catholic takes exception to the exception, his premise appears sound in all other respects. It may be that today he would have different feelings on the matter.

[13] That a fetal has rights was probably recognized as early as 322 BC at least. Aristotle, *Politics*, VII, 1335b, 24-26; Acquinas, *Summa Theologiæ*, I, q. 76, a. 5 and q. 118, a. 2; Noonan, Contraception, 86-88 (Harv. U. Press, 1965). The Old Testament provided a remedy for anyone causing a miscarriage. 21 Exodus 22. It does not offend the Establishment Clause of the 1st Amendment merely because civil enforcement corresponds to the tenants of some religious beliefs. *Generally, Witters v. Washington Dept of Social Svcs for the Blind*, 474 U.S. 481 (1986).

[14] Lord Coke's rationale rested on the impossibility of determining when life began, hence there would always be reasonable doubt as to whether or not murder had been committed. Two reasons may be advanced for that. First, at common law, "No man shall be taken or imprisoned upon the appeal of a woman, for the death of any other than her husband." *Magna Carta* (1215), Article 54. Thus, a failure of evidence. Second, medical knowledge as to the status of a fetus was quite primitive when compared to modern medical practices.

G. That a Fetus was intended as a member of Posterity is Consistent with the known object and Purposes of the Framers.

As the Preamble appears to confer rights upon "posterity" equal to "our selves", it is necessary to determine whether the framer's[15] intended that the rights be vested. Ante, footnote 10, and the cites therein. One measure of intent would be to determine whether vesting has occurred for the purpose of the rule against perpetuities. Gray, The Rule Against Perpetuities (4th Ed.); *Alamo School District v. Jones*, 182 Cal.App.2d 180, 6 Cal.Rptr. 272 (1960).

Had the framers used "and our heirs", it would have created the equivalent of a fee simple absolute with the powers of alienation. But such a concept would have been inconsistent with the concept of "unalienable rights" found in the Declaration of Independence[16] and the concept of an "indestructible and perpetual union." *White v. Hart*, 80 U.S. (13 Wall.) 646, 650. Therefore, the framer's must have had a

---

[15] Of the 39 signers of the constitution, at least 8 were lawyers (of which one studied at the Middle Temple in London England and another studied law in England), two more appear to have studies law extensively (Chs. C. Pinchkney at the Middle Temple in London, England), and two more were, or became, judges. Generally, Encyclopaedia Britannica (1971) (Comparison with signers Volume 22, p. 695, with their biographies.). Hence it is fair to assume that the framer's were not unaware of what they were doing, and how to secure that which they wished to do.

[16] American Declaration of Independence; Schwartz, The Bill of Rights, A documentary history. The Declaration states, in relevant part "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain **unalienable** Rights, that among these rights, Government are instituted among Men, deriving their just powers from the consent of the governed, ..." American Declaration of Independence, ¶ 2.

different intent in mind when they used "Posterity."

If "Posterity" is to be viewed as conferring a contingent remainder to a class, then it must fail for being obnoxious to the rule against perpetuities because there would be members of the class capable of taking more than 21 years, plus the gestation period, after lives in being. Gray, The Rule Against Perpetuities (4th Ed.); *Alamo School District v. Jones*, 182 Cal.App.2d 180, 6 Cal.Rptr. 272 (1960). But if void, then it would create a fee simple absolute in the present generation, thus, once again, frustrating the intent of the framer's in creating "unalienable rights" and a "perpetual union". Therefore, another meaning consistent with the framer's intent must be found. *Ante*, footnote 10, and the citations therein.

Under the rule in Shelly's Case, a limitation of an estate to an ancestor for life, with the remainder to his heirs or the heirs of his body, gave the whole estate in fee to the ancestor. 31 *Corpus Juris Secundum*, Estates § 4. This rule applies only where the estate in freehold and the estate in remainder are created by the same instrument as in the Preamble. *People v. Emery*, 314 Ill. 220, 145 N.E. 349; 69 C.J.S. p. 512, note 77. Again, because this is inconsistent with the known intent of the framers, another meaning must be found. *Ante*, footnote 10, and the citations therein.

An estate tail may, under certain circumstances, be created or arise by implication. *Hertz v. Abrahams*, 110 Ga. 707, 36 S.E. 409; *Haward v. Howe*, 12 Gray (Mass.) 49; *Gannon v. Albright*, 183 Mo. 238, 81 S.W. 1162; *Gay v. Scates*, 37 Pa 31; *Larew v. Larew*, 146 Va. 134, 135 S.E. 819. Such a situation commonly arises if a conveyance[17] or devise in fee has been

[17] The Constitution expressly concerns estates and interests in lands. See, Art. I, § 8, cl. 17 (District of Columbia; Places purchased); Art. III, § 3, cl. 2 (forfeitures); Art. IV, § 2, cl. 1 (privileges and immunities), § 3, cl. 2 (property belonging to the United States; Amendment III (Quartering of soldiers); Amend IV (Secure in their persons, houses);Amend V (nor be deprived of ... property without due process of law; nor shall private property

made to some particular person named without issue, upon an indefinite failure of issue. In other words, whenever it appears in the instrument creating the estate that it was intended that the issue of the first taker should take by inheritance in a direct line, and in a regular order and course of decent, so long as his posterity should endure, and an estate in fee or in tail is given in remainder upon an indefinite failure of issue, then the estate first created will be construed to be an estate tail, or fee tail. 28 American *Jurisprudence*, Second, Estates, § 53. *Cf., Barber v. Pittsburgh, F.W. & C.R. Co.*, 166 U.S. 83, 17 S.Ct. 488, 41 L.Ed. 925; *Anderson v. United Realty Co.*, 79 Ohio St. 23, 86 N.E. 644, affmd 222 U.S. 164 (recognizing by *dictum* that this rule was followed at common law).

The Statute of De Donis[18] made fee tails unalienable by using the words "to A and the heirs of his body." In 1472, Taltarum's Case virtually abolished tails for most purposes. Y.B. 12 Edw. IV, Mich., fo 14 b, pl, fo 19a, 25. An estate in tail was not subject to The Rule Against Perpetuities because it was a present future interest. See, 13 Edw. I, c. 1; Y.B. 12 Edw. IV, Mich., fo 14 b, pl. 16., fo. 19a, 25. Hence it is reasonable to infer that in lieu of the common law formulation the framers chose "to ourselves and our Posterity" to effectuate their intent that the "first takers should take by inheritance in a direct line, and in a regular order and course of decent, so long as his posterity should endure". This construction would carry out and effectuate the intent of the framers that the rights conferred be "unalienable", and to create a perpetual union. *Ante*, footnote 10, and the citations therein.

II. Posterity, including a fetus, has Presently Enforceable Rights

There are three points in time when one could cross the threshold of being "our selves" (present interest) from

be taken for public use without just compensation ....).

[18] 13 Edw. I, c. 1.

"posterity" (Presently enforceable future interests): conception; at birth; at age of capacity. Chitty on Contracts (23rd ed. 1968) 134; Restatement of Contracts (1st) § 77; *Coggs v. Berherd*, 2 Ed.Raym. 909.

Implicit in the Preamble is the concept that the Constitution is to be a social contract. Eg, Hobb, Leviathan (1651); Locke, Second Treatise of Government (1690); Laqueur, The Human Rights Reader. It was submitted to the People for ratification. 2 Farrand, United States Constitutional Convention, 1787; The Records of the Federal Convention of 1787, pp. 152, 163, 177, 193, 196, 209, 565, 582, 590, 651; Amicus Appendix. 3 Rotunda, op cit, p. 663, note 1. Thus it is implicit that acceptance could only be by those not suffering from a disability, ie., persons with the capacity to consent. R. Edge, "Voidability of Minor's Contracts: A Feudal Doctrine in a Modern Economy," 1 G.L.Rev. 205 (1967). Viewed as a social contract, the Individual in general promises the individual in particular to secure for him inalienable rights, in return for which the individual promises to conform to the laws of the majority which do not derogate[19] from the promise of inalienable rights. Such mutual promises have always been considered sufficient consideration for enforceability. Chitty on Contracts (23rd ed, 1968) 134; Restatement of Contracts (1st) § 77; *Coggs v. Berherd*, 2 Ed.Raym. 909.

As persons who have not reached the age of capacity[20]

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[19] Verdross, *Forbidden Treaties int'l Law*, 31 AJIL 571 (1937); *Id, Jus Dispositivum & Jus Cogens in Int'l Law, 60 AJIL 55 (1966);*.

[20] The 22nd Amendment provides: "Section 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age. Section 2. The Congress shall have the power to enforce this article by appropriate legislation." Arguably, without this provision, any "person born in the United States or under its jurisdiction" is a citizen, and could vote regardless of age. In practice, age was regulated by the States, and it was understood to be the common law age of maturity, unless modified by the respective states. 3 Rotunda, op. cit., p. 688, Historical Note.

could not consent, Chitty, op. cit., it would appear that adults are of the class "our selves," and all others of the class "Posterity."

At common law, with few exceptions, the tenant in possession of a fee tail could be enjoined from alienation by those with a right to inherit. Moreover, a *guardian ad litem*, a guardian appointed by a court, could prosecute or defend for an infant in any suit to which he may be a part, 2 Stephens Commentaries 342 (1841), or by the State acting in *Parens patriae*. *McIntosh v. Dill*, 86 Okla. 1, 205 P. 917, 925; 17 Halbury's Laws of England (1st ed, 1911), Infants ¶¶ 132, 135. Thus, it is clear that at common law that at least those members of Posterity who were born had a presently enforceable right.

Turning to whether a fetus, as a member of Posterity, had a common law protectable interest, it appears in the affirmative. As already noted, ante p. 11 citing Lord Coke, while it is was not murder to kill a child in a mother's womb, it was still a misprision (crime)!. The unborn was a life in being for purposes of the rule against perpetuities. Gray, op.cit. Moreover, it does not appear that common law barred tort actions for prenatal injuries, *Sinkler v. Kneale*, *supra*, 164 A.2d 93, 94 (1960), which could be brought by a representative. 2 Stephens Commentaries 342 (1841); *McIntosh v. Dill*, *supra*, 205 P. 917; 17 Halbury's Laws of England (1st ed, 1911) Infants ¶¶ 132, 135.

It thus appears that in view of the known object and intent of the framer's that they intended to create unalienable rights and a perpetual union, knew of the common law rights of the unborn, and chose Posterity without limitation to include within the class of persons protected the unborn conceived fetus.

1. A fetus is life within the meaning of the 5th Amendment

The Constitution provides, in relevant part:

"No person shall be, ... deprived of life ... without due process of law."

U.S. Constitution, 5th Amendment. Neither a State nor the federal government may utilize money to take life without due process of law. *Eg, Flash v. Cohen*, 392 U.S.83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968). Assuming, *arguendo*, that the fetus is a life, it has the right to representation, 2 Stephens Commentaries 342 (1841); *McIntosh v. Dill*, *supra*, 205 P. 917; 17 Halbury's Laws of England (1st ed, 1911) Infants ¶¶ 132, 135, to be heard on the question as to whether its life should be terminated. *Generally, Mullane v. Central Hanover B&T*, 339 U.S. 706 (1950).

It would appear that a fetus has all of the characteristics of life:[21] excretion,[22] ingestion,[23] respiration,[24] irritation,[25] and reproduction.[26] A zygote (early fetus) is viable, in contradistinction to the ovum and sperm which are not.[27] Whether or not it can be ascertained at any point in time that it is human is an absurd proposition; assuming it goes to term it cannot be anything but human. The fact that the zygote is not viable extrauterine does not negate the fact of life. Life exists in an environment. No one would seriously consider sending an astronaut tied to an "umbilical cord" on a space walk to test whether or not the astronaut were life by cutting the umbilical cord to see if the astronaut could survive; such a proposition is

[21] Biology: Observation & Concept by Case & Steirs (1971), p. 110.

[22] Id, pp. 122, 141, 143, 149-150;.

[23] Id, pp. 70, 80.

[24] Id, pp. 8, 51, 64, 77.

[25] Id, irritation, pp. 267, 329, 330;.

[26] Id, reproduction, pp. 122, 163-165, 298-299, 327, 329;.

[27] Id, pp. 324-327.

absurd. Moreover, even a fetus securely within the womb will die if there is an abruption of the placenta.[28] Finally, the courts can judicially notice the advance of science in making possible test tube pregnancies, and transfers from one womb to another, all suggesting the presence of life from conception.[29]

The terms "ensoulment", "psych", "free will", and when they manifest themselves, are not relevant. We are concerned with Posterity, and it cannot be denied, in light of the arguments heretofore made, that Posterity includes all future generation, with the conceived having a presently protectable interest. 2 Stephens Commentaries 342 (1841); *McIntosh v. Dill*, *supra*, 205 P. 917; 17 Halbury's Laws of England (1st ed, 1911) Infants ¶¶ 132, 135.

Therefore, the fetus is a life which may not be taken without due process of law, and a compelling, legitimate governmental interest.[30] *Generally, Mullane v. Central Hanover B&T*, 339 U.S. 706 (1950).

III

A STATE HAS AN INTERNATIONAL AND CONSTITUTIONAL OBLIGATION TO PROTECT HUMAN LIFE,

[28] Jacobs, Warren M. and Jacobs Mark A., MDs, Obstetrics and Gynecology, Family Health & Medical Guide (1979), page 93;.

[29] This in fact appears to be the scientific support for Missouri's definition of life (Webster, slip opinion, p. 2.), and provides a construction which should prove more sound in principal and more sound in practice by simply recognizing that life begins at conception, is entitled to protection, and therefore the state has an interest in protecting both the life of the fetus and the health of the mother.

[30] Because a fetus is a person, the State has an interest in protecting that life, and it therefore becomes a balancing test weighing the interest of the mother against that of the fetus. It would appear then that the life of the fetus could be terminated only if it threatens the life of the mother, because other alternatives are now available such as transferring the zygote to the womb of a willing carrier or mother.

AND THEREFORE THE REGULATIONS UNDER SCRUTINY ARE CONSTITUTIONAL

Under International Law, a State has the obligation to provide police protection of its citizens at home. Verdross, *Forbidden Treaties int'l Law*, 31 AJIL 571 (1937); *Id, Jus Dispositivum & Jus Cogens in Int'l Law*, 60 AJIL 55 (1966). The concept to protect a person from due process in American Jurisprudence is derived from the *Magna Carta* (1215). McKechnie,[31] *Magna Carta*; the Great Charter of King John. The 5th Amendment prohibits the taking of life without due process of law, and it is enforced and made binding against the states by the 14th Amendment. *Generally, Furman v. Georgia*, 408 U.S. 238 (1972), and it *progeny*; *Cruikshank*, *supra*, 92 U.S. (2 Otto), at 549.

Given a state's obligation to protect it citizens at home, and to ensure life is not taken without due process of law, Minnesota has a legitimate interest in providing for the protection of fetal life. It's citizens, and the citizen's of every state has an interest in insuring that there exists safeguards to insure that abortion does not become a tool for genocide. Eg, International Convention on the Prevention and Punishment of the Crime of Genocide, Congressional Digest, December 1984; U.S. Const., Art. VI, cl 2 (treaties).

This is not to say that a State may say a woman does not have any right to privacy and may never have an abortion. Clearly, the Constitution implicitly recognizes the right to privacy. U.S. Const., 2d (Quartering of soldiers), and 4th (search and seizure) Amendments; *Katz v. United States*, 389 U.S. 347 (1967), and its *progeny*. But it is equally clear that a person cannot use the right of privacy and the right to do with one's body what he or she wishes to do with their body if the conduct amounts, under state law, to a crime. *Bowers v. Hardwick*, 478 U.S. 186 (1986). Nonetheless, every person has the right to self defense. Foster, Crown Law 273-277 (1762); Restatement (2nd) Torts §§ 63, 64, & 65; *Brown v. United States*, 256 U.S. 335 (1921). Thus it would appear where the woman's life or health is endangered, termination of the pregnancy might be justified. But even here, there appears to be less drastic alternative means than outright abortion. This court can judicially notice, or remand for consideration, the fact that modern advances have made possible womb to womb transfers to embryos. On the same basis, this court may notice or remand the fact that there are many persons unable to conceive who would welcome such transfers.

There is another point to consider; the minor woman. As persons who have not reached the age of capacity[32] could not consent, Chitty, op. cit. If an adult does not have an absolute right to abortion, *a fortiori* neither does a minor female. *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Bellotti v. Baird* (*Bellotti I*), 428 U.S. 132 (1976), and *Bellotti v. Baird* (*Bellotti II*), 443 U.S. 622 (1979), relied primarily upon *Roe*. But as *Roe* stands on quicksand for *holding* that a woman has an unqualified right to abortion, those opinion are similarly flawed. *Webster*.

But even more is at stake. We are dealing with minors, and nearly every state has laws which make it statutory rape to have carnal knowledge of a female under age, or incest or child abuse if done by a family member. The courts are littered with cases where one parent or the other, have sold children into prostitution for drug money, or other reasons. How is the state to but an end to that evil crime, statutory rape, or incest, if there is no notification to anyone? It cannot, and thus the state has been hampered in its role of providing police protection of its citizens at home in the

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[31] McKechnie is the recognized scholar on the *Magna Carta*. 10 Halsbury's Statutes of England (4th Ed) Constitutional Law, 25 Edw 1 (*Magna Carta*)(1297), p. 14, Notes, ¶ 2.

[32] See R. Edge, supra, "Voidability of Minor's Contracts: A Feudal Doctrine in a Modern Economy," 1 G.L.Rew. 205 (1967).

enforcement of its penal laws. All that *Bellotti II held* was that parents cannot have a veto power, and therefore alternative procedures for obtaining consent were constitutionally required. The Minnesota statute does not confer veto powers on the parent. It only requires notification so that if there is a problem, a person interested in the health and welfare of the minor can but an end to the abuse.

Based on the foregoing, Minnesota's statutes and regulations which do nothing more than to insure at the minimum that both parents have actual notice of the abortion, without involvement of the courts carries out its basic duties under International law and the U.S. Constitution. It does not absolutely bar abortions, but does insure that life is not arbitrarily taken,[33] and it furthers the state interest in protecting expectant minors from a potentially abuse environment in the home, or elsewhere.

CONCLUSION

Based upon the foregoing, this court should *overrule Roe v. Wade*, 410 U.S. 113 (1973) prospectively, *affirming* that portion of the decision of the Eighth Circuit at 853 F.2d 1452 finding that Minnesota Statute §§ 144.343 (1987) as a whole is constitutional, and remand for further proceedings not inconsistent with this Court's opinion.

Dated: August 27, 1989

Respectfully submitted,

JAMES JOSEPH LYNCH, JR.
Attorney at Law

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[33] Indeed, arguably Minnesota, misled no doubt by *Roe*, has not gone far enough in the protection of fetal life because it allows the taking of the fetal life without any hearing whatsoever. But that issue is not now before the court, although under *Brown I* and *Brown II*, this Court could, and probably should, consider that issue as well.

P.O. Box 15766
Sacramento, CA 95852
(916) 448-7871

Attorney for *Amicus Curiæ*

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EXCERPTS FROM

2 Farrand, Max, United States Constitutional Convention, 1787; The Records of the Federal Convention of 1787*

[129]

COMMITTEE OF DETAIL, I

***

[Proceedings of the Convention, June 19 -- July 23.]

[152]

COMMITTEE OF DETAIL, IV

*****

VI

We the People of (*and*) the States of New Hampshire, Massachusetts, Rhode Island and Providence Plantations, Connecticut, New. York, New. Jersey, Pennsylvania, Delaware, Maryland, Virginia, North. Carolina, South. Carolina and Georgia do ordain declare and establish the following Constitution for the Government of ourselves and of our Posterity.

---

* Pages from Farrand's are indicated at the beginning of the page in [ ]. All punctuation and capitalization is exactly as found in Farrand's which faithfully follows the manuscript originals in Madison's book. All footnotes were omitted unless deemed important to the issues under consideration. The most commonly omitted footnote says "Found among the Wilson Papers and in Wilson's handwriting. Portions in parentheses represent parts crossed out. Italics represent later insertions."

1.

*****

[163]

COMMITTEE OF DETAIL, IX

*****

IX

We the People of the States of New Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia do ordain, declare and establish the following Constitution for the Government of ourselves and our Posterity.

1.

*****

[177]

Monday MADISON August 6

MADISON

Monday August 6th. In Convention

<Mr. John Francis Mercer from Maryland took his seat.>

Mr. Rutlidge <delivered in> the Report of the Committee of detail as follows: < a printed copy being at the

same time furnished to each member.>

We the people of the States of New Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia do ordain, declare, and establish the following Constitution for the Government of Ourselves and our Posterity.

Article I

****

[193]

TUESDAY, AUGUST 7, 1787.

JOURNAL

Tuesday August 7, 1787.

[To refer the report to a Committee of the whole Ayes -- 5; noes -- 4.

Delaware being represented during the Debate a question was again taken on ye Committee of ye whole Ayes --- 3; noes --- 6.]

On the question to agree to the Preamble to the constitution as reported from the committee to whom were referred the Proceedings of the Convention -- it was passed unan: in the affirmative [Ayes -- 10; noes --- 0.]

*****

MADISON

Teusday August 7th. In Convention

The Report of the Committee <of detail being> taken up,

***

The <preamble> of the Report was agreed to nem. con. So were Art: I & II.

*****

MCHENRY

Augt. 7.

*****

The preamble or caption and the 1. and 2. article passed without debate, ...

*****

COMMITTEE OF STYLE

Proceedings of Convention Referred to the Committee of Style and Arrangement.

We the People of the States of New-Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia do ordain, declare and establish the following Constitution for the Government of ourselves and our Posterity.

ARTICLE I.

*****

COMMITTEE OF STYLE

Report of Committee of Style

WE, the People of the United States, in order to form

a more perfect union, to establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I.

*****

[604]

THURSDAY, SEPTEMBER 13, 1787.

JOURNAL

Thursday September 13, 1787.

****

Resolved that the preceding Constitution be laid before the United States in Congress assembled,and that it is the opinion of this Convention that it should afterwards be submitted to a Convention of Delegates, chosen in each State by the People thereof, under the recommendation of it's Legislature; for their asent and ratification. ***

*****

[604]

***

[To postpoine the report respecting the 22nd and 23rd --- 9; noes --- 1.] Ayes

*****

To strike out the word "to" before establish justice --- 8; bites --- 2.] Ayes

[641]

MONDAY, SEPTEMBER 17, 1787.

JOURNAL

Monday September 17, 1787.

Detail of Ayes and Noes

	The Constitution Unanimously agreed to.	To deliver over the Journal and papers to the President.	
	[567]	[568]	[569]
New Hampshire	aye	aye	aye
Massachusetts	aye	aye	aye
Rhode Island	aye	aye	aye
Connecticut	aye	aye	aye
New York	aye	aye	aye
New Jersey	aye	aye	aye
Pennsylvania	aye	aye	aye
Delaware	aye	aye	aye
Maryland	aye	aye	no
Virginia	aye	aye	aye
North Carolina	aye	aye	aye
South Carolina	aye	dd	aye
Georgia	aye	aye	aye

MADISON

Monday Sepr. 17. 1787. In Convention

The engrossed Constitution being read, ...

Doer. Franklin rose with a speech in hand ....

*****

[643]

... --- He then moved that the Constitution be signed ...

[644]

*****

On the question to agree to the Constitution enrolled in order to be signed. It was agreed to by all the States answering ay.

* * * * *

[649]

MCHENRY

Monday Sepr. 1787.

Read the engrossed Constitution. Altered the representation in the house of representatives.

* * * * *

[651]

THE CONSTITUTION
OF THE UNITED STATES

We, the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I.

* * * * *

(21) (18) (19)

Nos. 88-805, 88-1125, 88-1309

Supreme Court, U.S.
FILED
AUG 28 1989
JOSEPH F. SPANIOL
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF OHIO,

Appellant,

v.

AKRON CENTER FOR REPRODUCTIVE HEALTH, *et al.*,

Appellees.

On Appeal from the United States Court of Appeals for the Sixth Circuit

---

JANE HODGSON, M.D., *et al.*,

Petitioners,

v.

THE STATE OF MINNESOTA, *et al.*,

Respondents.

THE STATE OF MINNESOTA, *et al.*,

Cross-Petitioners,

v.

JANE HODGSON, M.D., *et al.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF OF THE KNIGHTS OF COLUMBUS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT IN NO. 88-805, AND RESPONDENTS-CROSS-PETITIONERS IN NOS. 88-1125 AND 88-1309

Of Counsel:
W. PATRICK DONLIN
Supreme Advocate
CARL A. ANDERSON
Vice President for
Public Policy
Knights of Columbus

BRENDAN V. SULLIVAN, JR.
KEVIN J. HASSON *
WILLIAMS & CONNOLLY
839 17th Street, N.W.
Washington, D.C. 20006
(202) 331-5000

Dated: August 28, 1989

* *Counsel of Record*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-805

STATE OF OHIO,

Appellant,

v.

AKRON CENTER FOR REPRODUCTIVE HEALTH, *et al.*,

Appellees.

On Appeal from the United States Court of Appeals for the Sixth Circuit

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No. 88-1125

JANE HODGSON, M.D., *et al.*,

Petitioners,

v.

THE STATE OF MINNESOTA, *et al.*,

Respondents.

No. 88-1309

THE STATE OF MINNESOTA, *et al.*,

Cross-Petitioners,

v.

JANE HODGSON, M.D., *et al.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF THE KNIGHTS OF COLUMBUS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT IN NO. 88-805, AND RESPONDENTS-CROSS-PETITIONERS IN NOS. 88-1125 AND 88-1309

INTEREST OF THE *AMICUS*

Amicus curiae Knights of Columbus is an international organization of 1.4 million members. It has a long history of pro-family advocacy. For example, *amicus* underwrote the litigation in *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925). Moreover, a large percentage of its members are themselves parents. Because of its institutional interest, and the interests of its members, *amicus* believes that it can assist the Court by analyzing the impact of the present cases on the broader area of family rights generally. For these same reasons, *amicus* does not believe its interests will be fully attended to by existing parties. All parties have consented to the filing of this brief.

STATEMENT

In *Akron Center for Reproductive Health* v. *Slaby*, 854 F.2d 852 (6th Cir. 1988), and *Hodgson* v. *Minnesota*, 853 F.2d 1452 (8th Cir. 1988) (*en banc*), the United States Courts of Appeals for the Sixth and Eighth Circuits have held that states may not require that the parents of adolescent girls be notified prior to their daughters' obtaining abortions, unless states provide a so-called "judicial bypass" procedure enabling a judge to determine that the girl is mature enough to decide to have an abortion without telling her parents, or that an abortion is in her best interests. As the Eighth Circuit explained, "[i]n view of the unique nature and consequences of the abortion decision, states do not have the constitutional authority 'to give a third party an absolute, and possibly arbitrary, veto,' over the minor's abortion decision." *Hodgson*, 853 F.2d at 1456, *quoting Bellotti* v. *Baird*, 443 U.S. 622, 643 (1979) (plurality opinion). *See also Akron Center for Reproductive Health*, 854 F.2d at 861 ("we hold that a parental notification statute must provide a bypass procedure that is consistent with the dictates of *Bellotti II*"). The Eighth Circuit upheld Minnesota's parental notification statute, provided that its judicial bypass procedure remains in force. The Sixth Circuit struck down Ohio's statute largely because that court thought the judicial bypass provision inadequate. *Amicus* argues that no "judicial bypass" provision is ever constitutionally required, and thus urges this Court to affirm the Eighth Circuit, except insofar as it found the bypass provision necessary, and to reverse the Sixth Circuit.

SUMMARY OF ARGUMENT

In a nearly unbroken tradition, stretching back to the received English common law, courts and legislatures have recognized that parental authority is not delegated by the state, but rather inheres in the nature of parenthood. Thus, many "fundamental" rights of children have been conditioned on their parents' consent. Children may not marry without their parents' consent. Their interstate travel is largely conditioned on their parents' consent. And their right to enter into contracts is also restricted, and often conditioned on their parents' consent. In a line of cases beginning with *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), this Court has repeatedly emphasized the same principle. Thus, it has insisted that "[t]he child is not the mere creature of the State," but on the contrary, his parents "have the right coupled with the high duty" to direct his education. *Id.* at 535.

Planned Parenthood of Central Missouri v. *Danforth*, 428 U.S. 52 (1976), and the cases following it, are incompatible with the *Pierce* line of cases, and with the long-standing tradition of legislative and common-law recognition of inherent parental authority. Most fundamentally, *Danforth* and its progeny err in asserting that the only authority that parents have over their children's abortions is whatever the state is permitted to delegate to them. Parental authority is most emphatically not the product of state delegation, but of nature itself. The lower courts' decisions in these cases further extending *Danforth*'s reasoning to parental notification stat-

utes, like *Danforth* itself, are symptomatic of *Roe* v. *Wade*'s noted tendency for sudden displacement of time-honored doctrines, and are thus symptomatic of *Roe*'s flawed nature. *Danforth* and its progeny, and *Roe* itself, should be reconsidered and overruled.

ARGUMENT

There is a nearly unbroken legal tradition, Constitutional, legislative and common-law, that the family has its "origins entirely apart from the power of the State." *Smith* v. *Organization of Foster Families*, 431 U.S. 816, 845 (1977). Familial rights are therefore grounded "not in state law, but in *intrinsic* human rights, as they have been understood in 'this Nation's history and tradition.'" *Ibid.* (emphasis added; citations omitted). The family, in short, is logically prior to the State.[1]

That principle has often been codified in legislation recognizing and reinforcing parental authority. Thus, for example, childrens' rights to marry, to travel, and to make certain contracts are conditioned on their parents' consent. With the sole—and rather conspicuous—exceptions of *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52 (1976), and its progeny, this tradition of family autonomy has been nowhere more forcefully expressed than in the precedents of this Court. *Amicus* respectfully urges the Court to resolve the dissonance created in the law by *Danforth* and *Bellotti* v. *Baird*, 443 U.S. 622 (1979), by restating in this case its long-standing theme of familial autonomy.

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[1] Cf. Hobbes, *Leviathan*, ch. xxii (Fuller, ed. 1952) ("For the father and master being before the institution of the Commonwealth absolute sovereigns in their own families, they lose afterward no more of their authority than the law of the Commonwealth taketh from them"); Locke, *Concerning Civil Government*, ch. VI, par. 58 (Brit. ed. 1952) ("The power, then, that parents have over their children arises from that duty which is incumbent upon them, to take care of their offspring during the imperfect state of childhood").

I. THERE IS A LONG LEGISLATIVE AND COMMON-LAW TRADITION RECOGNIZING AND REINFORCING PARENTAL AUTHORITY.

Through both legislation and common law, both the federal government and the States have long acknowledged parents' authority by requiring their consent for important decisions made by their children.

A. Marriage

The most obvious example is marriage. It is a "fundamental right," *Loving* v. *Virginia*, 388 U.S. 1 (1967), and cannot be denied even to prisoners. *Turner* v. *Safley*, 107 S.Ct. 2254 (1987). Yet the requirement that a child obtain the consent of his or her parents before marrying has remained in force ever since its origins in the English common law.

Blackstone explains that the requirement was designed to reinforce a parent's natural duty:

> [t]he consent or concurrence of the parent to the marriage of his child under age, was . . . directed by our ancient law to be obtained: but now it is absolutely necessary; for without it the contract is void. And this also is *another means, which the law has put into the parents' hands, in order the better to discharge his duty*; first, of protecting his children from the snares of artful and designing persons; and, next, of settling them properly in life, by preventing the ill consequences of too early and precipitate marriages.

Blackstone's Commentaries, Book 1, Chap. XVI, par. 2 (Oxford 1966) (emphasis added; original emphasis omitted). In 1753, the rule was codified in "An Act for the better prevention of clandestine marriages," which required the consent of a parent or guardian in order for a person under twenty-one to marry.[2] Interestingly,

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[2] The statute provided, in relevant part, as follows: "And it is hereby further enacted, That all Marriages solemnized by License,

that statute allowed for the Chancellor or other officials to approve a "proper" marriage if a party's parent or guardian had been "induced unreasonably . . . to abuse the Truth reposed in him" and to withhold consent. It did *not*, however, provide for application to them in the first instance. And it certainly did not create a mechanism for them to supply their own consent in secret, without the parents' knowledge.

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after the said twenty-fifth Day of *March*, one thousand seven hundred and fifty-four, where either of the Parties, not being a Widower or Widow, shall be under the Age of twenty-one Years, which shall be had without the Consent of the Father of such of the Parties, . . . or if dead, of the Guardian or Guardians . . . and in case there shall be no such Guardian or Guardians, then of the Mother (if living and unmarried) or if there shall be no Mother living and unmarried, then of a Guardian or Guardians of the Person appointed by the Court of *Chancery*; shall be absolutely null and void to all Intents and Purposes whatsoever. XII. And whereas it may happen, that the Guardian or Guardians, Mother or Mothers, of the Parties to be married, or one of them, so under Age as aforesaid, may be *Non compos mentis*, or may be in Part beyond the Seas, or may be induced unreasonably, and by undue Motives to abuse the Truth reposed in him, her or them by refusing or withholding his, her or their Consent to a proper Marriage; Be it therefore enacted, That in case any such Guardian or Guardians, Mother or Mothers, or any of them, whose Consent is made necessary as aforesaid, shall be *Non compos mentis*, or in Parts beyond the Seas, or shall refuse or with-hold his, her or their Consent to the Marriage of any Person, it shall and may be lawful for any Person desirous of marrying, in any of the before-mentioned Cases, to apply by Petition to the Lord Chancellor, Lord Keeper, or the Lords Commissioners of the Great Seal of *Great Britain* for the Time being, who is and are hereby empowered to proceed upon such Petition, in a summary Way; and in case the Marriage proposed, shall upon Examination appear to be proper, the said Lord Chancellor, Lord Keeper, or Lords Commissioners of the Great Seal for the Time being, shall judicially declare the same to be so by an Order of Court, and such Order shall be deemed and taken to be as good and effectual to all Intents and Purposes, as if the Guardian or Guardians, or Mother of the Person so petitioning, had consented to such Marriage. Lord Hardwicke's Act, 1753, 26 Geo. 2. ch. 33.

All 50 States and the District of Columbia still require parental consent for children to marry.[3] Only 5 states

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[3] Twenty-seven States and the District of Columbia simply require parental consent. *See* Ala. Code § 30-1-5 (1983); Ark Stat. Ann. § 9-11-102 - 105 (1987); Cal. Civ. Code § 4101 (West 1983); Del. Code Ann. Tit. 13, § 123 (1981); D.C. Code Ann. § 30-111 (1988); Fla. Stat. Ann. § 741.04 - 0405 (West 1988); Ga. Code Ann. § 19-3-2 (1982); Ill. Ann. Stat. ch. 40, ¶ 203 (Smith-Hurd 1982); Iowa Code § 595.2 (1980 & Supp. 1989); Ky. Rev. Stat. § 402.210 (1988); La. Rev. Stat. Ann. § 9:211 (Supp. 1989); Md. Fam. Law Code Ann. § 2-301 (1984 & Supp. 1988); Mich. Comp. Laws Ann. 551.51 (West 1988); Miss. Code Ann. § 93-1-5 (1972 & Supp. 1988); Mo. Ann. Stat. 451.090 (Vernon 1986); Neb. Rev. Stat. § 42-105 (1988); N.C. Gen. Stat. § 51-2 (1987 & Supp. 1988); N.D. Cent. Code § 14-03-02 (1981); Ohio Rev. Code Ann. § 3101.01 (Baldwin 1984); Okla. Stat. Ann. Tit. 43 § 3 (West 1979); Or. Rev. Stat. § 106.060 (1983 & Supp. 1988); S.C. Code Ann. § 20-1-250 - 270 (Law. Co-op. 1985); S.D. Codified Laws Ann. § 25-1-9, 12, 13 (1984 & Supp. 1989); Utah Code Ann. § 30-1-2 (1989); Va. Code Ann. § 20-48, 49 (1989); Wash. Code § 26.04.010 (1988); Wis. Stat. Ann. § 765.02 (West 1981 & Supp. 1988); Wyo. Stat. 20-1-102 (1987). Eighteen states require a court's consent, in *addition* to parents' consent, in certain circumstances. For example, in New York an 18-year old may not marry without his or her parent's consent, but a 16-year old may not marry without *both* the consent of his or her parent's *and* that of a state superior court or family court judge. *See* N.Y. Dom. Rel. Law § 15 (McKinney 1988); *see also* Ariz. Rev. Stat. Ann. § 25-102 (West 1976) (same); Colo. Rev. Stat. §§ 14-2-106[1][a][I], 108 (1987) (same); Conn. Gen. Stat. Ann. § 46b-30 (West 1986) (same); Haw. Rev. Stat. § 572-1 (1985) (same); Idaho Code § 32-202 (1983) (minors under 18 require parental consent; girls under 16 also require consent of probate court); Ind. Code Ann. §§ 31-7-1-6, 31-7-1-7, 31-7-2 (Burns 1980 & Supp. 1986) (minors between 17 and 18 may marry without parental consent; girl under 15 who is pregnant or has given birth may marry with parental consent and judicial approval); Kan. Stat. Ann. § 23-106 (1988) (both parents' and court's consent required for minors under 13); Me. Rev. Stat. Ann. Tit. 19, § 62 (1981 & Supp. 1988) (minors under 18 require parental consent; minors under 16 also require consent of probate court); Minn. Stat. § 517.02 (1969 & Supp. 1989) (minors under 16 require both consent of parents' and consent of juvenile court); Mont. Code Ann. § 40-1-213 (1989) (minors under 18 require parental consent;

permit a court to consent in lieu of the parents, thus effectively emancipating the minor.[4] None, however, requires such a hearing to be conducted secretly from the parents.

B. Travel

A child's right to interstate travel, which is also a fundamental right, *Shapiro* v. *Thompson*, 394 U.S. 618

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minors under 16 require both parental and consent of district court judge); Nev. Rev. Stat. §§ 122.020 - 122.025 (1985) (same); N.J. Stat. Ann. §§ 37:1 - 6 (West 1968 & Supp. 1989) (same); N.M. Stat. Ann. §§ 40-1-5, 40-1-6 (1986) (same); Pa. Stat. Ann. Tit. 48 § 1-5 (Purdon 1965 & Supp. 1989) (same); R.I. Gen. Laws § 15-2-11 (1989) (minors under 18 require parents' consent, girls under 16 also require court's consent); Vt. Stat. Ann. Tit. 18 § 5142 (1987) (same); West Va. Code § 48-1-1 (1986) (same). Five states require parental *or* judicial consent. *See infra*, n.4.

[4] Alaska Stat. § 25.05.171 (1988) (minors between 16 and 18 require parental consent; minors between 14 and 18 may receive court approval if marriage is "in best interest" of minor, and parents either have consented or unreasonably refused consent); Mass. Gen. Laws Ann. ch. 207, §§ 7, 24, 25 (West 1987 & Supp. 1989) (minors under 18 require parental consent; court may waive requirement under specified circumstances); N.H. Rev. Stat. Ann. §§ 457:4, 457:5, 457:6 (1983 & Supp. 1988) (marriage by minors under 18 prohibited; court may waive disability for boys over 14, girls over 13 in its discretion); Tenn. Code Ann. § 36-3-106, 107 (1984 & Supp. 1988) (minors between 16 and 18 can marry with parental consent, but court may waive disability "upon good cause"); Texas Fam. Code Ann. §§ 1.51-53 (Vernon 1975 & Supp. 1989) (minors under 18 require either parental consent or court order; minors under 14 require court order). Other states, however, permit judicial consent in the limited circumstances where the girl is pregnant. *See, e.g.*, Ohio Rev. Code Ann. § 3101.01 (Baldwin 1984) (minors under 18 require parental consent; court may consent when girl is pregnant); N.J. Stat. Ann. § 37:1 - 6 (West 1968 & Supp. 1989) (parental consent required for minors under 18; court consent also required for minors under 16; but both requirements waived where girl pregnant); Ky. Rev. Stat. § 402.210 (1988) (parental consent required for minors under 18; district court may waive consent requirement, in its discretion, in case of pregnant girl).

(1969), is likewise largely conditioned on his or her parents' consent. Forty-five states and the District of Columbia have enacted the Uniform Interstate Compact on Juveniles,[5] which provides rather elaborate procedures for a "parent . . . entitled to legal custody of a juvenile

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[5] *See* Ala. Code §§ 44-2-1 - 44-2-8 (1982 & Supp. 1989); Alaska Stat. §§ 47.15.010 - 47.15.080 (1988); Ariz. Rev. Stat. Ann. §§ 8-361 - 8-367 (West 1989); Ark. Stat. Ann. §§ 9-29-101 - 9-29-108 (1987 & Supp. 1987); Cal. Welf. & Inst. Code § 1300 (West 1984 & Supp. 1989); Colo. Rev. Stat. §§ 24-60-701 - 708 (1988); Conn. Gen. Stat. Ann. §§ 17-75 - 17-81 (West 1988 & Supp. 1989); Del. Code Ann. Tit. 31, §§ 5201, 5221 - 5228 (1985); D.C. Code Ann. §§ 32-1101 - 32-1106 (1988); Fla. Stat. Ann. §§ 39.511 - 39.516 (West 1988); Ga. Code Ann. §§ 39-3-1 - 39-3-7 (1982); Haw. Rev. Stat. §§ 582-1 - 582-8 (1985 & Supp. 1988); Idaho Code §§ 16-1901 - 16-1910 (1979); Ill. Rev. Stat. ch. 23 §§ 2591 - 2597 (Smith-Hurd 1988); Ind. Code Ann. §§ 31-6-10-1 - 31-6-10-4 (West 1979 & Supp. 1989); Iowa Code § 232.171-72 (Supp. 1989); Kan. Stat. Ann. §§ 38-1001 - 1007 (1986); La. Rev. Stat. Ann. §§ 46:1451 - 46:1458 (West 1982); Me. Rev. Stat. Ann. Tit. 34-A, §§ 9001 - 9016 (1988); Md. Code Ann. Art. 83c, §§ 3-101 - 110 (1989); Mass. Gen. Laws Ann. ch. 119 App., §§ 1-1 - 1-7 (West 1969); Mich. Comp. Laws Ann. §§ 3.701 - 3.706 (West 1981); Minn. Stat. Ann §§ 260.51 - 260.57 (West 1982 & Supp. 1989); Miss. Code Ann. §§ 43-25-1 - 43-25-17 (1981); Mo. Ann. Stat. §§ 210.570 - 210.610 (Vernon 1983); Mont. Code Ann. §§ 41-6-101 - 41-6-106 (1987); Neb. Rev. Stat. §§ 43-1001 - 43-1009 (1988); Nev. Rev. Stat. §§ 214.010 - 214.060 (1986); N.H. Rev. Stat. Ann. § 169-A:1-11 (1978 & Supp. 1988); N.J. Stat. Ann. §§ 9:23-1 - 4 (West 1976); N.M. Stat. Ann. 32-3-1 - 32-3-8 (1986 & Supp. 1988); N.Y. Unconsul. Law §§ 1801 - 1806 (1979 & Supp. 1989); N.D. Cent. Code §§ 27-22-01 - 27-22-06 (1974); Ohio Rev. Code Ann. §§ 2151.56 - 2156.61 (Baldwin 1989); Okla. Stat. Ann. Tit. 10, §§ 531 - 537 (West 1987); Or. Rev. Stat. §§ 417.010 - 417.080 (1987); Pa. Stat. Ann. Tit. 62 § 731 (1968 & Supp. 1989); R.I. Gen. Laws § 14-6-1 - 14-6-11 (1981); S.C. Code Ann. § 24-17-10 (1976); S.D. Codified Laws Ann. §§ 26-12-1 - 26-12-14 (1984 & Supp. 1989); Tenn. Code Ann. §§ 37-4-101 - 37-4-106 (1984 & Supp. 1988); Texas Fam. Code Ann. §§ 25.01-09 (Vernon 1986); Utah Code Ann. §§ 55-12-1 - 55-12-6 (1986); Vt. Stat. Ann. Tit. 33 § 551 - 575 (1981); Va. Code Ann. §§ 16.1-323 - 16.1-330 (1988); Wash. Rev. Code Ann. §§ 13.24.010 - 13.24.900 (1962). The exceptions are Kentucky and North Carolina, which repealed their enactments of the Compact, and West Virginia, Wisconsin and Wyoming.

. . . who has run away without the consent of such parent" to petition a state court for a "requisition" securing the minor's return from the state to which he or she has fled. *See, e.g.*, D.C. Code § 32-1102, Art. IV(a) (1988). A child's freedom to leave the country is similarly conditioned.[6] Thus, passport officers may require children under 18 to obtain the consent of a parent or guardian before issuing them a United States passport. 22 C.F.R. § 51.27 (1988).

C. Contract

The right to enter into contracts—one of the basic rights guaranteed by 42 U.S.C. § 1981—is generally either effectively denied to children (the traditional rule), or else is conditioned on their parents' consent. *See, e.g.*, Cal. Ins. Code § 10-112 (Deering 1989) (requiring parental consent for minors to enter into certain insurance contracts); 18 Del. Code § 2707 (1988) (same). *See generally*, 2 Williston, *Contracts* §§ 222-248 (3d ed. 1959 & Supp. 1989) (discussing "infants'" lack of capacity to contract); Restatement (2d) Contracts, §§ 6, 14 (1981) (same). The federal government likewise requires parental consent before allowing minors to enlist in the military or join R.O.T.C. *See* 10 U.S.C. §§ 505(a), 2104 (b)(4), 2107(b)(4), 2107a(b)(4) (1982).

These restrictions, and others like them,[7] are not isolated oddities. Rather, they embody a fundamental tenet of the American legal tradition, namely that parents have

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[6] The ability to travel out of the country, while not a "right," is nonetheless a constitutionally-protected "freedom." *Haig* v. *Agee*, 453 U.S. 280, 306-307 (1981).

[7] Many restrictions on children are quite mundane. *See, e.g.*, Cal. Bus. & Prof. Code § 22706 (Deering 1989) (requiring parental consent for use by children under 18 of "tanning devices").

natural authority over their children, which the law recognizes and reinforces.[8]

II. THIS COURT HAS LONG RECOGNIZED THAT PARENTAL AUTHORITY IS AFFIRMATIVELY PROTECTED BY THE CONSTITUTION.

Apart from *Danforth* and its progeny, these same principles of family autonomy and parental authority have been repeated time and again in the precedents of this Court. Faced with a state statute that required all children to attend public schools, this Court insisted that

> [t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instructions from public teachers only. *The child is not the mere creature of the State; those who nurture him and direct his destiny have the right coupled with the high duty, to . . . prepare him for [his] additional obligations.*

Pierce v. *Society of Sisters*, 268 U.S. 510, 535 (1925) (emphasis added). *See also Michael H.* v. *Gerald D.*, 109 S.Ct. 2333, 2342 (1989) (plurality opinion) (" 'the Con-

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[8] This same vision of family and state is apparent in the debates surrounding the Thirteenth and Fourteenth Amendments. The abolitionists argued the natural evils of slavery that the law had to remedy were not limited to involuntary servitude; slavery also caused the slave's "authority and responsibility to rear his children [to be] obliterated. The members of his family might be torn from him and scattered." J. TenBroek, *The Antislavery Origins of the Fourteenth Amendment* 122 (1951). Likewise, Senator Harlan, arguing in favor of the Thirteenth Amendment, noted that one of the evils of slavery was the "abolition practically of parental relation, [thus] robbing the off-spring of the care and attention of his parents." Cong. Globe, 38th Cong., 1st Sess. 1439 (1864). Senator Wilson agreed. He thought the Thirteenth Amendment necessary, in part, because "[t]hen the sacred rights of human nature, the hallowed family relations of husband and wife, parent and child, will be protected by the guardian spirit of that law . . . ." *Id.* at 1324.

stitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition' ") (citation omitted). Earlier, in *Meyer* v. *Nebraska*, 262 U.S. 390, 400 (1923), the Court struck down a statute that purported to criminalize instructing children in foreign languages. The Court noted that "[c]orresponding to the right of control, it is the natural duty of the parent to give his children education. . . ." *Id.* at 400. The statute, the Court held, interfered "with the power of parents to control the education of their own." *Id.* at 401.

The Court enforced the same principle, under the aegis of the Free Exercise Clause, in *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972). There, the Court held that a state could not require Amish children, against their parents' wishes, to attend high school. Reiterating its insistence that "[t]he child is not the mere creature of the State," *id.* at 233 (*quoting Pierce*, 268 U.S. at 535), the *Yoder* Court rejected the state's argument that it should be permitted to determine what type of education best served the Amish children. "[I]t seems clear that if the State is empowered as *parens patriae*, to 'save' a child from . . . his Amish parents . . . the State will in large measure influence, if not determine, the religious future of the child." 406 U.S. at 232. And that, the Court insisted, was well beyond the pale, since the "primary role of the parents in the upbringing of their children is now established beyond doubt. . . ." *Ibid.*

The *Yoder* Court reserved the question of how it would balance a state's right as *parens patriae* with the rights of parents and children in a hypothetical case where Amish children wished to obey a compulsory education statute against their parents' wishes. *Id.* at 231. Nevertheless, the Court warned "that such an intrusion by a State into family decisions . . . would give rise to grave questions of religious freedom comparable to those raised here and those presented in *Pierce*. . . ." *Id.* at 231-32

(citation omitted). Six years later, in *Parham* v. *J.R.*, 442 U.S. 584 (1979), the Court went far towards resolving even that question.

In *Parham*, this Court upheld a state statute that authorized state mental institutions to admit temporarily any minor merely upon the application of that minor's parents or guardians. If, after observation, the institution found evidence of mental illness, it was authorized to admit the minor "for such period and under such conditions as may be authorized by law." 442 U.S. at 591. Any child hospitalized for more than five days, however, could always be discharged simply upon the request of his or her parents. *Ibid.* Several institutionalized children filed a class action challenging the statute as a deprivation of liberty without Due Process. They argued that "the likelihood of parental abuse" in having them committed against their will required a formal adversarial hearing. 442 U.S. at 603.

In rejecting that argument, this Court stressed once again that "our constitutional system long ago rejected any notion that a child is 'the mere creature of the State'. . . ." 42 U.S. at 602, *quoting Pierce*, 268 U.S. at 535. On the contrary, the Court emphasized that its "jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children." *Ibid.* Thus, an independent evaluation of the child by a staff physician at the hospital was all that due process required. *Id.* at 607.[9] The Court dismissed the argument that, because of the risk that some parents would abuse their children, a more formal procedure was necessary. "The statist notion that

[9] If the person to be committed were an adult instead of a minor, Due Process would require a full-scale adversary hearing. *See* 442 U.S. at 627 (Brennan, J., concurring and dissenting); *see also O'Connor* v. *Donaldson*, 442 U.S. 563, 580 (1975) (Burger, C.J., concurring); *McNeil* v. *Director Patuxent Institution*, 407 U.S. 245 (1972).

governmental power should supercede parental authority in all cases because some parents abuse and neglect children is repugnant to American tradition." *Id.* at 603. The Court added it would not

> assume that the result in *Meyer* v. *Nebraska* . . . and *Pierce* v. *Society of Sisters* . . . would have been different if the children there had announced a preference to learn only English or a preference to go to a public, rather than a church, school.

Id. at 603-04 (emphasis omitted). In short, because the child is not "the creature of the State" his parents' authority over him does not derive from the State.

Of course, as this Court has stressed, the State can and should *reinforce* parental authority. In *Ginsberg* v. *New York*, 390 U.S. 629 (1968), the Court upheld a statute that prohibited sales, to persons under 17, of pictures that "depict[ed] nudity" and were "harmful to minors." *Id.* at 632. The Court held that a state could properly accommodate parental authority by applying to minors a different definition of obscenity than that applicable to adults. "[C]onstitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." *Id.* at 639. Thus a "legislature could properly conclude that parents . . . are entitled to the support of laws designed to aid discharge of that responsibility." *Ibid.* Indeed, the Court has even upheld provisions giving parents complete discretion over what *non-obscene* sexual material may be delivered to their minor children. In *Rowan* v. *Post Office Dep't.*, 397 U.S. 728 (1970), it upheld a federal statute giving parents the right to have both their names and the names of their resident children under 19 deleted from mailing lists for material the parents judged to be "erotically arousing or sexually provocative." [10]

[10] Concurring, Justices Brennan and Douglas would have reserved the question of the constitutionality of applying the statute to all minors under nineteen. *See* 397 U.S. at 741 (Brennan, J., concurring).

The above cases all stand for the proposition that parental authority should not be invaded by the state, but instead ought affirmatively to be reinforced by it. None of those cases anywhere suggests that the state must create special mechanisms to "bypass" a child's parents without notice to the parents themselves.

Quite the contrary, where this Court *has* required judicial intervention is in cases where the state seeks to *terminate* parents' rights. Thus, the state may not remove a child from his or her parents, except upon notice and hearing. *Santosky* v. *Kramer*, 455 U.S. 745 (1982). And even then the state's case must meet the "clear and convincing" standard of proof. *Ibid.* Indeed, so profound is a parent's right to raise his or her children that a state may not terminate the parental rights of even certain unwed fathers except after notice and an adversary hearing. In *Stanley* v. *Illinois*, 405 U.S. 645 (1972), the Court mandated a hearing on the fitness of a resident, but unwed, father before the state could take custody of his children following their mother's death. "It is cardinal with us," the Court repeated, "that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations *the state can neither supply nor hinder.*" 405 U.S. at 651, *quoting Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1944) (emphasis added). *See Michael H.* v. *Gerald D.*, 109 S.Ct. 2333, 2342 (1989) (plurality opinion) (*Stanley* line of cases rests "upon the historic respect—indeed, sanctity would not be too strong a term—traditionally accorded to the relationships that develop within the unitary family") (footnote omitted).

III. *DANFORTH* AND *BELLOTTI II*—AS WELL AS *ROE*—ARE ABERRATIONS IN THE LAW, AND SHOULD BE REPUDIATED.

Danforth and its progeny are at odds with both the *Pierce* and the *Santosky* lines of cases. *Danforth* and *Bellotti II* forbid a state to accommodate parents' authority over their daughters' abortions, unless the state simultaneously provides for an *ex parte*—indeed affirmatively secret—proceeding to "bypass" the rights of the parents involved. This departure from an otherwise-settled tradition of protecting family autonomy is all the more remarkable because it was accomplished with so little fanfare.

A. *Danforth* And *Bellotti II* Are Incompatible With The *Pierce* Line Of Cases.

In *Danforth*, the Court struck down, among other things, a Missouri statute that required an adolescent to obtain her parents' consent before having an abortion. Writing for the majority, Justice Blackmun alluded only briefly to the *Pierce* line of cases and the fact that the lower court had upheld the parental consent requirement at issue as justified by the state's interest "in safeguarding the authority of the family relationship." 428 U.S. at 73. The *Danforth* majority then struck down that requirement by announcing simply that "the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy. . . ." *Id.* at 74. Earlier in its opinion, the majority elaborated on why it thought that was so. Discussing a spousal consent requirement, which it also invalidated, the majority announced that "since the State cannot regulate or proscribe abortion during the first stage . . . the State cannot delegate authority to any particular person . . . to prevent abortion during that same period." *Id.* at 69. The majority also did not feel that allowing parents to "overrule" a decision "made by the

physician and his minor patient" would "serve to strengthen the family unit." *Id.* at 75. Nor did the majority think that it would "enhance parental authority or control where the minor and the nonconsenting parent are so fundamentally in conflict . . . ." *Ibid.*

Bellotti v. *Baird*, 443 U.S. 622 (1979) ("*Bellotti II*"),[11] followed *Danforth* and struck down a Massachusetts statute which, as construed, required a minor seeking an abortion to first attempt to get her parents' consent. Failing that, she could still have an abortion if she persuaded a state court judge that the abortion was in her best interests.

The *Bellotti II* plurality struck down those provisions because they "g[a]ve a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy. . . ." 443 U.S. at 643, *quoting Danforth*, 428 U.S. at 74. The plurality then announced that a parental consent requirement would only be constitutional if the minor had the opportunity (1) to substitute a judge's idea of her best interest for that of her parents, or else, (2) to convince the judge that she was mature enough to make the decision on her own even if the judge thought it against her best interest. 443 U.S. at 643-44. The plurality stressed that "every minor must have the opportunity . . . to go directly to a court *without first consulting or notifying her parents*." *Id.* at 647 (emphasis added). And if that court then determines "that she is mature and well enough informed to make intelligently the abortion decision on her own, the court *must authorize her to act without parental consultation* or consent." *Ibid.* (emphasis added).

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[11] In *Bellotti* v. *Baird*, 428 U.S. 132 (1976) ("*Bellotti I*"), the Court vacated an earlier opinion of the district court, and remanded it to that court for certification of several questions of construction to the Supreme Judicial Court of Massachusetts.

Unlike the *Danforth* majority, the *Bellotti II* plurality paid somewhat more attention to the traditional protection afforded to parental authority. Nevertheless, the plurality said *Pierce* and its progeny were distinguishable because "[t]he abortion decision differs in important ways from other decisions that may be made during minority." 443 U.S. at 642. The plurality reasoned that "[a] minor not permitted to marry before the age of majority is required simply to postpone her decision . . . a pregnant adolescent, however, cannot preserve for long the possibility of aborting, which effectively expires in a matter of weeks from the onset of pregnancy." *Ibid.*[12]

At bottom, therefore, *Danforth* and *Bellotti II* justified their departure from the Court's longstanding protection of family autonomy with three arguments: (1) that bearing a child is a decision with implications more profound and more urgent than those of other decisions traditionally conditioned on parental consent; (2) that the state's interest in safeguarding parental authority would not be promoted when the parents and child are "fundamentally in conflict" over the child's desire to have an abortion; and (3) that the state may not *delegate* a right of consent to parents, because the state itself has no such right to give. None of these arguments compels *Danforth*'s conclusion.

1. To be sure, bearing a child has profound consequences for an unwed adolescent. It is, however, quite debatable whether those consequences are necessarily more profound than those of other decisions subject to parental control—whether or whom to marry, for ex-

[12] *Danforth*'s reach, of course, extends beyond *Bellotti II*. *See Planned Parenthood Ass'n of Kansas City* v. *Ashcroft*, 462 U.S. 476, 490-93 (1983); *Akron* v. *Akron Center for Reproductive Health*, 462 U.S. 416, 439-42 (1983); *H. L.* v. *Matheson*, 450 U.S. 398 (1981). *See also Zbaraz* v. *Hartigan*, 763 F.2d 1532 (7th Cir. 1985), *aff'd by an equally divided Court*, 108 S.Ct. 479 (1987) (requiring judicial bypass for parental notification statute).

ample.[13] And the fact that a girl's unwed pregnancy may be a predicament more urgent than others hardly proves that a judge, who presumably has never met her before, is better capable of assisting her in facing it than her parents would be.

In short, neither the importance nor the urgency of a girl's pregnancy supports the notion that parents should be kept in ignorance of it. To the contrary, that a girl's decision to have an abortion will have so profound an impact on her, and that it may be influenced by the pressure of time and other practical considerations, only underscore the value of her parents' involvement.[14]

2. The Court suggested in *Danforth* that recognizing parents' right to "veto" their child's decision to have an abortion would not "enhance parental authority or control where the minor and the nonconsenting parent are so fundamentally in conflict and the very existence of the

[13] It is not only difficult, but probably fruitless, to guess whether a marriage or an unwed pregnancy, by itself, would have the greater impact on a child's future. For it is surely the entirety of *childhood*, an entirety not separable into discrete decisions amenable to one-at-a-time judicial proceedings, that has the greatest lifelong consequences.

> *To safeguard the right of parents* to raise their children as they see fit, free of government intrusion, except in cases of neglect and abandonment, *is to safeguard each child's need for continuity*. This preference for minimum state intervention and for leaving well enough alone is reinforced by our recognition that *law is incapable of effectively managing, except in a very gross sense, so delicate and complex a relationship* as that between parent and child.

J. Goldstein, A. Freud & A. Solnit, *Beyond The Best Interests Of The Child* 13 (1973) (emphasis added). Cf. *Parham*, 442 U.S. at 504 ("Neither state officials nor federal courts are equipped to review such parental decisions").

[14] *Danforth* seems to presume that an adolescent will suffer adverse consequences only if she proceeds to bear her child. But abortion itself has adverse consequences, and the girl may live to profoundly regret that choice.

pregnancy has already fractured the family structure." 428 U.S. at 75. But there is no reason to assume that the family structure has been "fractured" whenever an adolescent wishes to conceal her pregnancy from her parents. That, no doubt, is the initial reaction of virtually every adolescent who becomes pregnant. Nor does the fact that the parents and their daughter are "in conflict" mean that the State's interest in reinforcing parental authority is somehow diminished. Parents and their children disagree all the time, and it is precisely when they do that parental authority is ordinarily exercised.

3. Most fundamentally, the *Danforth* majority misapprehended the source of parents' rights. It announced that the state cannot "give" to parents a right that it itself does not have—the right to "overrule a determination made by a physician and his minor patient." 428 U.S. at 75. Implicit in that statement is the notion that parents have only such authority as the State gives them to act in its stead. But " 'the child is not the mere creature of the state.' " *Parham, supra*, 442 U.S. at 602, *quoting Pierce*, 268 U.S. at 510. And since the family has its "origins entirely apart from the power of the State," parents' rights have their source "not in state law, but in intrinsic human rights. . . ." *Smith, supra*, 431 U.S. at 845. Thus, parents require no special legislative grace in order to "claim . . . authority in their own household to direct the rearing of their children . . . ." *Ginsburg, supra*, 390 U.S. at 639. Quite the contrary, "[i]t is cardinal . . . that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince, supra*, 321 U.S. at 166.

The statutes at issue in the present cases, like those limiting childrens' rights to marry, to travel, *etc.*, thus do not *delegate* anything. Rather, they recognize and reinforce the natural authority of parents over their children.

Parental authority is affirmatively undermined by the requirement, which both lower courts said they found in the Constitution, of a "judicial bypass" procedure for hiding childrens' abortions from their parents. That "requirement," as well as *Danforth* and *Bellotti II*, on which it rests, should be seen as the radical departure from constitutional, common-law and legislative tradition that it is. Cf. *Bellotti II*, 443 U.S. at 657 (White, J., dissenting) ("Until now, I would have thought inconceivable a holding that the United States Constitution forbids even notice to parents when their minor child who seeks surgery objects to such notice and is able to convince a judge that the parents should be denied participation in the decision.").

As Justice Harlan once noted, protected liberties are defined

> in the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound.

Poe v. *Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting). *Danforth* and its progeny constitute just such a departure from a long tradition of protecting family autonomy.

B. The Lower Courts' Decisions Highlight The Flaws In *Roe*.

Amicus recognizes that a majority of the Court in *Webster* v. *Reproductive Health Services*, 109 S.Ct. 3040 (1989), did not believe a full-dress reconsideration of *Roe* v. *Wade*, 410 U.S. 113 (1973), was in order until the Court was presented with a starker conflict with its

holding. *Amicus* nonetheless respectfully suggests that the lower court decisions in this case are so symptomatic of much that is wrong with *Roe* that the Court should take this opportunity to reconsider it.

The decisions of the lower courts in these cases, and *Danforth* and *Bellotti II*, which underlie them, rest on the proposition that there is a constitutional right to abortion sufficiently "unique" to justify departing from the Court's traditional approach to parents' rights. *See, e.g., Hodgson*, 853 F.2d at 1456.[15] That a right to abortion is claimed to be unique in this area of constitutional law—as it is said to be in so many others—demonstrates once again that it does not fit naturally anywhere in the Constitution. Established rules must always be changed to explain its presence. It is "painfully clear that no legal rule or doctrine is safe from *ad hoc* nullification . . . where an occasion for its application arises in a case involving state regulation of abortion." *Thornburgh* v. *American College of Obst. & Gyn.*, 476 U.S. 747, 814 (1986) (O'Connor, J., dissenting). The result is that *Roe*'s "scheme for constitutionalizing the regulation of abortion has had [an] institutionally debilitating effect" on the law. *Ibid.* The present case provides the Court with an example of that debilitating effect in the context of over two centuries of family law. Overruling *Danforth* and *Bellotti II* would go far toward resolving that particular anomaly, but a definitive resolution of all such anomalies can result only from overruling *Roe* itself. *Amicus* thus respectfully urges this Court to reconsider and overrule *Roe*, or, if it goes no further, to restore its traditional jurisprudence of respect for parents' rights and family autonomy by at least disavowing, if not overruling, *Danforth* and *Bellotti II*.

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[15] *Amicus* submits that there is and can be no constitutional right to abortion. See Brief of Knights of Columbus, as *Amicus Curiae*, in *Webster* v. *Reproductive Health Services*, No. 88-605.

CONCLUSION

For the foregoing reasons, the judgment of the Eighth Circuit should be affirmed, except insofar as it held a "judicial bypass" to be constitutionally required. The judgment of the Sixth Circuit should be reversed.

Respectfully submitted,

Of Counsel:
W. PATRICK DONLIN
Supreme Advocate
CARL A. ANDERSON
Vice President for
Public Policy
Knights of Columbus

BRENDAN V. SULLIVAN, JR.
KEVIN J. HASSON *
WILLIAMS & CONNOLLY
839 17th Street, N.W.
Washington, D.C. 20006
(202) 331-5000

Dated: August 28, 1989

* *Counsel of Record*

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v.

THE STATE OF MINNESOTA,

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BRIEF OF *AMICI CURIAE* IN SUPPORT OF HODGSON CROSS-RESPONDENTS AND AKRON APPELLEE FOR 13 INDIVIDUAL MEMBERS OF THE PANEL ON ADOLESCENT PREGNANCY AND CHILDBEARING OR THE COMMITTEE ON CHILD DEVELOPMENT RESEARCH AND PUBLIC POLICY

(Complete list of *amici curiae* appears on inside cover)

HANNAH E.M. LIEBERMAN
PAMELA H. ANDERSON
(Counsel of Record)
SHAW, PITTMAN, POTTS
& TROWBRIDGE
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8000
Attorneys for Amici Curiae

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LIST OF REPRESENTED AMICI

Panel Members

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Joy G. Dryfoos

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Jacqueline Darroch Forrest

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Judith E. Jones

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Herbert P. Ginsburg

William Kessen

John Modell

Barbara Starfield

Carol K. Whalen

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BRIEF OF *AMICI CURIAE* IN SUPPORT OF HODGSON CROSS-RESPONDENTS AND AKRON APPELLEE FOR 13 INDIVIDUAL MEMBERS OF THE PANEL ON ADOLESCENT PREGNANCY AND CHILDBEARING OR THE COMMITTEE ON CHILD DEVELOPMENT RESEARCH AND PUBLIC POLICY

DESCRIPTION AND INTEREST OF *AMICI CURIAE*

Amici are individuals who were members of either the Panel on Adolescent Pregnancy and Childbearing ("Panel") or the Committee on Child Development Research and Public Policy ("Committee") of the National Research Council.[1] Seven members of the Panel and six members of the Committee are *amici* here.[2]

The Committee on Child Development Research and Public Policy is an interdisciplinary body within the National Research Council. In 1983, the Committee established an expert, interdisciplinary panel to study the problems of adolescent pregnancy and childbearing.[3] The study was initiated, in part, to correct a perceived imbalance between general beliefs about the problems associated with adolescent sexuality and the scientific and other empirical data that had been collected about those issues. *Risking the Future* at ix-x.

The Committee selected Panel members who could bring a diverse range of expertise, experience, and political and philosophical points of view to the study. *Id.* at x. These Panel members included physicians, psychologists, professors of medicine, social scientists, a professor of law, an historian, and an economist. *Id* at iii-iv.

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[1] The National Research Council is the principal operating agency of both the National Academy of Sciences and the National Academy of Engineering, in the conduct of their services to the government, the public, and the scientific and engineering communities.

[2] This brief is filed on behalf of the listed *amici* as individuals, not on behalf of the Panel (which was disbanded in 1986 upon completion of its study), the National Research Council or the National Academy of Sciences.

[3] National Research Council, *Risking the Future, Adolescent Sexuality, Pregnancy, and Childbearing*, Vol. I at x (1987) (hereinafter cited as "*Risking the Future*").

The Panel members are authors of numerous textbooks, scholarly articles, and research reports in the areas of medicine, science, sociology, adolescent development and sexuality, and child psychology and are affiliated with over twenty universities (including law and medical schools) and research institutes. Many of the institutions and organizations with which the Panel members are affiliated have a specific focus on children and adolescents.

The Panel was charged with a three-fold mission: (1) to collect, integrate and evaluate data on trends in teenage sexual behavior; (2) to review and synthesize research on the antecedents and consequences of adolescent pregnancy and childbearing; and (3) to review and assess alternative preventive and ameliorative policies and programs. *Id.* at x. Over a two-year period, the Panel studied the initiation of sexual activity among adolescents, contraceptive use, pregnancy, pregnancy resolution, and the consequences of teenage pregnancy, childbearing, and parenting as well as the cost and effectiveness of policies and programs designed to address those areas. *Id.*[4]

In conducting its study, the Panel acknowledged that the issues surrounding adolescent pregnancy are both complex and controversial. As a scientific body, the Panel sought to "clarify the issues, sharpen awareness of crucial decision points, and define limits of existing knowledge" without injecting moral, philosophical or political ideology into its report. *Id.* at xi. The Panel's objective was "to inform the policy debate by clarifying the scientific issues." *Id.* at 5.

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[4] Five private foundations, the Rockefeller Foundation, the Ford Foundation, the William and Flora Hewlett Foundation, the Robert Wood Johnson Foundation, and the Charles Stewart Mott Foundation provided support for the study. *Id.* at x, xiii.

Risking the Future, Vol. I (1978), is the Panel's final report.[5] In the report, the Panel members unanimously endorsed three comprehensive policy goals, within which they set forth specific conclusions and recommendations. *Id.* at 5. In order of priority, the Panel's primary goals were to:

(1) Reduce the rate and incidence of unintended pregnancy among adolescents, especially among school-age teenagers;

(2) Provide alternatives to adolescent childbearing and parenting;

(3) Promote positive social, economic, health, and developmental outcomes for adolescent parents and their children.

Consistent with its overall approach, the Panel studied information regarding the availability of abortion services to adolescents in a non-ideological context. While the Panel stressed that it "strongly prefers prevention of pregnancy to avoid parenthood," it recognized that abortion is a legal alternative for adolescents for whom pregnancy prevention fails and devoted some attention to the issues associated with pregnancy termination. *Id.* at 6.

As individual members of the Panel or the Committee, *amici* wish to direct this Court's attention to the conclusions set forth in *Risking the Future* and the studies described therein. Specifically, the undersigned *amici* believe that the data reviewed by the Panel and the conclusions that can be drawn therefrom may provide the

[5] Before it was issued, *Risking the Future* was reviewed by several independent bodies, including the Committee, the review board of the Commission on Behavioral and Social Sciences and Education, a report review committee of the National Academy of Sciences, the National Academy of Engineering, and the Institute of Medicine, and a number of independent, outside reviewers.

Court with relevant empirical evidence which will assist it in its examination of the parental notification provisions that are currently before the Court.

SUMMARY OF ARGUMENT

There is no empirical evidence that mandatory parental notification provisions foster parent-child communications about abortion. Many teenage girls voluntarily choose to inform one or both parents about an unwanted pregnancy. Teenagers who do not wish, for whatever reason, to consult with their parents, go to great lengths to avoid complying with statutes that would require them to do so. There is no basis for concluding that the interests of these minors are well-served by the notification statutes that are intended to protect them.

There also is no scientific evidence that pregnant minors are especially vulnerable to psychological harm from an abortion, are unable to make a reasoned decision about whether to obtain an abortion or are more likely than adults to suffer adverse medical consequences from an abortion. There is, however, empirical data that indicates that parental notification requirements increase the likelihood that a pregnant teenager will delay obtaining an abortion. Teenagers appear to suffer a disproportionate burden from such delay, including, in some cases, postponement of abortions until the second trimester, when health risks increase. Thus, a fair reading of the available empirical data tends to indicate that parental notification requirements actually may harm pregnant minors without conferring substantial off-setting benefits.

ARGUMENT

I. INTRODUCTION

Since 1973, abortion has been a legal option for all women in the United States. Pregnant minors, as well as adult women, have a constitutionally protected right to choose to have an abortion, for "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority." *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 74 (1976). Nevertheless, the circumstances under and the manner in which minors may take advantage of their legal option to terminate an unwanted pregnancy have remained special and emotional issues for policy makers and the courts. *See Risking the Future* at 9. The perception that a minor's decision to obtain an abortion raises unique emotional, health or family-interest issues has spawned legislation specifically regulating the manner in which minors may obtain abortion services. *See generally Planned Parenthood Association of Kansas City v. Ashcroft*, 462 U.S. 476 (1983); *H.L. v. Matheson*, 450 U.S. 398 (1981); *Bellotti v. Baird*, 443 U.S. 622 (1979); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976). Such regulations often are based on the articulated goals of promoting the emotional and physical welfare of the minor and the state's interest in intra-family harmony and unity. *See, e.g.*, Brief of Cross-Petitioners, State of Minnesota, *et al.* at 22-34 (hereinafter "Minn. Br."); Brief of Appellant, State of Ohio at 24 (hereinafter "Ohio Br."). When state regulations impinge upon a constitutionally protected right, however, they must be narrowly tailored to serve a legitimate state interest. *Carey v. Population Services International*, 431 U.S. 678, 686, 688 (1977); *Roe v. Wade*, 410 U.S. 113, 155 (1973).

No one, including *amici*, would quarrel with the laudable goals of promoting family communication and protecting pregnant minors. It is the opinion of these *amici*, however, that these articulated goals are not well-served by the forced intervention of parents or the state into the abortion decision. In the opinion of these *amici*, the doubtful efficacy of notification requirements, particularly when weighed against the burdens they impose on a minor's right to obtain an abortion, raises serious constitutional questions.

These *amici* believe that the comprehensive study of adolescent pregnancy set forth in *Risking the Future* brings a unique and empirically-based perspective to these controversial issues. On the basis of the available data, the *Risking the Future* Panel concluded that parental involvement in an adolescent's decision to seek an abortion should not be mandated; that "minor adolescents should be encouraged, but not required, to involve their parents and partners in the decision-making process." *Risking the Future* at 9-10, 278-79. The Panel's conclusion was based on two subsidiary findings—the lack of a scientific basis for restricting the availability of abortion to adolescents and the delay and attendant health risks which often accompany parental consent requirements. *Id.* As set forth below, it is the opinion of *amici* that the findings set forth in *Risking the Future* and described herein cast grave doubts on the effectiveness and desirability of such restrictions.

II. PARENTAL NOTIFICATION REQUIREMENTS FOR MINORS SEEKING ABORTIONS ARE UNLIKELY TO PROMOTE CONSTRUCTIVE PARENT-CHILD CONSULTATION

A purported purpose of both Minnesota and Ohio's parental notice requirements is the furtherance of parent-child communication. *See, e.g.*, Minn. Br. at 4; Ohio Br. at 24. *Amici* share the view that communication between adolescents and their parents is important and may have salutory effects on many aspects of adolescent sexual be-

havior.[6] Indeed, the Panel concluded that adolescents should be encouraged to involve their parents in the process of pregnancy testing and counseling, *Risking the Future*, at 279, in decision-making with respect to pregnancy resolution options, *id.*, *see also id.* at 281, and in decisions concerning childrearing for those minors who become parents. *Id.* at 286-87.

However, the empirical evidence analyzed by the Panel does not support the proposition that compulsory parental notification will make an appreciable difference in parent-child communications concerning an abortion decision. With or without compulsory notification requirements, parental attitudes about abortion appear to have a significant influence on a pregnant minor's decision to terminate a pregnancy. *Id.* at 113. The data compiled by the Panel indicates that "[m]ost school-age adolescents, especially very young teenagers, consult their parents in deciding to obtain an abortion." *Id.* at 114. For example, in one study,[7] a majority of the 1,170 un-

[6] However, there is little scientific evidence as to the actual effects of parent-child communication on adolescent decisions regarding sexual activity. Research on the effects of parent-child communication on sexual topics "has produced conflicting and inconclusive results." *Risking the Future* at 245-46; *see also id.* at 102-04, 149, 150. Although school- and community-based family planning programs reflect increasing efforts to involve parents, there is limited evidence upon which the effectiveness of these approaches may be measured. *Id.* at 145-46. The Panel stressed that "there is little scientific basis for understanding how these [communication-enhancement programs] are likely to affect teenagers' decisions to delay initiation of sexual activity or to be more diligent contraceptors." *Id.* at 246. While there is evidence that close parent-child relationships may be associated with less sexual activity among younger teenagers, *id.* at 103, this may not be true with respect to older minors. *Id.* Other analyses have not been able to establish a correlation between parent-child communication and the sexual activity of the child. *Id.* at 103.

[7] *Citing* Torres, Forrest, & Eisman, *Telling Parents: Clinic Policies and Adolescents' Use of Family Planning and Abortion Services* 12 Fam. Plan. Persp. 284 (1980) ("Torres").

married, minor abortion patients under the age of 18 surveyed indicated that their parents knew that they were obtaining an abortion. *Id.* at 192. Among very young teenagers, parental influence is particularly strong. *Id.* at 113.[8] Survey data suggests that the younger the patient, the more likely she was to report that her parents knew that she was seeking an abortion and the more likely it was that she was referred to the abortion clinic by her parents. *Id.* at 192.[9]

Indeed, adolescents tend to involve their parents in other areas pertaining to sexual activity even in the absence of parental notification requirements. For example, data indicate that 59% of teenagers seeking contraceptive services from clinics or other organized providers "are sure" or "think" their parents know of their intentions. *Id.* at 158. Of this group, a majority voluntarily told their parents, while for most of the others—and particularly in the case of girls 15 and under—their parents suggested the visit. *Id.*

However, the evidence also suggests that those adolescents who do not voluntarily consult with parents about abortion or other issues relating to their sexual activity probably would continue to avoid such notification, even were it legally required. In the case of abortion decisions, the Panel noted that approximately 25 percent of the teenagers surveyed in the Torres study said their parents did not know of their decision to terminate their pregnancy "and that they would not have come to the clinic if parental consent or notification were required."

[8] *Citing* Steinhoff, Premarital Pregnancy and the First Birth (1976) (Paper presented at the Conference on the Birth of the First Child and Family Formation, Pacific Grove, CA. Report on part of a larger study, Hawaii Pregnancy, Birth Control and Abortion Study. University of Hawaii); Rosen, *Adolescent Pregnancy Decision-Making: Are Parents Important?*, 15 Adolescence 43 (1980).

[9] *Citing* Torres, n.7, *supra*.

Id. at 192. A study reviewed by the Panel of the impact of Minnesota's parental notification requirement—the very statute at issue in *Hodgson*—similarly indicated that a sizeable minority of pregnant minors seeking abortions avoid notification requirements. *Id.*[10] Approximately 43 percent of adolescent minors surveyed in the Minnesota study took advantage of the judicial bypass alternative to parental notification instead of informing *both* parents of their desire to obtain an abortion; about a quarter of these minors reported having notified one parent. *Id.* at 192.

Similarly, among the substantial minority (41%) of teenagers surveyed who sought contraceptive services but did not tell their parents, a majority say they would not have come to a clinic if parental notification were required. *Id.* at 159.[11] Moreover, the second most common reason teenagers choose a family planning clinic rather than a private physician for contraceptive services, according to one study, is to ensure privacy. *Id.* at 160 (26% of adolescents went to clinics over private doctors because they feared doctors would tell their parents; 65% made the decision on the basis of cost).[12] *See also id.* at 273.

A reluctance to tell their parents also causes adolescents to postpone pregnancy testing, *id.* at 173, or, for those who choose to carry their child to term, to delay prenatal care. *Id.* at 198. Such delay is undesirable and

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[10] *Citing* Blum, Resnick & Stark, The Impact of a Parental Notification Law on Adolescent Abortion Decisionmaking (1985) (Unpublished manuscript, University of Minnesota).

[11] Some teens in the latter group would have foregone contraception entirely if required to tell their parents, *Risking the Future* at 159, thus substantially increasing the risk of an unintended pregnancy.

[12] *Citing* Chamie, Eisman, Forrest, Orr, & Torres, *Factors Affecting Adolescents' Use of Family Planning Clinics*, 14 Fam. Plan. Persp. 126 (1982).

dangerous both for teenagers who choose to carry their child and for those who ultimately decide to terminate the pregnancy. *See infra* at 16-20.

In sum, a majority of adolescents involve their parents in many decisions relating to their sexual activity, including, but not limited to, abortion. Younger adolescents are particularly likely to consult and be guided by their parents. However, a significant minority will avoid parental notification when such notification is required, often choosing to forego or delay seeking services instead of involving their parents. This evidence indicates to *amici* that parental notification statutes are unlikely to foster parent-child communication beyond that which already occurs voluntarily.[13]

III. THE CHALLENGED NOTIFICATION STATUTES DO NOT FURTHER ANY DOCUMENTED SIGNIFICANT PSYCHOLOGICAL OR COUNSELING NEED OF ADOLESCENTS

A. The Psychological Considerations

Among the justifications Minnesota and Ohio offer for the challenged statutes are that notification may, in various ways, ameliorate alleged adverse psychological consequences of an abortion. *See, e.g.*, Minn. Br. at 13-15; Ohio Br. at 46. In the opinion of these *amici*, such concerns are not based on scientific fact.

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[13] Pregnant minors are not a monolithic group. *Risking the Future* at 2, 19. *See also H.L. v. Matheson, supra*, 450 U.S. at 419 (1981) (concurring opinion) ("When a minor becomes pregnant and considers an abortion, the relevant circumstances may vary widely depending upon her age, maturity, mental and physical condition, the stability of her home if she is not emancipated, her relationship with her parents, and the like."). For this reason parental notification requirements affect different minors in different and possibly unpredictable ways. Broad-brush legislation, including the Ohio and Minnesota statutes at issue here seem, to these *amici*, particularly ill-suited to address such an inherently individualized and idiosyncratic issue.

At the time the Panel undertook its analysis, there were few studies of the psychological effects of abortion on adolescents, *Risking the Future* at 195, and most did not distinguish between adolescents and adults. *Id.* at 244. While a very few of the studies found that abortion had a slight but measurably more negative effect on the short-term emotional well-being of teenagers than on adult women, *id.* at 196, 244, most studies indicated that the abortion experience is simply not likely to cause severe emotional problems. *Id.*[14] One study suggested that the negative reactions of teenagers to an abortion (primarily depression) are generally mild.[15] Indeed, for all women, including teenagers, a frequent reaction to having an abortion is relief. *Id.* at 195.

After examining the available data, the Panel concluded that existing research simply does not support the assumption that minors are especially likely to experience adverse psychological reactions to an abortion. *Id.* at 277 ("On the basis of existing research . . . the contention that adolescents . . . are especially vulnerable to serious psychological harm as a result of an abortion is not supported.") In particular, scientific research has not shown

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[14] At least some of the few studies which suggested that there may be measurable differences in the short-term emotional well-being of adult women and adolescents following an abortion did not control for other potentially explanatory variables, such as the timing of the procedure. *Id.* at 244. Other factors, which may contribute to the slight differences in effect include gestational age, delay and social support. *Id.* at 196.

These studies cast serious doubt on the assumption articulated in *H.L. v. Matheson*, that "[t]he medical, emotional, and psychological consequences of an abortion are serious and can be lasting; this is particularly so when the patient is immature." 450 U.S. at 411. Significantly, the studies upon which the *Matheson* court relied, *id.* at n.20, pre-date those examined by the Panel by at least a decade.

[15] *Citing* Adler & Dolcini, *Psychological Issues In Abortion for Adolescents* in *Adolescent Abortion: Psychological and Legal Issues* (G. Melton ed. 1986).

that mandated parental involvement helps adolescents cope with their decision to have an abortion. *Id.*[16] Similarly, the Panel found that the concern that adolescents are unlikely or unable to make well-reasoned conclusions lacks empirical support. *Id.* Given the absence of evidence to support or refute the belief that adolescents lack the cognitive capacity to make rational decisions about pregnancy termination, *id.* at 9, the Panel concluded that there is no scientific basis for restricting the availability of abortion on the basis of age. *Id.*

What the evidence does show is that confidentiality is a factor in a minor's choice of abortion providers. *Id.* at 279. ("Factors of cost and confidentiality lead most teenagers to clinics for [abortion] services."). The need to protect the confidentiality of an adolescent's decision to seek health care services relating to sexual activity has been widely recognized. At the time *Risking the Future* was written, 29 other states and the District of Columbia specifically allowed minors to give their own consent for family planning services. *Id.* at 157. The same sensitivity to the privacy interests of minors causes the vast majority of contraceptive providers to provide services to adolescents, particularly to teenagers over 15, without the

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[16] Since the Panel completed its work, more recent studies have been conducted, the results of which appear to be consistent with the findings of the Panel. *See, e.g.*, Brief for *Amici Curiae* American Psychological Association, et al., filed September 1, 1989, *citing* Ambuel, Developmental Change in Adolescents' Psychological and Legal Competence to Consent to Abortion: An Empirical Study and Quantitative Model of Social Policy (1989) (Dissertation Abstracts Int'l); Ambuel & Rappaport, Developmental Change in Adolescents' Psychological and Legal Competence to Consent to Abortion (1989) (Paper presented at American Psychological Association Convention); APA Interdivisional Committee on Adolescent Abortion, *Adolescent Abortion, Psychological and Legal Issues*, 42 Am. Psychologist 73 (1987). Neither these *amici* as individuals, nor the Panel as a group, have independently reviewed these subsequent studies.

minor's parents' consent.[17] *Id.* at 155-56. Indeed, the Minnesota legislature has expressly relieved minors of the need to obtain parental or other adult consent "for medical, mental and other health services to determine the presence of or to treat pregnancy and conditions associated therewith, venereal disease, alcohol and other drug abuse." Minn. Stat. § 144.343 (1988).

The Panel recognized that the preservation of confidentiality is important to adolescents seeking assistance with respect to choices concerning their sexual behavior. *See, e.g., Risking the Future* at 8, 169, 170. It stressed the importance of privacy in every aspect of adolescent decision-making related to their sexual activity, emphasizing that "the girl or woman should be treated with the same dignity, *confidentiality*, kindness, and excellence of health care that are due any patient." *Id.* at 9 (emphasis added). *See also id.* at 278.

B. The Counseling Considerations

Both Ohio and Minnesota emphasize a need to protect teenagers from making an uninformed decision to terminate a pregnancy. *See, e.g.*, Minn. Br. at 32; Ohio Br. at 13 ("state's interest [is] in protecting a minor from the

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[17] Only one percent of Planned Parenthood affiliates, 10 percent of public health departments and other providers and 19 percent of hospitals required parental consent or notification. *Id.* at 155. More agencies require parental consent or notification for teenagers under 15 years of age. The figure for private physicians is lower: 59 percent of a national sample of physicians (including obstetrician-gynecologists, general practitioners and pediatricians) were willing to provide services to unmarried minors without parental consent. *Risking the Future* at 156-57. Physicians were less likely to serve minors without requiring parental consent in states which had not enacted legislation permitting minors to provide their own consent. *Id.* at 157. *Citing* Orr, *Private Physicians and the Provision of Contraceptives to Adolescents*, 16 Fam. Plan. Persp. 83 (1984).

long range consequences of an ill-advised abortion decision"). Relying heavily on Justice Stewart's comment in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 91 (1976) (concurring opinion), that "[i]t seems unlikely that [a teenage girl] will obtain adequate counsel and support from the attending physician at an abortion clinic, where abortions for pregnant minors frequently take place,"[18] both states suggest that parental notification helps ensure that a pregnant teenager has been adequately counseled prior to the abortion procedure. *See* Minn. Br. at 35; Ohio Br. at 27 (unlikely that minor will obtain adequate counsel from clinic).

The Panel's research does not support the assumption that non-parental counseling, particularly that of abortion providers, will necessarily be inadequate. The Panel found abortion clinics typically provide extensive counseling:

> All clinics make abortion counseling available on request; such counseling generally consists of describing the procedure and explaining its risks, obtaining informed consent, and confirming that it was the patient's own decision to have the procedure. [One researcher] reports that 90 percent of clinics routinely counsel all first-abortion patients; 88 percent of clinics provide decision counseling to help a young woman explore the various factors that are involved in making an informed decision about the termination of her pregnancy. Nonprofit clinics appear to place greater emphasis on counseling than for-profit facilities. As a matter of policy, 68 percent of clinics provide a pregnancy test before per-

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[18] Justice Stewart's sweeping conclusion is based on an excerpt from the record in *Bellotti v. Baird*, 428 U.S. 132 (1976), describing the counseling procedures in one abortion clinic. *See Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. at 91 n.2. The empirical evidence suggests that the procedures described in *Bellotti* may not be representative of the counseling generally provided to pregnant minors.

forming an abortion, even when a test has been provided elsewhere. In addition, 93 percent routinely provide a post-abortion clinic visit.

Risking the Future at 191-92. "Adherence to principles of voluntarism and informed consent" requires family planning/abortion clinics to engage in comprehensive counseling, embracing "an account of the possible risks, benefits, and consequences of maternity and abortion, the available alternatives, including adoption, and the resources available for needed care." *Id.* at 174. Thus, the evidence compiled by the Panel does not support the presumption that non-parental counseling available to minors seeking to terminate an unwanted pregnancy is inadequate.

IV. PARENTAL NOTIFICATION REQUIREMENTS IMPOSE SUBSTANTIAL, UNJUSTIFIED BURDENS ON PREGNANT MINORS

As discussed above, in the opinion of these *amici*, the relevant scientific literature does not provide support for the proposition that parental notification or consent requirements actually foster familial communication, are necessary to reduce the likelihood of adverse psychological consequences to pregnant minors or contribute substantially to the minor's ability to make an informed decision about abortion. There is, however, one measurable effect of consent or notification provisions—delay and increased burden for the pregnant minor who seeks to obtain an abortion. *Id.* at 194.

A. Notification Requirements Result In Delays Which May Lead To Increased Health Risks

Where performed early in a pregnancy, abortion is a relatively safe procedure. Little risk of medical complications attaches to abortions performed by qualified professionals in the first trimester of pregnancy. *Id.* at 278. The health risks associated with early, legal abortions are

no greater for adolescents than for adults and generally appear to be lower. *Id.* at 125, 278.[19]

Delays in seeking advice about pregnancy termination or in obtaining an abortion can have adverse consequences, however. *Id.* at 194, 277. For instance, in *Hodgson v. Minnesota*, 648 F. Supp. 756, 765 (D. Minn. 1986), the Court found as a matter of fact that "[e]ven delays of less than one week may push a woman into the second trimester. Second trimester procedures entail significantly greater costs, inconvenience, and risk." 648 F. Supp. at 765.

Ironically, the delays associated with notification or consent requirements have an especially devastating effect on the very class of individuals that such procedures are intended to protect. As a group, teenagers are far less likely than older women to obtain abortions during the first trimester of their pregnancies. *Risking the Future* at 114. The younger the pregnant minor, the more likely she is to delay. According to one source, 34 percent of abortions to girls age 15 and younger are performed during the first eight weeks of gestation, compared with 41 percent of abortions among girls ages 15-19 and 51 percent of those among women ages 20-24. *Id.*[20] The delay has been attributed to the inability of teenagers, particularly younger teenagers, to recognize the signs of pregnancy or to distinguish them from normal menstrual irregularities. Teenagers also tend to deny that they are pregnant. *Id.*

Whatever the reason for the initial delay, statutorily imposed parental notification requirements appear to exacerbate a troublesome situation by increasing the like-

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[19] By contrast, the health risks of pregnancy and child birth are substantially higher for very young mothers than for adult women. *See generally id.* at 123-125.

[20] *Citing* Alan Guttmacher Institute, *Teenage Pregnancy: The Problem That Hasn't Gone Away* (1981).

lihood that a pregnant teenager will delay obtaining an abortion. *Id.* at 194, 278. The requirements (or the perception of such requirements) are thought to inhibit some teenagers from seeking and obtaining abortions. *Id.* at 114. In addition, the statutory schemes typically impose waiting periods after parental notification has been accomplished. For instance, the statute enacted by the Minnesota legislature requires that both parents be given forty-eight hours written notice, with notice commencing at the time of delivery or on the next day, if notice is mailed. Minn. Stat. § 144.343. The trial court found that this procedure delayed the minor's abortion by at least forty-eight hours or more commonly seventy-two hours. *Hodgson v. State of Minnesota*, 648 F. Supp. 765, (D. Minn. 1986). The Ohio legislation requires that notification be provided to parents at least twenty-four hours prior to the abortion. Ohio Rev. Code Ann. § 2919.12(B)(1)(a)(i) (1989).

Moreover, as discussed above, many teenagers who do not voluntarily consult with their parents choose to use a judicial bypass proceeding rather than to comply with the notification provision. *Risking the Future* at 192. Judicial bypass proceedings allow a minor to establish that she is mature enough to make the decision without consulting her parents or to establish that parental consultation would not serve her best interests.[21] Minors who avail themselves of the judicial bypass alternative to parental notification are often found to be mature. *Id.* at 195. For those minors deemed immature, abortions are almost always found to be in their best interest. *Id.*[22]

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[21] To serve the best interests of minors, the proceeding should be expeditious, confidential and accessible.

[22] In Massachusetts, for example, between April 1981, when the consent statute took effect, and February 1983, about 1,300 minors sought an abortion through the judicial bypass procedure. In 90 percent of the cases the minor was judged to be mature; in the remaining cases, all but five requests for abortions were approved, according to the best interest standard. In three of the cases denied, the trial court's decision was overturned on appeal; in one case the judge invited the minor to seek approval from another judge, who granted the petition; and in the last case the minor decided to go to a neighboring state for an abortion (Mnookin, 1985). Similar findings have been reported in Minnesota (Donovan, 1983).

Risking the Future at 195.

A judicial bypass proceeding may require the minor to travel to another jurisdiction and wait for some period prior to obtaining access to the courts. *Id. See Hodgson v. Minnesota*, 648 F. Supp. at 763 (initial stages of proceeding may take a week or more; minor may need to travel to another jurisdiction). In the case of the Ohio proceeding, delays of twenty-two days are likely. *Akron Center for Reproductive Health v. Slaby, et al.*, 854 F.2d 852, 867 (6th Cir. 1988). Delays of this magnitude, especially when combined with some pregnant teenagers' delays in recognizing or taking decisive action when confronted with an unwanted pregnancy, could result in postponement of the abortion until the second trimester.

B. The Delay Caused By Parental Notification Statutes Disproportionately Burdens Minors Because Of Their Limited Access To Abortion Facilities

Teenagers generally have less access to abortion providers than do adult women. *Risking the Future* at 114.[23] Geographical constraints as well as costs hinder minors seeking abortion services. *Id.*[24] *Hodgson v. Minnesota, supra*, 648 F. Supp. at 761.

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[23] *Citing* the Alan Guttmacher Institute, *Teenage Pregnancy: The Problem That Hasn't Gone Away* (1981).

[24] The district court in *Hodgson* found that 94% of the counties in Minnesota had no readily available abortion providers and that virtually all of the abortion providers in Minnesota were located in Duluth or Minneapolis-St. Paul. 648 F. Supp. at 761.

Where the delay imposed by parental notification requirements results in postponement until and within the second trimester, access to abortion services becomes even more limited. One study reviewed in *Risking the Future* found that while seventy-two percent of abortion providers surveyed will perform an abortion at ten weeks, only thirty-two percent will perform one at thirteen weeks, twenty-one percent at fifteen weeks and only five percent at twenty-one weeks. Eighty-two percent of abortion providers do not perform abortions after the first trimester. *Risking the Future* at 191. Given many minors' already limited access to abortion services, any delay that causes postponement until the second trimester could prevent the minor from exercising her right to obtain an abortion.

Second trimester abortions also are substantially more expensive than first trimester abortions.[25] *Id.* at 193. *See also Hodgson v. Minnesota, supra*, 648 F. Supp. at 761. The increased cost of a second-trimester abortion may prove to be an insurmountable barrier for a pregnant minor. *See Risking the Future* at 114 (geographical distances and costs limit teenagers' access to abortion, especially school-age girls and those from poor families).

In sum, it is the conclusion of these *amici* that parental notification requirements impose substantial and unwarranted burdens on pregnant adolescents by causing delay and postponement of the minor's abortion. These delays not only result in increased health risks but may create insurmountable barriers due to the decreased availability of abortions after the first trimester.

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[25] In 1981, hospital charges for abortions averaged $735, as opposed to $227-$230 in 1983 for non-hospital facilities. *Risking the Future* at 193.

CONCLUSION

Amici urge the Court to assess the claims of the parties in light of the findings set forth in *Risking the Future*. Specifically, *amici* believe that the scientific studies examined in *Risking the Future* do not support the claim that minors present an increased risk of psychological trauma or adverse medical consequences from abortions. The studies suggest to these *amici* that the statutes will not contribute to constructive intra-family communication. Nor is the available scientific literature consistent with claims that any delay that results from the restrictions will be insignificant. *See* Minn. Br. at 17; Ohio Br. at 37. To the contrary, it appears more likely that the delays in these notification proceedings will result in a higher degree of risk to the health of pregnant adolescents who ultimately obtain an abortion. To these *amici*, this burden of increased risk appears to outweigh any benefit to be derived from parental notification provisions.

Respectfully submitted,

HANNAH E.M. LIEBERMAN *
PAMELA H. ANDERSON
(Counsel of Record)
SHAW, PITTMAN, POTTS
& TROWBRIDGE
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8000
Attorneys for Amici Curiae

Dated: October 14, 1989

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* Robin G. Hayutin, Leslie Stout Tabackman and Nancy Sherbow contributed to the preparation of this brief.

APPENDIX

APPENDIX

Eugene S. Bardach	Professor, School of Public Policy University of California, Berkeley
Davidson, Ezra C., Jr.	Chairman, Department of Obstetrics-Gynecology Drew University of Medicine & Science
Dryfoos, Joy G.	Independent Researcher & Writer
Daniel D. Federman	Professor of Medicine Harvard Medical School
Forrest, Jacqueline Darroch	Vice President for Research The Alan Guttmacher Institute
Furstenburg, Frank F., Jr.	Professor of Sociology University of Pennsylvania
Ginsburg, Herbert P.	Professor of Developmental & Educational Psychology Columbia University
Jessor, Richard	Professor of Psychology & Director, Institute of Behavioral Science University of Colorado
Jones, Judith E.	Associate Professor of Public Health Columbia University
Kessen, William	Higgens Professor of Psychology Yale University
John Modell	Professor of History Carnegie Mellon University
Starfield, Barbara	Professor of Health Policy and Pediatrics The Johns Hopkins University, The Johns Hopkins University School of Medicine
Whalen, Carol K.	Professor, Social Ecology University of California, Irvine

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IN THE

SUPREME COURT OF THE UNITED STATES

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v.

STATE OF MINNESOTA, et al.,
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On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF AMICUS CURIAE OF THE ELLIOT INSTITUTE FOR SOCIAL SCIENCES RESEARCH, AND THE AMERICAN ACADEMY OF MEDICAL ETHICS.

Stephen R. Kaufmann
P.O. Box 5131
Illinois Building, Suite 800
Springfield, Illinois 62705
(217) 544-1144
Attorney for Amici Curiae

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BRIEF AMICUS CURIAE OF THE ELLIOT INSTITUTE FOR SOCIAL SCIENCES RESEARCH, AND THE AMERICAN ACADEMY OF MEDICAL ETHICS.

INTERESTS OF AMICI

The Elliot Institute for Social Sciences Research, and the American Academy of Medical Ethics favor holding the Minnesota statute, Minn. Stat. Ann. §§ 144.343 (2)-(7) (1987) constitutional in its entirety. Amici believe that limitations on State regulation of abortion have resulted in the exploitation of women and minors who are at high-risk of suffering abortion related complications. Knowing that these high-risk women are being coerced into abortion for the convenience of others, Amici supports parental and State involvement which protects women from unwanted abortions and which preserves their natural rights to reproductive freedom.

SUMMARY OF ARGUMENT

Thirty to sixty percent of all women having abortions actually want their child-

ren.[1] Many of these women submit to unwanted abortions only because they feel pressured or coerced into aborting pregnancies which are "unwanted" by their boyfriends, husbands, physicians, counselors, welfare workers, or population planners. The involvement of parents may often be the only protection a minor has from the pressures which make her feel abortion is her "only choice."

It is an undeniable fact that abortion involves health risks. Though the exact frequency and extent of these risks are in dispute, the right to evaluate these threats properly lies with the State. The State has a right to judge the "significance" of the health risks of any product or service and to regulate or prohibit trades or practices accordingly. This

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[1] M. Zimmerman, Passage Through Abortion, 110-112 (1977) (hereinafter Zimmerman); D. Reardon, Aborted Women - Silent No More, 12,51 (1987) (hereinafter Reardon).

right includes the right to regulate reproductive technologies, including abortion.

Abortion, itself, is not a fundamental right, but rather an "evolved" right. In Roe v Wade, 410 U.S. 113, 163 (1973) this right was described as evolving from advances in medical technology by which abortion may now be safer than childbirth. According to this reasoning, as technological changes reveal abortion to be more or less dangerous, the State's "compelling" interests increase or decrease proportionately. Therefore, since abortion involves risks even in the first trimester, some of which were not recognized prior to Roe, the State has a compelling interest in regulating abortion throughout pregnancy.

The fundamental issue before this Court is to identify the proper balance between the rights of individuals and of the State. Amici will show that the right of States to regulate birth control technologies

includes the right to regulate abortion. Yet at the same time, Amici recognizes that the State's right to regulate these technologies, is properly limited by the inherent and natural right of individuals to conceive and bear children.

Such a balance of natural rights versus regulation of technology can and should be enunciated, especially now when individual rights are being threatened as never before. In the place of the present confusion surrounding "privacy" rights, Amici offers the Court a clear rationale and timeless standard for protecting both the natural reproductive rights of individuals and the right of State to regulate technologies and commerce.

ARGUMENT

I. PARENTAL NOTIFICATION REQUIREMENTS SERVE TO PROTECT MINORS FROM BEING COERCED INTO UNWANTED ABORTIONS.

Many women and minors face coercive pressure to undergo unwanted abortions of desired pregnancies.[2] Furthermore, it has been shown that 65 to 70 percent of women

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[2] Between 30 and 60 percent of women having abortions have a positive desire to carry the pregnancy to term and keep their babies. [Zimmerman,110-12,120; Reardon, 12,51] This desire to keep the child is overcome only by external pressures. In a study of over 250 women who had suffered physical or psychological aftereffects from abortion, 55 percent felt "forced" into an unwanted abortion by others and 64 percent felt "forced" by their circumstances. Only 33 percent felt free to make their own decision, and 61 percent felt their lives and decisions at that time were very much "controlled by others." [Reardon, 10-11] Pro-choice researchers have similarly found that over two-thirds of the women made statements suggesting they had "no choice" or were "forced" to have an abortion. [Zimmerman, 193] Testimony from minors who were coerced into abortion are included in the appendices to this brief.

seeking abortions have a negative moral view of abortion.[3]

Coercion and moral ambivalence are the primary factors which determine whether or not a woman is likely to suffer long-term mental health problems as a result of her abortion. Women are at high risk of severe post-abortion psychiatric reactions if: 1) they feel coerced by others, either overtly or covertly, into choosing an abortion; 2) they feel "forced" by circumstances into aborting a wanted pregnancy; 3) they have ambivalent feelings about the moral rightness of their abortion; or 4) if they have unresolved feelings of desire for their pregnancies or their babies.[4]

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[3] Zimmerman, 69; Reardon, 13

[4] Friedman,et.al.,"The Decision-Making Process and the Outcome of Therapeutic Abortion", Am. J. Psychiatry, v.131, 1332-1337 (1974) (hereinafter Friedman); Senay, "Therapeutic Abortion: Clinical Aspects", 23 Archives of Gen. Psych., 408-415, (1970); Lazarus, "Psychiatric Sequelae of Legalized Elective First Trimester

Abortion", 4 J. of Psychosomatic Ob&Gyn, 141-150 (1985); Pare and Raven,"Follow-up of Patients Referred for Termination of Pregnancy",The Lancet, v.1, 635-638 (1970); Reardon, 131-38.

If any of these conditions exist, the woman is likely to experience her abortion as in conflict with her maternal instincts and moral self-image. For these women, abortion is not a glorious right by which they are able to reclaim control over their lives; instead it is an "evil necessity" to which they are forced to submit because they "have no choice." Rather than affirming their values, these women feel forced to compromise and betray their values. The resulting blow to a woman's self-image can result in: suicidal behavior, drug and alcohol abuse, radical personality changes, loss of interest in previously enjoyed activities, emotional breakdown, memory loss, eating disorders, sexual dysfunction, psychosomatic illness, emotional numbness, sleep disorders, increased tendency toward violence, child abuse, difficulty bonding with later children, and more. The summary of a detailed survey of 100 high-risk abortion patients, entitled "Post-Abortion Reactions of High Risk Abortion Patients," has been lodged with this brief.

It is noteworthy that the criteria for high risk abortion patients - feelings of being under pressure to abort and feelings of ambivalence - are typical of women who abort for reasons of physical health. psychological health, fetal malformation, and rape or incest. Indeed, when viewed within the framework of high-risk criteria, all of the categories typically associated with "hard case" abortions are actually contra-indications for abortion. While there are

Sixty to eighty percent of all women having illegal abortions can be classified as "soft-core" aborters who choose abortion only to please others, or because they feel at a loss for other options.[5] For these women, abortion is at best a marginal choice, at worst a choice which is literally forced upon them. Very few of these women would freely choose abortion in

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many reasons for this, a simplified explanation is that the harder the circumstances which a pregnant woman faces, the more likely she is to feel "forced" into a decision which is not freely her own. See Rayburn and Laferia,"Mid-Gestational Abortion for Medical or Genetic Indications", Clinics in Ob&Gyn. (1986), vol.13,no.1., Heath,"Psychiatry and Abortion", 16 Canadian Psych. Assoc. Journal, 55-63 (1971); Blumberg, et.al. "The Psychological Sequelae of Abortions Performed for a Genetic Indication", 122:7 Am. J. Ob&Gyn. (1975), Mahkorn, "Pregnancy and Sexual Assault", and Maloof "The Consequences of Incest: Giving and Taking Life", The Psychological Aspects of Abortion, Mall and Watts, eds. (1979); Reardon, 161-218; Friedman, 1332-1337.

[5] Reardon, 131-134,297-300.

the presence of emotional, social, or financial support. Very few would have had an illegal abortion under the protection of pre-Roe laws.[6]

Thus, one effect of legalizing abortion has simply been to make it easier to pressure women into unwanted abortions. Parents are frequently the only ones who can help to alleviate these pressures.[7]

Ironically, nothing prevents parents from forcing their daughters to have abortions. Such coercion is in fact, rela-

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[6] Only 6 to 20 percent of the women having abortions would have been willing to seek an illegal abortion. Osofsky, eds., The Abortion Experience, 196-98 (1973); Reardon, 13.

[7] In the Reardon sample of 252 high-risk women, 83 percent stated they would have kept the pregnancy if they had been encouraged to do so by one or more other persons, and 84 percent would have carried to term under "better circumstances." To the degree that parents may provide the encouragement or circumstantial aid which a minor needs and wants, young girls can be helped to avoid the "evil necessity" of an unwanted abortion. [Reardon, 10-11]

tively common. [Reardon, 11] There are even documented cases where the parent with custody of a child forced an abortion on the girl which the non-custodial parent would have prevented. [Reardon, 212-218]

Parents who would take a pro-abortion stance almost inevitably get the opportunity to force their will upon their child, since a pregnancy cannot be hidden forever. Yet parents who would support and encourage a daughter to keep her child are often denied any input.

In short, without parental notification, present law acts as a one way funnel which allows parents to pressure their daughters into abortions, yet prevents those parents who would support childbirth from helping their daughters avoid unwanted abortions.

II. PARENTAL NOTIFICATION REQUIREMENTS PROVIDE HELP TO REDUCE OR PREVENT THE HARMFUL AFTEREFFECTS OF ABORTION IN MINORS.

Roe recognized that women do not have an absolute right to abortion, but rather that it is "primarily a medical decision, and basic responsibility for it must rest with the physician." (at 166, also 163) Yet parental involvement is equally important, and perhaps even more important, since the attending physician may have little or no knowledge of the girl's medical history. Worse yet, the abortion providers may have a blatant disregard for a young girl's medical history.[8]

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[8] In 1986, Mrs. Wallis B. Renner filed a $1 million lawsuit against Planned Parenthood of Central Indiana claiming they risked the life of her 16-year-old daughter in providing her with an abortion despite two court orders blocking the abortion. Mrs. Renner had obtained the court orders because her daughter had certain abnormalities of the cervix which her own doctor testified would cause serious physical problems or even death if the girl underwent an abortion. The Planned Parenthood

In addition parents have an obvious need to know when their child has been through an abortion so that they can provide special care if and when it becomes necessary. The fact that a minor might be too ashamed to tell her parents about an abortion is highly suggestive that she has conflicting feelings about her decision, and thus is more likely to be a high-risk patient. Furthermore, to allow the abortion to remain hidden only increases the pressure on the daughter to repress and hide her feelings which, in turn, may aggravate her long-term reaction.

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counselors even denied Mrs. Renner the right to ensure that the out-of-state abortionist was informed of her daughter's condition. Following the abortion, Mrs. Renner's daughter suffered severe cramps for which she required treatment. Bond, "Mother Files $1 Million Lawsuit," National Right to Life News, October 23, 1986, p6.

III. ROE DID NOT GRANT WOMEN A FUNDAMENTAL RIGHT TO ABORTION, BUT FOUND THIS NEW RIGHT AS EVOLVING FROM THE DEVELOPMENT OF NEW TECHNOLOGIES WHICH MAY HAVE MADE ABORTION "SAFER THAN CHILDBIRTH."

The challenge against State notification laws hinges on the contention that such laws impose undue hardship on a minor's exercise of her fundamental rights. But access to abortion technology is clearly not a fundamental right of women, as can be seen by the fact that Roe assigns responsibility and control over abortion primarily to the attending physician. Roe, 410 U.S. at 163 and 166.

But if the consultation and consent of a physician can be required in the making of this health decision, why not the consultation and consent of parents? Why not the consultation and consent of the State? Parents and the State have an interest in safeguarding the health of women which is

equal to or greater than that of individual physicians.

The following arguments will examine the State's compelling interest in safeguarding the health of women through parental notification or direct regulation of abortion technology.

A. ABORTION TECHNOLOGIES INVOLVE HEALTH RISKS WHICH WERE NOT KNOWN, WERE NOT UNDERSTOOD, OR WERE OTHERWISE IGNORED IN ROE V. WADE.

While Roe considered only the mortality rate of abortion in its determination that abortion is "safe," new evidence suggests that there are unforseen psychological and reproductive complications resulting from abortion. These health risks have been amply documented for the Court in other briefs and the medical literature and will not be elaborated on here.

Notably, even proponents of abortion do not claim that it is risk free.[9] Indeed, they oppose notification requirements on the grounds that a delay in procuring an abortion can result in a statistically significant increased mortality risk. Hodgson v Minnesota, 648 F.Supp. 756, 764-65 (1988). But if such statistical risks are compelling enough to warrant judicial action, then certainly the State can also find in the same statistical risks compelling reasons for regulating abortion.

Abortion's defenders do not deny its risks so much as downplay them, arguing

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[9] In fact, the undesirable nature of abortion is universally acknowledged. Abortion providers go to great lengths to encourage sterilization or improved birth control practices for patients, and frequently express disdain toward women who come back seeking repeat abortions. [Francke, The Ambivalence of Abortion, 182 (1978)] If there is nothing wrong with abortion, why do abortion supporters advocate its avoidance? If abortion is "safe," why not promote its use in place of the Pill which has numerous health risks.

that the damages caused by 1.5 million abortions per year are "acceptable" or "minimal." But such evaluations are clearly value judgments. If the State can be concerned about unintended deaths from abortion, why not subsequent miscarriages or ectopic pregnancies? Who is to decide what the "acceptable" limits of abortion induced depression, guilt, suicide, or child abuse are to be?

If the Court continues to reserve to itself the right to judge the relative risks of abortion, will it require that the Surgeon General bring future research into the aftereffects of abortion before the Court to be ratified and approved? Or is all future research irrelevant once the Court has declared this technology to be safe? Obviously not.

Given the uncertainty surrounding the impact of all technologies, the State's compelling interests may change with time.

The State must be free to adjust regulation of technology in accordance with such new information and needs.

B. THE STATE'S TWO-FOLD INTEREST IN PROTECTING THE HEALTH OF WOMEN AND PROTECTING THE LIFE OF HUMAN EMBRYOS MITIGATES AGAINST ANY ABSOLUTE RIGHT TO ABORTION TECHNOLOGY.

Since abortion has health risks, even during the first trimester, the State may find in these risks a compelling interest to protect women from these risks throughout pregnancy.[10]

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[10] The State's right to regulate this technology is especially important since there is no guarantee that women considering abortions will be adequately and accurately informed of the health risks or will be in the proper emotional state to rationally weigh these risks. The record of abortion providers withholding information about the risks of abortion for fear of discouraging their client from "the right choice" has been well documented by numerous sources. For a review of the literature see Reardon, 232-271.

IV. ROE DID NOT RECOGNIZE AN ABSOLUTE RIGHT OF ABORTION, BUT RATHER FOUND THIS NEW "RIGHT" AS HAVING EVOLVED FROM TECHNOLOGICAL ADVANCES.

The rationale for the abortion right enumerated in Roe rests entirely on the disputed "fact" that advances in medical technology make "abortion in early pregnancy...relatively safe"(at 149) and that today "mortality in abortion may be less than mortality in normal childbirth." (at 163).

But how can a "fundamental" human right come into existence only when abortion appears to be safer than childbirth? If it is a fundamental right, then it is a right which exists regardless of its dangers. By what power can any fundamental right be expanded or contracted merely by changes in medical technology?

The answer is that abortion is not a fundamental right. Rather, it is an

evolved right which rests upon advances in medical science.

Because it was dealing with an evolved right, the Roe majority erred in thinking that the medical "facts" which it found to be compelling in 1973 would not change with the acquisition of new knowledge, new technologies, and new social values in 1990 and beyond. If at one moment in history the State's "legitimate interests in protecting both the pregnant woman's health and the potentiality of human life" (Roe, 410 U.S. at 115,149) can contract, then at another point in history they can expand. If, for example, new technologies make unsuspected risks more apparent, the State's rights may expand. Similarly, knowledge of fetal development, new theories of "meaningful life," and advances in fetal medicine and

artificial wombs may also change the States "compelling" interests over time.[11]

V. THE STATE HAS A LEGITIMATE INTEREST IN REGULATING BIRTH CONTROL TECHNOLOGIES SUCH AS ABORTION.

A. THE MEDICAL COMMUNITY IS ALREADY LEGITIMATELY REGULATED BY GOVERNMENT BODIES, AND THIS REGULATION INCLUDES REGULATION OF BIRTH CONTROL TECHNOLOGIES.

B. THE RIGHT OF THE STATE TO CONTROL BIRTH CONTROL TECHNOLOGIES IS ALREADY ESTABLISHED IN CONSTITUTIONAL LAW.

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[11] In its eagerness to grant physicians the right to perform "safe" abortions, which many States were already recognizing, the Roe majority's fundamental error was in granting itself the authority to restrict and define those interests which the State could find to be "compelling." If the State is not free to be guided by its own judgments of what is compelling and what it not, then the State is not free at all.

In Griswold v. Connecticut 381 U.S. 479 (1964), at 485, the Court recognized that the State could regulate the manufacture, sale, and distribution of contraceptives in the same way that it is empowered to regulate any other trade or commerce.[12]

As emphasized in Griswold, the failure of the Connecticut law was not that its goals, or even its means were illegitimate, but rather that its means were incongruous with other laws. To allow the manufacture and distribution of contraceptives, but to ban their "use" is unreasonable. Such a

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[12] In his dissent in Poe v. Ullman, 367 U.S. 497 (1960), which anticipated his majority opinion in Griswold, Justice Douglas recognizes that States would have a right to ban completely the sale of contraceptives through drug stores, or even ban the manufacture of contraceptives because: "Where either the sale or the manufacture is put under regulation, the strictures are on business and commercial dealings that have had a long history with the police power of the States. The present law, however, deals not with sale, not with manufacture, but with use." (at 519).

means, in the absence of less intrusive controls, "sweep unnecessarily broadly and thereby invade the area of protected freedom." (at 485) The necessity of proving the use, not just possession, of contraceptives to enforce this law clearly would involve severe invasion of marital privacy. Nonetheless, as Griswold allows, the State does have the right to regulate contraceptives by other means.

Similarly, in Eisenstadt v Baird, 405 U.S. 438, 443,454 (1971) and White concurring, at 463, the plurality allows for the State's legitimate interests in regulating contraceptives for the purposes of protecting health or discouraging extra-marital relations. In its recognition of these interests, Eisenstadt supports the present arguments of Amici.

But the Eisenstadt decision warrants further discussion because while the Court therein acknowledged the State's right to

regulate birth control technologies, in fact the plurality did not allow itself to be governed this principle. Instead the Court gave itself the authority to strike down the Massachusetts law on the grounds that it doubted the sincerity of the Massachusetts legislators' goals.[13]

Specifically, the Court questioned the sincerity of the Massachusetts' legislation

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[13] Though the State sincerely claims its legislation is intended to be a health measure, the majority rejects that claim. (at 452) The State claims further that its legislation is intended to deter immorality, and the Court finds this claim to be absurd. (at 449) When the Court thus judges the sincerity of duly elected legislators, the Court overreaches itself. If legislators are insincere and oppressive in their legislative efforts, they will be forced to answer to the people when seeking reelection -- especially if their insincerity is leading them to oppress the people's rights. But if their reasoning, even if flawed, represents the opinion of the majority of citizens, than the legislature's rationale is a reasonable representation of the people's will. Similarly, whether or not a State's legislation is effective at reaching difficult goals is an issue for the legislatures to decide, not the judiciary.

regulating distribution of contraception on moral grounds because the State allowed for the "exception" of unregulated distribution of condoms.(at 448,449) But this "exception" existed because the State chose to classify condoms as being primarily a prophylactic with a secondary effect as a contraceptive. For logical reasons the State therefore chose to regulate prophylactics differently than other contraceptives.[14] Given the present AIDS crisis, which Surgeon General Koop assures us can be alleviated by the promotion of condoms, the Eisenstadt decision appears in hindsight to have dismantled an important public health

[14] And even if condoms should be classified as a contraceptive, the simple fact that a State prefers to encourage the use of one contraceptive method over another, does not provide constitutional grounds for preventing States from regulating birth control technologies which it does not favor.

policy which gave preferable treatment to prophylactic birth control devices.

The existence of "exceptions" in any law is not proof of a legislature's insincerity, much less its unconstitutionality. If the laws appear to be filled with "exceptions", such is the natural result of legislatures working to achieve compromises which reflect both charity and justice, freedom and control. Though the law in question was imperfect and prone to "exceptions," such compromises are the backbone of American legislation.[15]

The Eisenstadt plurality further ruled that States could not limit distribution of contraceptives to physicians simply because the Court did not believe that protecting the health and ensuring accurate contracep-

[15] When the judiciary sets itself up to judge the sincerity of legislator's motives and the logical purity of their laws, it is doing nothing less than engaging in judicial activism. (see Griswold, 381 U.S., Black dissenting, 520-524)

tive advice was the true intention of the legislature.(at 450-451) But even if one ignores this disparagement of the Massachusetts legislature's integrity, this argument fails because it takes a very narrow view of the State's health concerns. Birth control technologies involve a broad range of health and social issues, including the risk of unplanned pregnancies.

Specifically, the Eisenstadt majority forbad State regulation of the distribution of contraceptives which have no health risks. (at 451, White concurring, 464) But spermicidal agents, the contraceptive at issue in Eisenstadt, are now known to carry the risk of causing genital irritation, infection, serious fetal malformations, and miscarriage.[16]

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[16] Jick, "Vaginal Spermicides and Congenital Disorders" 245 J.A.M.A. 1329-32 (1981). In Wells v Ortho Pharmaceutical Co., 615 F.Supp. 262 (N.D. Ga. 1985), plaintiffs were awarded $5.6 million in compensatory damages for birth defects

Since the health effects of any technology can remain undetected for many years, it is imprudent for the Court to ever classify any contraceptive as "safe" merely on the evidence available at one point in time. Determination of when a contraceptive has been sufficiently proven to be "risk-free" is properly left to the individual States.

In addition spermicides, like many other contraceptive devices, have a high failure rate in preventing conception. Therefore, State regulation of those who distribute and counsel others in the use of birth control technologies is clearly reasonable when the State's "health" interests are broadly construed to include concern for unplanned pregnancies.

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resulting from spermicide use.

C. STATES MUST BE FREE TO ADJUST REGULATION OF BIRTH CONTROL TECHNOLOGIES TO MEET CHANGING CONDITIONS.

Reproductive control decisions have a number of personal and social implications. For example, during a time of a great venereal disease threat such as AIDS, it is conceivable that the State may seek to promote prophylactic contraceptives and discourage other methods. At other times, the State may wish to ban contraceptives which are less effective or have greater risks than other alternatives.[17]

Judicial intervention in the regulation of birth control technologies threatens the ability of the States to respond to changing social and public health needs. If at times legislation falls behind current

[17] Such was the case when the FDA forced the removal of "sequential pills" from the market because, according to current data, combination pills are more effective and have fewer risks. FDA Consumer 25 (April 1976).

knowledge of what is "safe" or "effective," public opinion will soon force change. The judiciary should restrain its desire to intervene as a super-legislature.

In the cases of Eisenstadt and Roe, the Court forced changes upon the States which the legislatures were already freely considering. The result of such judicial activism is the establishment of arbitrary and confusing law, an invitation to duplicate such activism in the lower courts, and heightened tension between the courts and the legislatures. Let legislators legislate, and eventually they will get it right on their own.

D. STATE REGULATION OF BIRTH CONTROL TECHNOLOGIES IS ESPECIALLY JUSTIFIED BECAUSE PHYSICIANS, FAMILY PLANNING AGENCIES AND DRUG MANUFACTURERS HAVE A FINANCIAL INTEREST IN PROMOTING BIRTH CONTROL TECHNOLOGIES WHICH MAY HAVE DETRIMENTAL

SIDE-EFFECTS OR MAY BE LESS THAN FULLY EFFECTIVE.

The birth control and abortion industries in America encompass a multi-billion dollar market plus hundreds of millions in government subsidies. Drug manufacturers, physicians, and family planning agencies all enjoy a share in these profits, and all of these parties have a financial interest in these technologies.

Part of this promotion includes defending their technologies from charges of being unsafe. Thus, like the tobacco industry which publishes a study exonerating cigarettes for every study which condemns them, so the drug companies publish a study "proving" their contraceptives are "safe" for every study which suggests the opposite. The controversies surrounding the health risks of the IUD and the Pill, for example, have gone on for decades and are still unresolved.

Thus, while evidence exists to defend or condemn any birth control device, those who sell these products will tend to believe and promote the evidence which supports their interests. If the State considers such a one-sided assessment of risks to be an exploitation of the people, it may properly regulate these technologies according to its own assessment of risks and effectiveness.

E. STATE REGULATION OF BIRTH CONTROL TECHNOLOGIES IS ESPECIALLY JUSTIFIED BECAUSE MANY PHYSICIANS, FAMILY PLANNING AGENCIES AND DRUG MANUFACTURERS ARE IDEOLOGICALLY BOUND TO REDUCING BIRTHS AMONG SOME CLASSES OF WOMEN REGARDLESS OF THE DETRIMENTAL SIDE-EFFECTS WHICH THEIR TECHNOLOGIES WILL IMPOSE ON WOMEN.

The natural reproductive rights of persons are being threatened. But contrary to the rhetoric surrounding the abortion

issue, the rights of individuals are threatened not by anti-abortionists, but by pro-abortionists.

Many of the persons and organizations who advocate abortion under the banner of "reproductive freedom" are in fact less concerned about the reproductive freedom of individuals than about the control of individuals' reproduction. These population controllers and social engineers realize that in order to achieve their eventual goal of forced reproductive control for the "common good" they must first expand individual "rights" to include the tools they will need. After all, if abortion is accepted for the individual good of women, why not require forced abortion for the "common good?"

A good case can be made that it is population controllers who initiated the movement to legalize abortion, financed the movement, promoted abortion, and provided

abortions, and have erected social structures to pressure women, especially among the poor, into having unwanted abortions. These groups and individuals have exploited women's rights rhetoric to advance their own goals at the expense of women's rights and with the intent of further exploitation of women.[18]

The examples of "pro-choice" advocates supporting coercive population control, including forced abortion, are numerous. For example, Lawrence Lader, founder of the National Abortion Rights Coalition, and author of the pro-abortion tract Abortion (1966) which cited as an authority eight

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[18] While this argument is only tangentially related to the issues at hand, ample evidence can be found in the J. Kasun, The War Against Population: The Economics and Ideology of Population Control, (1988) (hereinafter Kasun); A. Chase, The Legacy of Malthus: The Social Costs of the New Scientific Racism (1977) (hereinafter Chase), J. Simon, The Ultimate Resource (1981) (hereinafter Simon); G. Greer, Sex and Destiny (1984) (hereinafter Greer).

times in Roe v. Wade, was instrumental in convincing N.O.W. to adopt a pro-choice position because of the symbolic importance of the "right of women to control their own bodies."[19] But while Lader defends a "pro-choice" position on one hand, he is also a radical proponent of coercive population control, arguing that forced population control, including forced abortion, is "imperative," both at home and abroad, since "We must accept the principle that having a child is no longer a matter of private will, but of public welfare." [Lader, 218-222.]

In a review of the Chinese program of forced population control which includes forced abortion, forced sterilization, forced contraceptive implants, and infanticide of handicapped newborns and undesir-

[19] Lader, Abortion II: Making the Revolution, 36-40 (1973).

able female offspring, Lader has only the highest praise.[20] Similarly, N.O.W. president Molly Yard has defended the Chinese anti-choice policy, saying: "I consider the Chinese governments policy among the most intelligent in the world...a one-child per family policy."[21] And the international arm of Planned Parenthood has willingly sacrificed millions of dollars of U.S. government funding rather than stop providing personnel and funding to support the coercive population control in China.

Planned Parenthood has frequently supported coercive population control. For example, at the White House Conference on Hunger in 1969, Dr. Charles U. Lowe of H.E.W. and Dr. Alan Guttmacher of Planned Parenthood urged a national policy of (1)

[20] Lawrence Lader, "The China Solution," Science Digest, 91:4, April 1983, 78.

[21] Transcript of "Oprah Winfrey Show," July 6, 1989.

mandatory abortion for any unmarried girl found pregnant within the first three months of pregnancy, and (2) mandatory sterilization of any such girl giving birth out of wedlock for a second time.[22] Planned Parenthood president Faye Whattleton has likewise promoted an us-against-them, rich-versus-poor mentality as motivation for population control at any price.[23]

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[22] E. Craven, "Abortion, Poverty and Black Genocide: Gifts to the Poor?", Abortion and Social Justice, eds. Hilgers, 235 (1972). Similarly, Frederick Jaffe, Vice President of the Planned Parenthood/World Population and head of research for Alan Guttmacher, has argued for government population programs which would require "permits for children", "compulsory sterilization of all who have two children", "compulsory abortion", "encourage homosexuality", and "fertility control agents in water supply." Family Planning Perspectives, Special supplement-U.S. Population Growth and Family Planning: A Review of the Literature, vol. 2, no. 4, October 1970, ff.p.24.

[23] In a fundraising letter [Simon, 327] Whattleton inflames the fears of true-blue Americans against the rising expectations of Third World peoples, writing:

> Thai women and millions of other women like them in India, China, Africa and throughout the developing nations control our destiny. Their decisions--decisions of hundreds of millions of young women--about their family's size--control your future more surely, more relentlessly than the oil crisis or the nuclear arms race.
>
> ...unless population growth is harnessed and slowed to meet the limited resources and human services of these nations, development will be shattered. Chaos, mass famine and war will continue to increase. We will be affected for better or worse.
>
> The great tinderbox of revolution and international anarchy is rising expectations of the world's masses coupled with unrestrained population growth. Starvation, revolution and violent repression will fill our headlines unless human fertility is reduced... (Emphasis her own.)

In short, her message is that if we do not control them, they will breed themselves into a position of power over us; preservation of America's dominance depends on aborting, sterilizing, and contracepting the Third World at any price.

Pro-choice sources also reveal that some abortionists openly display sexist and even misogynous attitudes toward women;[24] they

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[24] Denes, In Necessity and Sorrow 227,79,134 (1976); Nathanson, Aborting America, 110 (1979); Zeckman and Warrick, "Abortion Profiteers" Special Reprint, Chicago Sun-Times, 11-15, (1978); Reardon p266-270.

provide abortions less to help the women than to prevent these "unfit" persons from raising "unfit" children.[25] Such attitudes are pervasive, throughout the medical and population control industry.[26]

Persons or organizations who advocate coercion, privately or publicly, would certainly not hesitate to conceal or under-

[25] Dr. Edward Allred, owner of the largest chain of abortion clinics in California is a staunch advocate of abortion as a method of controlling the population of minority groups: "Population control is too important to be stopped by some right-wing pro-life types. Take the new influx of Hispanic immigrants. Their lack of respect of democracy and social order is frightening. I hope I can do something to stem that tide; I'd set up a clinic in Mexico for free if I could.... When a sullen black woman can decide to have a baby and get welfare and food stamps and become a burden to all of us it's time to stop." "Doctor's Abortion Business Is Lucrative", San Diego Union, Oct. 12,, 1980 B1:1.

[26] For an in depth analysis of the population controller's shocking disregard for the health of Third World women, see noted feminist Germaine Greer's, Sex and Destiny (1984). See also Simon, Chase, and Kasun.

state the risks of abortion or birth control, or even experiment on women with insufficiently tested technologies.[27]

For example, at a 1962 conference sponsored by the Population Council, the IUD was being promoted as the panacea for controlling the world's "overpopulation." Arguing that the risks of IUD use were acceptable, Dr. J. Robert Willson, of the University of Michigan School of Medicine defended its wide-spread promotion saying: "If we look at this from an overall, long-

[27] In 1970, Planned Parenthood President, Dr. Alan Guttmacher testified before a Senate subcommittee that the health dangers of the Pill are secondary to the social "dangers" of pregnancy and overpopulation. "Expert Decries 'Alarm' on Birth Control Pill," New York Times, Feb. 26, 1970, 50:3. Similarly, Dr. Ravenholt, head of AID's population control programs, defended the widespread promotion of Depo-Provera, despite initial negative results, on grounds that the ill-effects could not be fully ascertained until tested on tens of millions of women. Ehrenreich, et.al., "The Charge: Genocide," Mother Jones, November 1979, p30.

range view, perhaps the individual patient is expendable in the general scheme of things, particularly if the infection she acquires is sterilizing but not lethal." These "expendable" patients are, of course, the "non-productive" welfare recipients, "irresponsible" teenagers, and the "ignorant masses" of the world's underdeveloped nations.[28]

Dr. Robert S. Mendelsohn has criticized the medical community for participating in the social engineering program of population controllers at the expense of women's health:

> ...some of the worse examples of callous experimentation on unsuspecting women involve new forms of birth control...It is clear to me that present-day physicians will do almost anything to

[28] R. Mendelsohn, Male Practice: How Doctors Manipulate Women 120 (1981) (hereinafter Mendelsohn).

> prevent women from having babies, particularly if they are black or brown, uneducated, or poor. They have been so brainwashed by the population control zealots that no price is too high to pay to lower the birth rate among welfare mothers or in the underdeveloped countries of the world. [Mendelsohn,126]

Population control zealots have announced their determination to advance their goals without regard to local customs, religious beliefs, or national sovereignty. According to Planned Parenthood policy, population control agencies in America and abroad "should not use the absence of law or the existence of an unfavorable law as an excuse for inaction [in promoting birth control and abortion technologies]; action outside of the law, and even in violation

of it, is a part of the process of stimulating change."[29]

If population controllers are willing to promote their agenda in violation of public law, certainly they are willing to promote it in violation of individual rights.

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[29] The Human Right to Family Planning, International Planned Parenthood Federation, London, 20-21 (1984). Accordingly, International Planned Parenthood has established a policy of promoting and training illegal abortions in developing countries which forbid abortion.[Kasun,188] Similarly, in the U.S., pro-abortion groups such as the Federation of Feminist Women's Health Centers have vowed to train illegal abortionist and teach women self-abortion techniques, the most dangerous kind of abortion, if abortion becomes illegal. ("Group says it will teach do-it-yourself abortion technique," State Journal-Register, Springfield, IL, July 23, 1989, p37) Clearly, these abortion proponents are willing to encourage dangerous abortions even at the risk of killing women; indeed if such deaths occur, they will use such deaths to prove the need for "safe and legal abortions" as they have in the past. But in fact, the legality of abortion has never guaranteed its safety, in terms of morbidity or mortality. See the Feminists for Life Brief in Webster v. Reproductive Health Services.

While the sincerity of population controllers beliefs are not at issue here, it is noteworthy that the myth of overpopulation has been thoroughly exploded and the overwhelming benefits of population growth are only now being understood.[30] For over seventy years eugenicists have been using the threat of imminent national and worldwide disaster as an excuse to interfere with the reproductive lives of people, both at home and abroad, who are either poor, illiterate, or disenfranchised. When

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[30] See authorities Simon, Kasun, Chase. Even population controllers and eugenicists admit that the arguments against their theory of limited world resources and overpopulation are difficult to refute, but insist merely that their approach of population control is a safer bet. [Hardin, "The Tragedy of the Commons," Science, December, 1968, 1243-1248.] Hardin, incidentally, was one of the earliest proponents of abortion as a "woman's right to control her own body," yet he too supports coercive population control programs, especially of "feeble-minded" groups, because "Injustice is preferable to total ruin." ibid.

boiled down to its essence, their overpopulation theory is predicated on 1) the fact that on average poor people (and nations) always have more children than rich (and nations), and 2) the fear that the children of the poor pose a threat to the wealth and security of the rich. [31]

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[31] See Authorities Chase, Greer, Kasun, Hardin. For many wealthy individuals and nations, population control has become a substitute for charity. According to one Planned Parenthood supporter, "I'm hooked on this charity...It prevents the need for other charities." (New York Times, Feb. 4, 1978, p20.) Indeed, Planned Parenthood founder, Margaret Sanger abhorred supportive charities for the poor, especially pre-natal medical care, because such charities "perpetuate constantly increasing numbers of defectives, delinquents and dependents. My criticism, therefore, is not directed at the 'failure' of philanthropy, but rather at its success." Sanger, The Pivot of Civilization 105-123 (1922).

For many individuals and governments, advocacy of population control of the poor has supplanted truly progressive social legislation. [Craven, 223-242] It is not poor women who have lobbied the government for abortion and birth control, it is the rich who lobby for it for them. ibid For most poor women, it far easier to get birth control pills than aspirin, easier to get an abortion than dental care. This fact of discrimination is not lost on minorities.

VI. THREATS TO TRUE REPRODUCTIVE FREEDOM FROM PRIVATE INTERESTS AND THE STATE REQUIRE THAT THE INDIVIDUAL'S NATURAL RIGHT TO REPRODUCTIVE FREEDOM MUST BE CLARIFIED AND STRENGTHENED.

While Amici asks the Court to explicitly confirm the State's right to regulate birth control technologies, such as abortion, Amici also recognizes a need to clarify and strengthen the legitimate and inherent reproductive rights of all persons.

As noted above, population controllers pose a real threat to reproductive freedom.

According to Mrs. Laura Anderson, a black social worker: "The current issue of population, in my mind, displaces an emerging American conscience for human dignity and eradication of poverty and hunger....In my opinion, when we attempt to solve problems by getting rid of people or potential people who will have these problem, like welfare recipients and those who will be poor or hungry, that's genocide. And I join with many people in making this charge against the move toward population control." [Rosenblum, "Coercion in Liberation's Guise," Abortion and Social Justice, ed. Hilgers, 154 (1972).]

The State in turn may also pose such a threat. Federally funded family planning programs have periodically come under attack from recipients who felt coerced into "voluntary" sterilizations or "elective" abortions.[32]

In Buck v. Bell, 274 U.S. 200,207 (1927) the Court explicitly allowed the State to force sterilization on any person considered a "potential parent of socially inadequate offspring" because it is "better for all the world, if instead of waiting to

[32] "[T]here is uncontroverted evidence in the record that...poor people have been improperly coerced into accepting sterilization..." U.S. District Court of D.C., Judge Gesell, Relf V. Weinberger, civil actions Nos. 73-1557,74-243, March 1974.) See also Craven, 263; Reardon 272-278; and Chase, 16-19. In a study of four Indian Health Service hospitals between 1973 and 1976, the GAO found that 3406 sterilizations were performed without the patient's informed consent as a result of a general policy to restrict population growth of Indians. Miller, "Native American Peoples on Trail of Tears Once More," America, 9 December 1978, 423.

execute degenerate offspring for crime, or let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind."[33]

The threat of government control of reproduction even extends outside our

[33] Two years prior to Buck v. Bell, an unknown European foreshadowed Holmes' decision claiming that the unfit were sapping the strength of the State, and in order regulate their births, "the State will have to avail itself of modern medical discoveries. It must proclaim as unfit for procreation all those who are afflicted...and practical measures must be adopted to have such people rendered sterile." The book calling for control of reproduction as a cornerstone of social policy was Mein Kampf, by Adolf Hitler. [Chase,135]

By 1932, American sterilization programs had forcibly sterilized 15,000 persons. German health officials, in turn, structured German eugenic programs on the American model. Ludmerer, Genetics and American Society 118 (1972); Drogin, Margaret Sanger, 24 (1980). When the Germans surpassed America's population control efforts, Paul Popenoe of the American Birth Control League (the original Planned Parenthood), praised the Germans for "proceeding toward a policy that will accord with the best thought of eugenicists in all civilized countries." Ludmerer, 117.

borders. In 1976 U.S. policy, which conditions foreign aid on aggressive population control policies, prodded India into forcibly sterilizing three million people in mobile tent-camps.[34] American policy has similarly encouraged coercive population control programs in numerous other Third World nations. [Kasun,79-94]

But for population controllers, the model government program of population control is China's one-child policy which includes the forced abortion of women who are "handcuffed, tied with ropes or placed in pig's baskets." [Kasun, 91]

True reproductive freedom does not exist under present interpretation of Constitutional rights. If under Bell the State has

[34] Kasun, 85-86. At approximately the same time, Dr. Ravenholt, director of AID's Office of Population insisted that one-quarter of the fertile women of the world must be sterilized to meet U.S. goals of population control and to maintain "the normal operation of U.S. commercial interests around the world." [ibid, 81]

the right to prevent the reproduction of undesirable persons, then surely this would encompass the right to implement forced abortions, or forced contraceptive implants. All that currently separates American population control policy from Chinese policy is the legislative will to openly embrace coercion.

Amici argues that the first step which must be taken toward restoring reproductive freedom is the abandonment of the umbrella "right of privacy." It must be recognized that when the Court first began to articulate this "right," it burdened itself with vague terminology which by its very nature can be either totally meaningless or irresistibly powerful.[35]

[35] The right of privacy presently guiding judicial decision is an undefinable enigma; it "cannot be said to be absolute" [Roe, 154] yet it is a "fundamental" right which repeatedly prevails over State interests. Does the "right of privacy" include only sexual behavior? Birth control access? Reproductive freedom? All private

Envisioned as arising from the shadowy penumbra of the Constitution, this "right" lacks clear guiding principles or even a common understanding which can serve to protect the people, guide the judiciary, or justly restrict the legislatures. Thus, if only for the sake of clarity in the law, this catch-all "right of privacy" must be repudiated.

Amici argues that in the place of the "right of privacy" the Court should recognize the "natural reproductive right" of individuals. This more narrowly defined right addresses the issues raised by the contraception and abortion cases, and draws a clean line between the rights of individuals and the privileges of the State.

With seventy years of legal confusion surrounding issues related to reproductive freedom, such a clarification of the law is

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behaviors? Semi-private behaviors?

urgently and immediately needed from the Court. A logical and timeless framework for defining the "natural reproductive rights" of persons is described in the remainder of this brief.

A. THE FUNDAMENTAL RIGHTS OF REPRODUCTIVE FREEDOM AS GUARANTEED IN THE CONSTITUTIONALLY RESERVED RIGHTS OF INDIVIDUALS ARE THOSE NATURAL RIGHTS WHICH ARISE FROM A PERSON'S NATURAL SEXUALITY. SPECIFICALLY, 1) THE STATE MAY NOT FORCIBLY LIMIT ANY PERSON'S NATURAL FERTILITY OR PREVENT PERSONS FROM NATURALLY CONCEIVING OR BEARING CHILDREN, AND 2) THE STATE MAY NOT FORCE ANY PERSON TO CONCEIVE CHILDREN NOR COMPEL ANY PERSON TO PROVIDE REPRODUCTIVE MATERIAL FOR THE ARTIFICIAL CONCEPTION OR GESTATION OF CHILDREN.

Whether or not one believes the Declaration of Independence's claim that the inalienable rights of all persons are

endowed upon them by their Creator, the natural reproductive rights of all people are clearly central to our biological humanity. Any law which transgresses these timeless rights for the sake of any social goal, whether to eliminate the "unfit" or to "create a race of thoroughbreds" through eugenic manipulations, violates all human dignity and freedom.

History demonstrates that the more totalitarian a State becomes, the more likely it is to seek to control every aspect of life, even and especially human reproduction, so as to control both the "quality" and quantity of its population. Accordingly, no just government has the right to coerce or force sterilization, contraception, or abortion upon any person or group of persons. Recognition of this right must begin with a rejection of Buck v. Bell.

Amici would further argue that the right to natural fertility includes the right to enter into a natural, heterosexual marriage for the purpose of establishing a family.

But while the right to intercourse within marriage is an inalienable corollary to the natural right of reproduction, sexual activity outside of the marital covenant is not similarly included. The distinction lies in the fact that extramarital intercourse is rarely intended as an exercise of reproductive freedom, but instead is an exercise of sexual self-gratification. Furthermore, the State has had a long standing, and well recognized interest in safeguarding and promoting the special nature of marital relations and protecting the stability of the family unit. Sexual activity outside of marriage such as fornication, adultery, homosexuality, incest, statutory rape, and bestiality have never been recognized as natural rights,

and the State should retain the power to legislate against such activities. Such activities are contrary to nature, destructive of the family, exploitive of persons, diminish human dignity, and beget children into unstable families.

On the other hand, the State's right to discourage sexual activity outside of marriage must still be limited to the extent that it may not forcibly limit the natural fertility of persons engaged in extra-marital activities. Furthermore, the children of illicit unions should be accorded the same rights and status of all other persons since by their conception, their parents entered into a de facto marriage covenant, though perhaps a bigamous one, which invokes mutual responsibilities and duties toward their children and each other.

The right of natural reproductive freedom was alluded to by the Court in

Eisenstadt v. Baird, 405 U.S. 438, at 453, in its statement regarding the right to self determination with regard to an individuals "decision whether to bear or beget a child."

While Amici agrees with the core principle of individual reproductive rights which underlies this statement, the conclusions reached in Eisenstadt are overly broad. For while every individual has the right to control his or her natural reproductive powers, this right does not include the right to use any means or technology a person wants to control the bearing and begetting of children.

While the State must be prohibited from infringing on natural reproductive rights, the State does have a legitimate right to regulate and even proscribe birth control technologies which can be used to limit fertility, enhance fertility, or artificially create new human, or non-human, life.

Since all technologies have social and economic consequences, health consequences, moral consequences, and very frequently, unforseen consequences, and are subject to abuse, nearly all technologies have at one time or another been subject to liability claims in the courts and regulation by duly empowered governments.[36]

With regard to birth control technologies, a term which includes artificial conception and gestation technologies as well as contraceptive and abortifacient technologies, the consequences of these technologies are becoming increasingly complex. For example, the issues of surrogate mothers, custody of frozen human embryos,

[36] The only types of technology which might have some claim to Constitutional protection are technologies related to the right to bear arms. But even this technology cannot be given an absolute status. Individuals are not entitled to own any conceivable weapon, but rather are entitled to "reasonable" access to firearms.

<u>in vitro</u> fertilization, and visitation rights of sperm donors, are even now perplexing both the judiciary and the legislature. In the future, such issues as genetic engineering, artificial wombs, animal wombs, cloning for replacement organs, and a whole host of other technologies will arise which will dwarf the present quagmire. Surely the State must have a legitimate interest in regulate present as well as future birth control technologies.

There is no Constitutional basis for distinguishing between birth control technologies and any other technology. Therefore, the Court cannot and should not treat birth control technologies as a "favored technology" and impose restraints on the right of States to regulate this class of technologies.

To limit the right of States to regulate technology on the basis of a shadowy "right of privacy" which is dimly perceived within

the Constitution and hazily-defined within this Court's rulings, is a short-sighted course which will surely lead to ever more confusion in the decades ahead. Perhaps worse, such a limitation on the States will serve as an invitation to technocrats to exploit men and women with ill-conceived and dangerous technologies which will wreak havoc on individuals and society.

B. THE STATE'S REGULATION OF BIRTH CONTROL TECHNOLOGIES POSES NO THREAT TO THE INDIVIDUAL'S NATURAL RIGHT TO REPRODUCTIVE DECISIONS.

While the State has a right to regulate birth control technologies, it is obvious that the State has no interest or desire to enact a general prohibition of birth control technologies. Indeed, quite to the contrary, federal, state, and local governments have been spending hundreds of millions of dollars promoting contraceptive

use. Given the overwhelming public and government support for increasing contraceptive use, there is no realistic basis in the allegations of abortion proponents that allowing the States to regulate reproductive technologies would lead to a ban against all birth control. Even if some States were to choose to regulate some birth control technologies for reasons of health, moral, or social interests, it is evident that such regulation would be accompanied by promotion of other contraceptives as a substitute.[37]

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[37] It has been falsely argued that anti-abortionists seek to eventually ban all birth control technologies. But in fact no one has ever suggested any rationale or desire to seek a Constitutional ban or court ruling which would limit or ban the states from allowing contraceptives. The grain of truth to these allegations is that if constitutional safeguards for the human embryo are ever recognized or enacted, this safeguard would prohibit chemical abortifacient as well as surgical abortion. But such a turn of events, would not effect contraceptive and sterilization technologies and would serve only to direct birth control research into the pursuit of these

Furthermore, even the abstract possibility that the State might one day seek to "force" population growth by a ban on contraceptives poses no threat to reproductive freedom. The history of population growth, around the world, shows that even without access to contraceptive technology or abortion, peoples of all eras and nationalities have limited their births according to their needs through the employment of delayed marriage, withdrawal, periodic or total abstinence, or even with unreliable rhythm methods.[38]

These natural methods of fertility regulation have been advanced in the last twenty years by the discovery of at least six new methods of natural family planning, each with many variations, which employ

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non-abortive alternatives.

[38] See authorities Greer, Kasun and Simon

from one to seven body symptoms for identifying the exact time of female fertility. The most commonly recommended methods have method effectiveness ratings for avoiding pregnancy of from 97-99 percent, rates which are at least comparable to the Pill, and easily exceed the effectiveness rates of IUDs, condoms, jellies and the rest.[39]

These natural methods of fertility control, both the old and the new, employ no technology, only self-knowledge. The dissemination of such knowledge would be protected by First Amendment rights. Therefore, it is unreasonable to believe

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[39] The final report of a 1978 federal study of NFP, found a 100 percent method effectiveness rate for a Sympto-Thermal variation of NFP and a 94% effectiveness rate for the Ovulation Method. The highest tested effectiveness rate ever reported belongs to a variation of the Temperature-Only method which has been demonstrated to have only 7 unplanned pregnancies per 10,000 fertile woman-years, a rate which is less than half the failure rate for vasectomy. J. Kippley, The Art of Natural Family Planning, 14-17 (1984).

that even an oppressive government's ban against all birth control technologies could never "force" people into having "unwanted" children.

The existence of natural methods of birth control demonstrates that individuals will always have reasonable alternatives to birth control technologies and a reasonable opportunity to exercise their reproductive freedom. The State is not obligated to guarantee any more than these natural opportunities, though in its sovereignty it is certainly free to provide technological aids if it so chooses.

In some ways, natural reproductive rights are similar the right of free speech. Ultimately, the inalienable right to free speech is guaranteed by the natural abilities of humans to communicate. But while the right of free speech is enhanced by mass communication technologies, not all persons have equal access to these techno-

logies, nor is the State required to provide access to these technologies. Clearly, while speech is a natural right which the State may not infringe upon, technological enhancements of this right are open to regulation.

If regulation of free speech or reproductive technologies become unduly oppressive, the natural rights of individuals provide a safeguard by which the people can subvert or overthrow an oppressive rule. Thus, the Court can and should restrict itself to protecting these natural rights.

When these timeless, natural rights are protected, the people will be able to press the government for the subsidiary "rights" to the technologies they desire to enhance their natural rights. Left alone, the laws passed by properly elected legislatures will eventually come to reflect the "compelling" interests of the people. Such laws cannot, by definition, be oppressive

of natural rights since the people of a democracy will not freely vote to oppress themselves.

CONCLUSION

In summary of the above arguments, Amici respectfully petitions the Court to: (1) hold that the Minnesota statute, Minn. Stat. Ann. §§ 144.343 (2)-(7), is constitutional; (2) reject Roe v. Wade and its progeny; (3) sustain the result of Griswold v. Connecticut; (4) reject the overly broad results of Eisenstadt v. Baird; (5) reject Buck v. Bell; (6) reject the "right of privacy" as unconstitutionally vague; and (7) recognize the "natural right of reproductive freedom" as a fundamental and inalienable right of all human beings.

It is clear that the confusion created by these prior cases and mishandled issues has led to the conflict at hand. The natural right of reproductive freedom suggested here is in keeping with the

historical and moral values of both the Western and Eastern heritages, and is in accord with the natural law, right reason, and the fundamental respect of individual human dignity. Such a timeless principle would certainly have received the unanimous consent of America's Founding Fathers.

Sixty years of judicial activism in the area of reproductive control must necessarily be reversed swiftly and completely. Amici urges the Court to recognize the right of States to regulate reproductive technologies however they deem necessary, and at the same time, restore protection in the law for every individual's natural right to reproductive freedom.

Respectfully submitted,

Stephen R. Kaufmann
P.O. Box 5131
Illinois Building, Suite 800
Springfield, Illinois 62705
(217) 544-1144
Attorney for Amici Curiae

APPENDICES

APPENDIX A

DESCRIPTION OF AMICI

The Elliot Institute for Social Sciences Research is an independent, not-for-profit research group committed to a program of original research in the areas of abortion, birth control, and population control. It is a leader in researching the long-term physical and psychological effects of abortion on women, and it is actively involved in research exposing the myth of overpopulation and its origin in the racist and exploitive of the eugenic and population control movements.

The American Academy of Medical Ethics is a professional organization with an affiliation of 20,000 physicians who are committed to preserving the guiding

principles of the original Hippocratic Oath. As a consequence of its member's fidelity to this ancient and honored oath, the AAME is dedicated to the preservation and protection of all human life, from the moment of conception until the moment of natural death. Therefore, the AAME opposes the use of medical technology to destroy the lives of unborn children, opposes the abuse of medical science for the purpose of exploiting women and the poor, and opposes the withholding of medical treatment from the disabled or infirm for the purpose of shortening their lives.

APPENDIX B

A SUMMARY OF SOME PUBLISHED CASES OF MINORS AND WOMEN COERCED INTO ABORTION

Some summaries from D. Reardon, Aborted Women - Silent No More (1987):

1. Gaylene "Hayes" was manipulated into an abortion by school authorities and was encouraged to conceal the pregnancy and abortion from her parents. After the abortion, at age 14, she became self-destructive. p36-40.

2. Alice Gilmore, 18, was manipulated into an abortion by clinic despite her repeated announcements that she wanted to keep her baby. Afterwards, she suffered sexual dysfunction, loss of self esteem, and severe depression. p147-150

3. "Tammy Conrad," 18, discovered she was pregnant while she was hospitalized for psychiatric care. She desired to keep the baby, but was subsequently coerced by her psychiatrist into an unwanted abortion "for her own good." She subsequently become suicidal. p179-182

4. Jakie Bakker became pregnant as the result of rape at age 19. After being counseled to abort, she suffered many physical and emotional aftereffects which were more severe and longlasting than her reaction to the rape. She feels lied to by abortion providers. p206-210.

5. Edith Young was forced into abortion without her understanding or consent at age twelve to hide the fact of her pregnancy resulting from an incestuous

rape by her step-father. When she later learned what abortion was, and that she had been forced not only into sex, but into the "murder" of her child, she suffered severe a emotional impact on her subsequent self-destructive behavior. She believes she and her baby could have been protected if her natural father had been informed. p212-218.

6. Jerri "Porter", 18, was pressured by her boyfriend into aborting a pregnancy which she wanted to keep. Family planning counselors encouraged the abortion, insisting that her desires to keep the baby were not "realistic." p278-279.

7. Lorijo Nerad and her husband Jim, during a time of temporary unemployment, were pressured by welfare caseworkers into sterilization and abortion of a wanted

child. The negative emotional impact on both of them led to child abuse, drug abuse, and radical personality changes. p273-278.

Some summaries from C.M. Friedman, et al. "The Decision-Making Process and the Outcome of Therapeutic Abortion," American Journal of Psychiatry, (1974)

1. "Candice," a 22-year old woman with borderline intelligence but with no previous history of mental illness, was pressured into an unwanted abortion by a genetic counselor, a surgeon, and her parents. Forty-eight hours later she began to go through denial of the abortion and became so agitated that she was transferred to psychiatric hospitalization because she lacked the "ego resources to deal with her grief."

2. "Krista" felt pressured into an abortion by a boyfriend who backed down from a promise of marriage. She subsequently post-abortion psychiatric illness which required psychiatric treatment.

Samples of testimonies of coercion contributed to the files of the Elliot Institute for Social Sciences Research.

Testimony of "Susan Blossmor" on file at the Elliot Institute.

Dear Sir,

Thank you for your interest in abortion. I want to tell my story in order to help others from making the same mistake and feeling the horrible pain. Although it is hard for me to do it helps me face my feelings. Thank you for giving me this chance. If you have questions feel free to contact me.

After I became pregnant, my family would not support my decision to keep my baby. My boyfriend said he would give me no emotional or financial help whatsoever. All the people that mattered to me told me to abort. When I said I didn't want to

they started listing reasons why I should. "It would be detrimental to your career and health. You will have no social life, no future with men." Could I actually do it? I started feeling like maybe I was crazy to want to keep it. I finally just told everyone that I would have the abortion just to get them off my back, but inside I still didn't want to have the abortion. Unfortunately when the abortion day came I shut off my inside feelings. I was scared to not do it because of how my family and boyfriend felt.

I know my decision would have been different if at least my parents would have supported me. I just felt so alone in my feelings to keep my baby.

I'm so angry at myself for giving in to the pressure of others. If there is one thing that I learned from this experience - that is never to give in to other people's

opinions on your own situation. Stand up for what you know is right!!

When I went to the clinic, the counselor that I spoke with did not ask me if I was sure about my decision. She did not try to ask me how I felt about the whole thing. She just explained the procedure briefly. Inside I was screaming for her to ask me how I felt about what I was going to do so I could tell her that I just didn't feel right about it, but I was just too far away from my feelings at that point to be able to speak out. I had turned off my feelings for the moment.

When I was lying on the procedure table waiting for the doctor a nurse sat with me and held my hand. I started crying and she said that I wasn't sure that I was doing the right thing. She just said that I was fortunate that abortion was legal and I was able to have this procedure done. She then said that the procedure was safe

and didn't hurt very much. She said, "We just ask that you don't scream or yell because the other patients in the next room would be able to hear." She then tried to get my mind off of what was going to happen by asking me about boating on Lake Michigan. I wanted to get up off that table then but was afraid of what my boyfriend and parents would say and do. That nurse did not want to hear about my doubts. She could not have cared much about how I felt about the abortion. She was worried about other patients hearing me. My God! All she was worried about was her job -- assisting in the procedure.

After the procedure while I was in the recovery room I was very upset and crying. The nurses would not even look at me. It was like they just didn't want to deal with my feelings. I was the last person done that day so they started to clean the procedure room. A nurse came out of the

procedure room and started rinsing the clear plastic tubes of the suction tubes in the sink in the recovery room. They were full of blood! I couldn't believe how insensitive they could be.

As soon as I came out of that procedure room I knew I had made the biggest mistake of my life. While still in the room I said to myself, "Ok, now you're suppose to feel relieved." That's what the books said I would feel (I read about abortion beforehand). Well I kidded myself with that idea for about 30 seconds I did not feel relieved. I hated myself! But it was too late -- my baby was dead! It was the worst feeling of frustration that I've ever had in my entire life. I could not reverse what I had done. God help me!

Two days after the abortion I wrote a suicide note to my parents and boyfriend. I just couldn't fathom how I could possibly live with the knowledge of what I had done.

I killed my own baby! I went down the basement an figured out how to shoot my father's pistol. Hysterical and crying I put the barrel of the gun into my mouth. All of a sudden I heard someone upstairs. For some reason my father had stopped by to pick up something (at 10 a.m. usually no one is home). I stopped what I was doing and went upstairs. He saw that I was upset and asked me if I wanted to have lunch with him at noon. I felt I at least owed him lunch. By the time lunch was over I was too scared to do it. Eventually I came to the conclusion that I should look to the future.

Since the month after my abortion I've been trying to get pregnant again. I've tried 4 months in a row now. But since my boyfriend is away at school my timing of sexual intercourse and ovulation has not coincided. He does not know that I am doing this. I know that is not fair to

him. But I can't think of any other way to make up for what I have done. Rationally I know what I'm doing is maybe stupid. But a big part of me just has to make up for things. I can't explain but I just have to get pregnant again. I just got off the phone with my boyfriend. I'm going to see him this weekend to try again.

I still am not satisfied with my choice today. It has not been that long since the abortion. I would be just about 7 months pregnant right now. My baby was due at the beginning of April. But I do not think my feelings on this will ever change. I killed my own child. How can anyone ever feel that type of choice was a right one? The only thing that gives me some comfort is the knowledge in my heart that my child is in a much better place then we know with God. I believe that when I die I will finally be able to see my baby. I'm so sorry.

Sincerely,

"Susan Blossmor"

Testimony of "Jill Nolan" on file at the Elliot Institute

Dear Sir,

This is a letter from one who regrets her abortion very much. I was still 19 when I got pregnant living with a boyfriend (who is soon to be my ex-husband) in Detroit on Michigan Avenue by Livennois. And I was faced with "the CHOICE". How I'd wished I could've been like the wholesome looking mother-to-be on the T.V. commercials. The one with a cute maternity dress and a nursery all made up ready and waiting and a warm protective husband coming home, putting his arms around her saying "honey, I can hardly wait."

My boyfriend wanted nothing to do with a future with me. A baby implied a future, commitment. He had already gotten the cow for free - why raise the calf?

Yet in the face of abandonment, I did not look at reality and use my courage to squarely tell him what I wished to do. "I'm going to have this baby, whether you stay and meet my emotional needs or not."

As human beings, we have 2 basic needs; for love and worth, to love and to be loved, to feel worth about yourself and to have the security of knowing someone sees worth in you. In desperation, to meet these needs in my life even temporarily, even imaginarily, I grasped on to my boyfriend and his insistence that I have an abortion. Thus I sacrificed my first born to the idol of temporary emotional security.

It was so easy to be swayed, despite vague moral convictions that abortion was

murder. For I felt so immature, selfish and unready to have a child.

Are mothers ever ready? Babies and children bring out the best and the worst in us. Yes, we have the potential for learning of a noble self sacrificial, forbearing kind of love, but, more often than that, children on a daily basis, also expose our own innate selfishness. The power both to train and scar our children lies in our hands. And there is little support in our society to help a woman choose to keep and raise her child. Parents, many from scarred backgrounds need education on how to train and love their children and this is not readily available.

My boyfriend and my family insisted that there was no way out but to choose abortion. I chose to be verbally manipulated to carry out their point of view, rather than thinking through the choice. I was given no alternatives. A

clinic was quickly found to take care of our little "problem."

At the clinic, the doctor seemed so abrupt and angry, so tense and under pressure. I felt like the only difference in his eyes between me and the unborn child in my womb was 19 years. Had I been 19 years younger, unable to speak and helpless, I too would have met the same fate in his office, the death penalty. The crime, being a "useless" member of society. My life seemed so valueless in the doctor's sight.

A person's self esteem (the worth they feel about themselves) determines the value they place on the lives of others. "Love others as you love yourself." Yet how do you love others when, deep down, you despise yourself?

The Nazi movement didn't start with Hitler. He just jumped on the bandwagon of a movement originating in the 20's by a

groups of doctors and psychiatrists in Germany. They proposed "mercy" killing of elderly or mentally impaired members of society. These dear peoples lives were valueless in their sight. Hitler just extended this kind of thinking to the Jews (the apple of God's eye) and other minority groups. I believe that this same kind of thinking (stemming from zero self esteem) is what is behind abortions in this country.

At the clinic I learned a shameful lesson I wished I'd never learned, perhaps the same lesson Nazi soldiers learned when "just carrying out orders" in concentration camps. I too, was just "following orders." I wanted to be a "good" girlfriend. I pray that now, I can be (instead of a spineless robot, the gutless wonder) a woman of conviction.

The weeks, months, years following the abortion, I fell in and out of depression

(only masked for a time by bursts of desperate hyperactivity). The sadness over what happened hangs about me like the hovering scent of funeral flowers that linger in a room after the funeral has come and gone.

I later got pregnant. But this time, I battled with my own selfishness and fears and my boyfriend and stood up for my rights to be a mother and for the rights of my unborn child, who is soon going to be nine and is very beloved by us all.

I am now being divorced. I never enjoyed sex for years and this damaged my live-in relationship and shortlived marriage to this same boyfriend. Whenever we made "love" I saw the CHOICE of abortion looming behind every expression of "love" between us.

Now, I am engaged to be married to one in whose eyes I am loved, one who sees me

and all human beings as a pearl of great price. His name is Christ.

I'm pro choice now. I'm determined not to let anybody but Christ (through the common sense plan of conduct transformation laid out in his word, the Bible) influence my moral choices anymore. I want to be an independent thinker and not let man do my thinking for me anymore. If you don't "do" your own thinking, someone else will "do" your thinking for you.

Testimony of Jeanene Clark on file at the Elliot Institute.

When I was 16 years old I became pregnant and subsequently had an abortion. This decision was based upon lies and lack of knowledge has caused me many years of anguish and will continue to do so for the rest of my life. Here is my story:

August 1977 - I was 16 and I was pregnant. I knew this because I had gone to the local Health Department for a free pregnancy test and they had called me back that morning. The counselor on the phone asked me what I was going to do. What was I going to do? I had just began "experimenting" with sex. I wasn't suppose to get pregnant. That happened to other people, not me. I answered the counselor, "I don't know, maybe an abortion. I just don't know." The counselor picked up on this statement and offered to make an appointment for me at a Dallas abortion clinic. I agreed. I was never counselled towards anything, or offered any alternative other than abortion. My abortion was publicly funded.

A few days later I was taken to the Fairmont Abortion Clinic in Dallas, Texas. Upon arrival I was "counselled" about the

abortion I was about to have. The counselor showed me a picture of a six week old "fetus." (The age they had decided on for my baby) This picture looked like chopped liver. I was told by the counselor that at this stage of development, the fetus was not a baby. That it was no more than a "wad of tissue." I was informed that there was nothing to the procedure. It would not hurt any more than menstrual cramps, and there were few side effects. I was told that I would have to stay there for an hour after the abortion (which I did not do) to make sure my bleeding was not too severe. That I should take a morphine pill to relax me and I could have a morphine shot with the pill if I wanted it. I did not. I was taken to an exam room when I was placed in an examination position. The doctor asked if I minded if a woman who was being trained observed the procedure. I agreed. The doctor dilated

my cervix and proceeded to insert the vacuum aspirator. I felt when the baby caught and immediately began having severe cramps. The doctor finished and they rushed the bottle (which contained my baby) out of the room before I could see it. This tends to disturb the patient when she sees her baby (who only minutes ago was sleeping peacefully in her womb) ripped to shreds in a glass jar. I was then taken to a waiting area to make room for another woman who had made the "choice" to murder her baby. I continued to have severe cramps for the rest of the day. I felt sad and empty, as if a part of my soul had been taken away.

As I looked back at my post-abortion life, I realize that so many of the mistakes that I made and created for myself were due to the subconscious image I had created of myself, I had killed my own

baby. How could anyone love me when I couldn't love myself?

I began to drink heavily and use drugs. I had severe depressions in which I contemplated suicide. I had and still have horrible nightmares involving babies and people trying to kill me. I still get depressed and cry a lot. I pray at night that God will let my baby know that I didn't kill him because I hated him. I long to hold him so much now that it hurts, and I want him to know that.

I harbor secret fears that one of my children will be taken from me because of this horrible act that I have committed. This fear was compounded when I almost miscarried one of my children at twelve weeks. I feel sure the problem was connected to my abortion. The problems go on and on. I had never allowed myself to calculate the month that my baby would have been born. Recently I figured out when the

baby would have been born and was horrified when I realized that it was within weeks of when both of my children were born. I had felt intense pressure from within myself to become pregnant at this particular time with both my children. And now the realization has hit me that subconsciously I have substituted my live children for my dead child, by conceiving and giving birth at the same times.

I have spent many years trying to push the memory of what I have done to the back of my mind, but it won't stay there. I have constantly compared my dead child to what he would have been doing had he lived. I understand that most women who choose to abort experience the same feelings. My child would have been in first grade this year. It's very hard for me to look at a first grader.

I have shed many tears over the last few years and now I'm angry. I'm angry at

myself, my family, Fairmont Clinic, their counselors, the doctors, (who can commit murder on a daily basis) and most of all I'm mad at my government, who prints "IN GOD WE TRUST" on our coins, yet has legalized the daily painful, violent slaughter of the youngest members of our society.

I hope and pray that our great nation can turn this thing around before it is too late for all of us. And most of all before we as individuals have to stand before God and confess what we have done to His most perfect creation.

Signed

Jeanene Clarke

BEFORE ME, the undersigned authority on this day appeared Jeanene Clarke who affirmed the above statements under oath, and has stated that they are true and correct.

Lillian E. Mahoney
Notary Public in and for Texas
My commission expires: 7/31/85

Supreme Court, U.S.
FILED
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Nos. 88-1125, 88-1309

In the Supreme Court of the United States

October Term, 1989

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Petitioners,
Cross-Respondents,

vs.

THE STATE OF MINNESOTA, ET AL.,
Respondents,
Cross-Petitioners.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF AMICUS CURIAE
IN SUPPORT OF THE STATE OF MINNESOTA

By WILLIAM J. GUSTE, JR.,
ATTORNEY GENERAL OF LOUISIANA
Counsel of Record
P. O. Box 94005, Capitol Station
Baton Rouge, Louisiana 70804-9005
504-568-5575

WITH ATTORNEYS GENERAL JOINING FOR
THE STATES OF ARIZONA, MISSOURI,
AND PENNSYLVANIA

WILLIAM J. GUSTE, JR., Attorney General
JENIFER SCHAYE and MEREDITH H. LIEUX,
Assistant Attorneys General
JO ANN P. LEVERT and THOMAS A. RAYER,
Of Counsel.

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THE TENTH AMENDMENT AND THE *WEBSTER* DECISION PROVIDE THE CONSTITUTIONAL BASIS FOR THE COURT TO UPHOLD THE CONSTITUTIONALITY OF THE MINNESOTA STATUTE WHICH REQUIRES NOTICE TO PARENTS WHERE A MINOR CHILD SEEKS AN ABORTION BECAUSE THE STATUTE BEARS A RATIONAL RELATIONSHIP TO A LEGITIMATE STATE INTEREST.

1. The Tenth Amendment Reserves Powers not Granted in the United States Constitution to the States and the People.
2. *Webster* Has Effected Substantial Changes in the Area of Abortion.
3. The State Has a Compelling Interest in Protecting Human Life or Potential Human Life in the Womb of the Mother, as well as a Compelling Interest in Protecting the Health and Well-being of a Pregnant Daughter. These Interests are Attained by Requiring Parental Notice Where a Minor Seeks an Abortion.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

INTEREST OF THE AMICUS CURIAE

In its *amicus* brief in *Webster v. Reproductive Health Services, et al*, No. 88-605, Attorney General Guste for the State of Louisiana, joined by the Attorneys General of Arizona, Idaho, Pennsylvania, and Wisconsin, urged the Court to overturn *Roe v. Wade*[1] in its entirety, recognizing that the State has a compelling interest in protecting human life from the moment of conception. Louisiana has enacted a statute which expresses the State's

[1] 410 U.S. 113, 93 S.Ct. 705 (1973).

compelling interest in protecting the unborn child from conception.[2]

The *Webster*[3] plurality overruled the rigid three-part or trimester framework in *Roe*, acknowledging the states' compelling interest in protecting potential human life and maternal health throughout pregnancy. The Court in *Webster* also adopted a minimum level of scrutiny (instead of "strict scrutiny" required by *Roe*) in determining whether an abortion statute is constitutional, that is, whether it has a rational relation to any valid state objective. Mr. Justice Blackmun's dissent accurately characterized the plurality opinion, noting that state statutes in the area of abortion are now to be judged by the Court's most lenient standard of review, and that *Roe* would not survive the *Webster* analysis.[4] The State of Louisiana supports this judgment, which in effect, overrules *Roe v. Wade* in its entirety.

Louisiana has an interest in the disposition of the present case. Similar to Minnesota, Amicus has a number of statutes which seek to preserve the integrity of the family, including the rights and obligations of parents who make decisions that affect minor children. In particular, pursuant to La. R.S. 40:1299.35.5,[5] Louisiana requires that parents be informed of and consent to an abortion procedure on their minor daughter, or where parental

[2] La. R.S. 40:1299.35.0, reproduced in Appendix *A* at App. *3*.

[3] *Webster v. Reproductive Health Services, et. al*, 109 S.Ct. 3040 (1989).

[4] *Webster*, supra, 109 S.Ct. at 3067.

[5] Louisiana Revised Statutes 40:1299.35.5 is reproduced in Appendix B at App. 5.

consent is not obtained by the minor, the statute provides an alternative or by-pass procedure, whereby judicial consent may be obtained.[6]

To the extent that notice is implicit within Louisiana's parental consent statute, the decision of the Court in this case can impact upon the statutory scheme in Louisiana and other states. Pursuant to this reasoning, Louisiana, Minnesota and the Several States, therefore, have compelling interests in the preservation of a state's right to legislate in matters affecting the family and domestic relations.

Amicus urges the Court to find that a statute is constitutional which requires parental notice where a minor seeks an abortion because such a statute reasonably furthers the state's compelling interest in protecting human life or potential human life in the womb of the mother.

Amicus urges the Court to find that Minnesota's interests in protecting both the health and well-being of a pregnant minor and the unborn child amply justify a statutory requirement that parents receive notice prior to the performance of an abortion on their minor daughter.

SUMMARY OF ARGUMENT

THE TENTH AMENDMENT AND THE *WEBSTER* DECISION PROVIDE THE CONSTITUTIONAL BASIS FOR THE COURT TO UP-

[6] *Margaret S. v. Treen*, 597 F. Supp. 636 (E.D. La. 1984; affirmed 794 F.2d 994 (5th Cir. 1984) held that R.S. 40:1299.35.5 is constitutional.

HOLD THE CONSTITUTIONALITY OF THE MINNESOTA STATUTE WHICH REQUIRES NOTICE TO PARENTS WHERE A MINOR CHILD SEEKS AN ABORTION BECAUSE THE STATUTE BEARS A RATIONAL RELATIONSHIP TO A LEGITIMATE STATE INTEREST.

The Tenth Amendment to the United States Constitution reserves power not delegated to the United States to the Several States and to the people. The police power reserved to the States under the Tenth Amendment enables the States to set standards of behavior that promote the safety, health or morals of the people. Neither the States nor the people have renounced their power to make pronouncements about the value of unborn human life or about regulations on or limitations to abortion. Conversely, Louisiana and other states have persisted to legislate in these areas.

Under the principles of federalism, the Court again should leave with the States the latitude to legislate in matters of abortion limitation, including those areas which preserve the family integrity. In the exercise of judicial restraint, as embodied within the Tenth Amendment, the Court should uphold the Minnesota procedures which mandate parental notification of a minor's intent to obtain an abortion or the alternative judicial by-pass option.

Amicus submits that *Webster* has abandoned *Roe's* heightened scrutiny as the standard for reviewing the constitutionality of state abortion statutes and has returned to the traditional rational basis test, which requires only that the Court determine whether the statute has a rational relation to a legitimate state objective. The

challenging party bears the burden of proving the statute unreasonable.

Minnesota and the Several States have a legitimate interest in protecting maternal health and familial relationships. The Minnesota statute bears a rational relationship to that objective and should, therefore, pass constitutional muster.

According to *Webster*, the Several States also have a compelling interest in protecting human life or potential human life. The Minnesota statute, therefore, is reasonable even if it forms part of the state's review process in furthering this compelling interest.

ARGUMENT

THE TENTH AMENDMENT AND THE *WEBSTER* DECISION PROVIDE THE CONSTITUTIONAL BASIS FOR THE COURT TO UPHOLD THE CONSTITUTIONALITY OF THE MINNESOTA STATUTE WHICH REQUIRES NOTICE TO PARENTS WHERE A MINOR CHILD SEEKS AN ABORTION BECAUSE THE STATUTE BEARS A RATIONAL RELATIONSHIP TO A LEGITIMATE STATE INTEREST.

1. The Tenth Amendment Reserves Power not Granted in the United States Constitution to the States and the People.

Abortion legislation falls squarely within the police power reserved to the States under the Tenth Amendment.[7] The police power enables the States to set stan-

[7] U.S. Const. Amend. X: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

dards of behavior so as to promote the public well-being of its citizens. In *Mugler v. Kansas*, 123 U.S. 623, 8 S. Ct. 273 (1887), the Court spelled out the fundamental legislative nature of the State police power, warning that judicial usurpation of this power violates the principles of federalism formalized in the Tenth Amendment:

> It belongs to [state legislatures] to exert what are known as the police powers of the state, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety.
>
> [T]he courts cannot, without usurping legislative functions, override the will of the people as thus expressed by their chosen representatives. They have nothing to do with the mere policy of legislation. Indeed, it is a fundamental principle in our institutions, indispensable to the preservation of public liberty, that one of the separate departments of government shall not usurp powers committed by the constitution to another department.
>
> . . .
>
> It cannot be supposed that the states intended, by adopting [the Fourteenth Amendment], to impose restraints upon the exercise of their powers for the protection of the safety, health, or morals of the community. 123 U.S. at 661-664, 8 S.Ct. at 297-98. (citation omitted.)

Chief Justice Rehnquist recognized the application of those fundamental principles to abortion legislation in his dissent in *Roe v. Wade*: "[T]he drafters did not intend to have the Fourteenth Amendment withdraw from the States the power to legislate with respect to [abortion]." *Roe v. Wade*, 410 U.S. at 177 (Rehnquist, J., dissenting).

Significantly, the Court has recognized restrictions placed on its own powers by the federalism principles embodied in the Tenth Amendment. In *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S.Ct. 1005 (1985), the Court explained: "The essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else—*including the judiciary*—deems state involvement to be." *Id* at 546. (Emphasis added).

Conforming with the view of the majority, Justice Powell in his dissent stated: "Judicial enforcement of the Tenth Amendment is essential to maintaining the federal system so carefully designed by the Framers and adopted in the Constitution." *Id.* at 570.

Neither the Several States nor the people have consensually renounced their power to make moral pronouncements about the value of unborn human life or about abortion. Thus, in matters of domestic social policy and public morality touching upon the everyday familial lives of the people, where a fundamental right protected by the Constitution is not thereby infringed, the Several States should be free to legislate for the public good. *San Antonio Independent School District v. Rodriquez*, 411 U.S. 1, 93 S.Ct. 1278 (1973); *Dandridge v. Williams*, 397 U.S. 471, 90 S.Ct. 1153 (1970); *United States v. Darby*, 312 U.S. 100, 61 S.Ct. 451 (1941). And, the *Webster* Court has now concluded that the right to abortion is not a fun-

damental constitutional right. *Webster*, supra, 109 S.Ct. at 3058 (1989).

Justice O'Connor perhaps best sums up the ever evolving concept of federalism in her separate opinion in *FERC v. Mississippi*, 456 U.S. 742 (1982):

> During the last Term of service on this Court, Justice Black eloquently explained that our notions of federalism subordinate neither national nor state interests:
>
> "The concept does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Younger v. Harris*, 401 U.S. 37, 44 (1971). *Id.* 456 U.S. at 796, 797.

This Court has specifically applied these fundamental principles of federalism to domestic affairs. In *Rose v. Rose*, 481 U.S. 619, 107 S.Ct. 2029 (1987), the Court recognized traditional family autonomy, noting that:

> We have consistently recognized that '[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.' *Ex Parte Burrus*, 136 U.S. 586, 593-594, 10 S.Ct. 850, 852-853, (1890); see *Hisquierdo*, supra 439 U.S., at 581, 99 S.Ct., at 808; *McCarty*, supra, 453 U.S., at

> 220, 101 S.Ct., at 2735. 'On the rare occasion when state family law has come into conflict with a federal statute, this court has limited review under the Supremacy Clause to a determination whether congress has 'positively required by direct enactment' that state law be preempted. *Hisquierdo*, supra, 439 U.S., at 581, 99 S.Ct., at 808, quoting *Wetmore v. Markoe*, 196 U.S. 68, 77, 25 S.Ct. 172, 175 (1904). Before a state law governing domestic relations will be overridden, it 'must do 'major damage' to 'clear and substantial' federal interests.' *Hisquierdo*, supra, 439 U.S., at 581, 99 S.Ct., at 808. 481 U.S. at 625 (1987)

Under the *Rose* analysis, the standard for reviewing the Minnesota Statute, M.S.A. 144.343 Subsec. 22-5, is limited to a consideration of whether the State, in requiring parental notification of a minor's intent to obtain an abortion, has thereby "done major damage" to a "clear and substantial" constitutional right which the pregnant child may possess. However, unlike the *Rose* analysis, the *Webster* minimum scrutiny analysis limits judicial review to a consideration of whether the parental notification statute bears a rational relationship to a legitimate state interest, because under *Webster*, there is no constitutional right to abortion. *Webster*, supra, 109 S.Ct. at 3057, 3063, 3076. Under this test, the statute has a presumption of constitutionality and the challenger bears the burden of proving it unreasonable.[8]

Amicus, therefore, urges the Court to exercise ju-

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[8] *See*, L. Tribe, American Constitutional Law 1439-1442 (1978); The Constitution of the United States of America, Analysis and Interpretation 1697-1702 (J. Killian ed. 1987); J. Nowak, R. Rotunda, & J. Young, Handbook on Constitutional Law 524-525 (1978).

dicial restraint and find that governmental regulation of domestic and family relations is reserved to the States and to the people through the democratic process.

2. *Webster* Has Effected Substantial Changes In the Area of Abortion.

In *Webster*, the plurality explicitly narrowed *Roe*; Justice O'Connor avoided reconsideration of *Roe*; Justice Scalia called for an express over-ruling of *Roe*. According to Justice Blackmun, "the plurality and Justice Scalia would overrule *Roe* and return to the State virtually unfettered authority to control [abortion]." *Webster v. Reproductive Health Services, et al*, 109 S.Ct. at 3067 (Blackmun, J., dissenting).

The Court in *Webster* rejected the trimester framework established in *Roe*. Chief Justice Rehnquist noted that the detailed approach in *Roe* conflicted with "a Constitution cast in general terms," *Id.* at 3056, and he rejected the basic premise in *Roe* that "the State's interest in protecting potential human life should come into existence only at the point of viability, [or] that there should be a rigid line allowing state regulation after viability but prohibiting it before viability." *Id.* at 3057.

Significantly, the Court in *Webster* abandoned *Roe's* heightened scrutiny as the standard for reviewing abortion statutes and returned to the traditional rational basis test, noting that:

> The experience of the court in applying *Roe v. Wade* in later cases, (citation omitted) suggests to us that there is wisdom in not unnecessarily attempting to elaborate the abstract differences between a "fundamental right" to abortion, (citation omitted) a "limited constitutional right," (citation omitted) or a *liberty interest* protected by the Due Process Clause, which we believe it to be. *Webster*, 109 S.Ct. at 3058 (Emphasis added).

Justice O'Connor has previously rejected *Roe's* heightened scrutiny test, in her dissents in *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983) and in *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 814, 828, 106 S.Ct. 2169, 2207, 2214 (1986). *Webster*, 109 S.Ct. at 3063 (1989).

The state's objectives of protecting potential human life and maternal health throughout pregnancy are consistent with Justice O'Connor's previous dissents.

After *Webster*, it is therefore apparent that five justices have defined the state's interests as being "compelling" in the protection of potential human life and maternal health at all stages of pregnancy. Using a minimum level of scrutiny as the standard of review, the Minnesota statute should, therefore, pass constitutional muster. The Court must only determine whether the statute has a rational relation to a legitimate state objective. *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 491; 75 S.Ct. 461, 466 (1955).[9]

The plurality in *Webster*, supra, initially notes that "*Roe v. Wade* implies no limitation on the authority of a state to make a value judgment favoring childbirth over abortion," *Id.* at p. 3042; and further concludes that the:

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[9] *See, Roe v. Wade*, 410 U.S. 113, 173, 221, where Justice Rehnquist presented the traditional due process test, citing *Williamson*. (Rehnquist, J., dissenting).

". . . State has a *compelling interest in ensuring maternal health* and *in protecting potential human life*, and these interests exist throughout pregnancy." *Id.* at 3057. (Emphasis added).

These articulated compelling state interests afford ample justification for a state to require appropriate parental notification of a pregnant child's decision to seek an abortion. However, Amicus suggests that the state also has a compelling interest in fostering and promoting parental involvement in the wrenching decisions facing their pregnant daughter. This interest emanates from recognition of and deference to the constitutionally established rights of all parents to nurture and support their children in the making of momentous and enduring decisions. *Prince v. Massachusetts*, 321 U.S. 158 (1944).

Amicus, therefore, urges the Court to apply the standard of review it established in *Webster*, supra, to this case. The Court should find that the provisions of the Minnesota parental notification statute reasonably afford the parents of a pregnant child opportunity to exercise their fundamental right of participation in the grave decision of their child to have an abortion. *Webster*, 109 S.Ct. at 3058.

Clearly, the Minnesota Statute in question passes constitutional muster, for various reasons well articulated in the Brief of the Relator, State of Minnesota. The pregnant child is offered adequate and realistic alternatives which afford her the opportunity to choose an abortion, notwithstanding parental objection or non-involvement. The judicial by-pass procedures, like those under the Louisiana Statute, R.S. 40:1299.35.5, do not unduly endanger her health or impose unreasonable restraints upon her decision-making process, nor do they increase the traumatic experience of the abortion.

3. The State Has a Compelling Interest in Protecting Human Life or Potential Human Life in the Womb of the Mother, as well as a Compelling Interest in Protecting the Health and Well-being of a Pregnant Daughter. These Interests are Attained by Requiring Parental Notice Where a Minor Seeks an Abortion.

Amicus urges the court to recognize herein that the State's interests in protecting the long-term health and well-being of a pregnant minor as well as that of the unborn child are compelling, and that these interests may be legitimately achieved through legislation requiring that parents receive notice prior to the performance of an abortion on their minor daughter. The origins of the State's interests in protecting and encouraging familial interrelationships emanates from Roman and ancient laws under which individuals had no societal existence except as part of a family. The common law gives recognition to familial interrelationships through its judicial precedents. The civil law, under which Louisiana is governed, gives recognition to these relationships through a written code, derived from the French Code Napoleon of 1804.

Accordingly, the Louisiana Civil Code expressly defines the scope of parental authority as being vested in

both the father and mother until a child reaches the age of majority or is emancipated. La. C.C. art. 216.[10]

The Louisiana Civil Code also provides that minor children do not have the legal capacity to contract or to represent themselves in litigation so the mother and father have the parental duty to protect and represent them. La. C.C. arts. 235 and 237.[11]

In conformity with these long established principles of law governing the rights and obligations of parent and child, and because of this Court's holding in *Roe* and its progeny,[12] Louisiana requires statutory consent to the abortion procedure in the form of a notarized statement

[10] Art. 216. Parental authority. A child remains under the authority of his father and mother until his majority or emancipation.

In case of difference between the parents, the authority of the father prevails. La. C.C. art. 216.

[11] Art. 235. Parental protection and representation of children in litigation.

Fathers and mothers owe protection to their children, and of course they may, as long as their children are under their authority, appear for them in court in every kind of civil suit, in which they may be interested, and they may likewise accept any donation made to them.

* * *

Art. 237. Parents' liability for offenses and quasi-offenses of children.

Fathers and mothers are answerable for the offenses or quasi-offenses committed by their children, in the cases prescribed under the titles: *Of Quasi-Contracts, and of Offenses and Quasi-Offenses.*

[12] The Louisiana Legislature passed House Concurrent Resolution No. 10 immediately after the decision in *Webster* on or about July 10, 1989, making it clear that Louisiana has never accepted permissible abortion and that any post-*Roe* legislation is for the purpose of restricting abortion to the maximum extent possible under the reasoning of the United States Supreme Court. H. Con. Res. 10, 1989 La., Second Extraordinary Session reproduced in Appendix C at App. 9.

by the minor's parent, or the abortion procedure is characterized as a battery on the minor by the physician. *Cage v. Wood*, 484 So.2d 850 (La. App. 1st Cir. 1986).

The Louisiana Medical Malpractice Act[13] requires written and informed consent prior to invasive surgical or medical treatment. The courts have held that invasive procedures without valid written consent are considered a statutory battery. *Pizzalotto v. Wilson*, 437 So.2d 859 (La. 1983). Certainly, societal interests require that parents help guide their distressed daughter through decisions related to abortion. At a minimum, the parents have an obligation to care for the minor in the event some complication develops.

Amicus suggests that the interests of the people of Minnesota in protecting familial rights are no less than those of the people of Louisiana. The Minnesota notification statute is reasonably related to the governmental objective of preserving family autonomy with emphasis on the health and well-being of minor daughters and the life of unborn children. The by-pass provisions provide reasonable alternative means to seek judicial action for giving or witholding notice whenever necessary. The Eighth Circuit decision should be affirmed.

CONCLUSION

Minimum constitutional scrutiny of abortion statutes as articulated in *Webster* and judicial restraint as embodied in the Tenth Amendment to the United States Constitution, require that the Court reaffirm herein the

[13] La. R.S. 40:1299.40

proposition that the States retain the right to legislate in matters affecting familial relationships and the life of unborn children.

Respectfully submitted,

WILLIAM J. GUSTE, JR.
Attorney General
Louisiana Department of Justice
Post Office Box 94005
Capitol Station
Baton Rouge, Louisiana 70804-9005
Telephone: (504) 342-7013

Jenifer Schaye
Assistant Attorney General

Meredith H. Lieux
Assistant Attorney General

Jo Ann P. Levert
Of Counsel

Thomas A. Rayer
Of Counsel

October 1, 1989

Joined by:

William L. Webster
Attorney General of Missouri

APPENDIX A

LOUISIANA LEGISLATIVE INTENT

La. R.S. 40:1299.35.0 Legislative intent

It is the intention of the Legislature of the State of Louisiana to regulate abortion to the extent permitted by the decisions of the United States Supreme Court. The Legislature does solemnly declare and find in reaffirmation of the longstanding policy of this State, that the unborn child is a human being from the time of conception and is, therefore, a legal person for purposes of the unborn child's right to life and is entitled to the right to life from conception under the laws and Constitution of this State. Further, the Legislature finds and declares that the longstanding policy of this State is to protect the right to life of the unborn child from conception by prohibiting abortion impermissible only because of the decisions of the United States Supreme Court and that, therefore, if those decisions of the United States Supreme Court are ever reversed or modified or the United States Constitution is amended to allow protection of the unborn then the former policy of this State to prohibit abortions shall be enforced.

APPENDIX B

LOUISIANA PARENTAL CONSENT STATUTE

§ 1299.35.5. Minors

A. No physician shall perform or induce an abortion upon any pregnant woman who is under the age of eighteen years and who is not emancipated judicially or by marriage unless the physician has received one of the following documents:

(1) A notarized statement signed by the mother, father, legal guardian, or tutor of the minor declaring that the affiant has been informed that the minor intends to seek an abortion and that the affiant consents to the abortion.

(2) A court order as provided in Subsection B of this Section.

B. The following provisions shall apply to all applications for court orders by minors seeking abortions and appeals from denials of applications:

(1) Jurisdiction to hear applications shall be in the court having juvenile jurisdiction in the parish where the abortion is to be performed or the parish in which the minor is domiciled.

(2) Each clerk of each court which has jurisdiction to hear such applications shall prepare application forms in clear and concise language which shall provide step by step instructions for filling out and filing the application forms. All application forms shall be submitted to the at-

torney general for his approval. Each clerk shall assist each minor who requests assistance in filling out or filing the application forms.

(3) Each application shall be heard in chambers, confidentially, in a summary manner, and within forty-eight hours of the filing thereof.

(4) If the court finds that the minor is sufficiently mature and well enough informed to make the decisions concerning the abortion on her own, the court shall issue an order authorizing the minor to act on the matter without parental consultation or consent.

(5) If the court finds that the minor is not competent to make the decision concerning the abortion on her own, but finds that the abortion nevertheless would be in the best interest of the minor, the court shall issue an order authorizing the abortion.

(6) Appeals from decisions of the court hearing the application shall be by trial de novo in the court of appeal.

(7) Each clerk of each court of appeal shall prepare appeal forms in clear and concise language which shall provide step by step instructions for filling out and filing the appeal forms. All appeal forms shall be submitted to the attorney general for his approval. Each clerk shall assist each minor who requests assistance in filling out or filing the appeal forms.

(8) Each appeal shall be heard in chambers, confidentially, in a summary manner, and within forty-eight hours of the filing thereof.

(9) The decision of the court of appeal shall be based on the criteria provided in Paragraphs (4) and (5) of this Subsection.

(10) Each minor who declares to the clerk of the court hearing the application or appeal that she does not have sufficient funds to pay for the costs of the application or the appeal shall be allowed to proceed in forma pauperis.

(11) Each minor who files an application or an appeal shall be entitled to a hearing and a determination by the court independently of any notice to or consultation with her parents, tutor, or guardian.

(12) Except as otherwise provided in this Section, or as otherwise provided by rule of court, hearings of applications and appeals shall be conducted in accordance with the provisions of the Louisiana Code of Juvenile Procedure.

APPENDIX C

LOUISIANA HOUSE CONCURRENT RESOLUTION

Second Extraordinary Session, 1989

HOUSE CONCURRENT RESOLUTION NO. 10

BY REPRESENTATIVES DIMOS, JENKINS, ALARIO, ST. RAYMOND, ACCARDO, ATER, BELLA, BRADLEY, BRUN, BRUNEAU, CAIN, CARRIER, CRANE, DAMICO, DIEZ, DONELON, DUKE, ELLINGTON, ENSMINGER, FORSTER, GARRITY, GAUDIN, GEE, GUIDRY, GUZZARDO, HAIK, HAND, HEBERT, HEBERT, HERRING, KIMBALL, LABORDE, LANCASTER, LANDRIEU, LEMOINE, MARTIN, MCCLEARY, MCFERREN, MILLER, ODINET, PATTI, SALTER, SCOGIN, SIRACUSA, SITTIG, A. D. SMITH, A. J. SMITH, J. R. SMITH, SOUR, STELLY, STINE, STRAIN, S. H. THERIOT, THOMPSON, TRAVIS, VOLENTINE, AND WADDELL AND SENATORS BARES, HAINKEL, LAURICELLA, BRINKHAUS, CROSS, DECUIR, DOLAND, FOSTER, HOLLIS, LANDRY, MCLEOD, OSTERBERGER, POSTON, ULLO, WINDHORST, AND RAYBURN

A CONCURRENT RESOLUTION

To express the intent of the legislature that the district attorneys of this state shall enforce state criminal laws which prohibit abortion to the fullest extent

permitted under and consistent with the U.S. Constitution as interpreted by the United States Supreme Court.

WHEREAS, Louisiana's criminal abortion statutes, R.S. 14:87 through 88, remain a part of the Louisiana Revised Statutes of 1950; and

WHEREAS, since the Roe v. Wade decision the Louisiana Legislature has passed a number of statutes designed both to restrict abortion to the maximum extent permitted by the United States Supreme Court and to protect the unborn as well as women, doctors, and nurses who do not wish to participate in abortion; and

WHEREAS, the Louisiana Legislature has clearly stated its intent in R.S. 40:1299.35.0, that Louisiana's criminal statutes prohibiting abortion take priority over those statutes which only regulate abortion and that abortion should be prohibited as soon as permitted by federal courts.

THEREFORE, BE IT RESOLVED that it is the intent of the Legislature of Louisiana that the district attorneys of this state shall enforce the criminal statutes pertaining to abortion, R.S. 14:87, 87.1, 87.2, 87.4, 87.5, and 88, to the fullest extent permitted by and consistent with the Constitution of the United States as interpreted by the United States Supreme Court.

SPEAKER OF THE HOUSE
OF REPRESENTATIVES

PRESIDENT OF THE SENATE

No. 88-1125

In the Supreme Court of the United States

OCTOBER TERM, 1989

JANE HODGESON, ET A.L.,
APPELLANTS

V.

MINNESOTA, ET A.L.
APPELLEES

PETITION FOR A WRIT OF CERTIOARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR JEFF WHITE, OPERATION RESCUE AND RANDY ADLER AS AMICUS CURIAE SUPPORTING APPELLEES

ROBERT L. SASSONE
Attorney at Law
900 North Broadway • Suite 725
Santa Ana, California 92701
(714) 547-5611

MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE ON BEHALF OF RESPONDENT

Amici hereby respectfully move for leave to file a brief amicus curiae in the present case. Requested consent of parties is expected but has not yet been received and filed. When filed, it will make this motion unnecessary.

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INTEREST OF AMICI CURIAE

The interest of the amici, in brief, is that as long as the US Supreme Court (as very broadly interpreted by District Courts) considers abortion a fundamental right and a Civil Right according to District Courts requiring protection under 42 USC Sec 1983-1985, amici and those similar to them will continue to run the risk of being pauperized by Federal judges and have their bones broken by abortion mill guardians.

Operation Rescue is a name given to a movement under whose banner many tens of thousands of Americans have been arrested for trespass at abortion clinics during the past year. Rev Dr Randy Adler is a husband and father, the pastor of a Protestant church and the head of the pastor's committee for Operation Rescue of Southern California.

Never wealthy in material goods before August 30, on August 30, 1989, in a case where there were no damages to plaintiffs, he lost his last asset to the ACLU attorneys for attorney fees pursuant to a judgement re contempt in United States District Court (Central District of California) case CV 89-1181 AWT, the honorable A Wallace Tashima, judge presiding. Among the allegations of the contempt was the charge that Adler participated in a rescue March 25 in Los Angeles (where about 500 rescuers were injured). Adler and hundreds of others filed a counter claim alleging Civil Rights violations, which counter claim has been dismissed as not stating a cause of action since Roe v Wade makes any recovery impossible, even assuming the truth of the matters stated.. Jeff White was acquitted of criminal charges

by a jury and ordered to pay the ACLU a fine by judge Tashima who found him in contempt presumably for what the jury acquitted him of. The number of amici listed herein is limited so the description of their interests will not unduly burden the court. There were many other arms broken by LAPD and numerous other injuries such as broken feet, soft tissue damage, nerve damage, other breaks, etc. inflicted by LAPD and their horses and by pro abortion counter demonstrators who beat certain non resisting rescuers without police interference.

Our interest is that we wish this great Court would go back to stopping legislating so we could go back to being ordinary citizens.

SUMMARY OF ARGUMENT

Hey! You people up there in the Ivory Tower. Please abort Roe v Wade. In spite of your talents, you cannot fine tune it to make it a workable law and you cannot do as good a job as a real legislature.

If you do not abort Roe v Wade, we, intimately associated with America's most active ACLU attorney welfare system, will continue to have our arms broken by the finest police from Los Angeles and other cities, and will soon owe the ACLU more hundreds of thousands of dollars awarded in Federal cases relating to the FUNDAMENTAL Civil Right to abort pursuant to 42 USC Sec 1983-1985 by Federal judges in cases with no other damages.

Our nefarious crime, of course, is to protest at abortion clinics and on

occasion to be arrested, although acquitted in criminal court, perhaps because Article 1, Section 1 of the California Constitution begins: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life..." Note that life is broadly protected and need not be born as is also true in the definition of personhood in Title 1, USC Sec 1, not the more restrictive 1973 US Supreme Court definition that only those humans lives are entitled to protection which the US Supreme Court wishes.

The pro abortionists can prolong the bitter battle, but cannot win. Those favoring abortion favor it a little like any other issue. Most opposing see it as killing millions of innocent tiny babies via horrible torture deaths. Accordingly,

there is a vast difference in the commitment of those on the opposing sides. This is why, other things being equal, the candidate promising to appoint anti abortion Justices wins in a landslide. The main thrust for abortion has come from those in the media who usually favor abortion and slant the media accordingly, those in control of elite groups such as the AMA, and the former majority of this Court. This would have been enough to carry the day with most issues. The abortion issue differs, however in that there are millions who would sacrifice their lives to stop what they believe is the bloodshed. The demographics favor the anti abortionists. Twenty years ago, the young were more pro abortion. This has changed because 1,500,000 potentially pro abortion voters die annually before birth.

SUMMARY OF BRUTALITY BY HEAD OF US CIVIL RIGHTS COMMISSION (from Wall Street Journal, 8/18/89)

"POLICE BRUTALITY - BUT NO OUTRAGE

by William B. Allen

Selma, Ala, 1965: blacks trying to register to vote are stopped at the courthouse steps by police using billy clubs and cattle prods to beat the nonviolent demonstrators into submission and retreat. The brutality of the confrontation reaches its climax with the first attempt to march from Selma to Montgomery, a march that is aborted when the state troopers charge the marchers, swinging billy clubs and firing canisters of tear gas into the fleeing crowd. Soon mounted police armed with bull whips, ropes, and barbed wire wrapped in rubber join in the unprovoked

attack. Hosea Williams is among the first knocked down by excessive police force.

Martin Luther King, Jr., begins sending telegrams from his office in Atlanta before the day is through. He calls the event a "vicious maltreatment of defenseless citizens of Selma, where old women and young children were gassed and clubbed at random."

Horrifying Images

The news media quickly convey the images to a horrified American people. The Department of Justice is pressed to investigate, and to send federal marshals to Alabama to protect the marchers. Within two weeks, President Lyndon B. Johnson introduces legislation later known as the Voting Rights Act.

Within a month, a full-scale march to Montgomery, under the protection of federal officers and a nationalized Alabama national guard, is conducted peacefully, and the tactic of peaceful demonstration is firmly secured in the American conscience.

Washington, D.C., 1984: Scores of people - including several high-ranking government officials -protesting the apartheid policies of the South African government block the doors of the South African Embassy. The protesters are gingerly arrested, released on their own recognizance. The national media cover the protests extensively, and for more than two years similar demonstrations occur throughout the country, with hardly a single act of excessive force on the part of the police.

Pittsburgh,Pa., 1989: 121 members of the group Operation Rescue are arrested while peacefully protesting outside an abortion clinic. The group is trained in the same type of passive resistance techniques employed by the civil rights protests a generation ago. Police, who had removed their badges and name plates, respond with "pain compliance" techniques - twisting the protesters' ears, bending the hands backwards to the wrist, and carrying the protesters off by inserting billy clubs between their handcuffed hands and the small of the back are employed to force the protesters into submission.

Women - from college age to grandmothers -are dragged by the bottoms of their blouses, their breasts exposed to hooting male prisoners. One affidavit reads: "He grabbed me between my breasts

and dragged me up the stairs by my wire-rimmed bra. My breasts were fully exposed as I was being dragged up the stairs." Complaints are filed with an assistant district attorney, who does not process them, allegedly on orders from her superiors. Several of the protesters report that other attempts to file complaints with city, county, and federal officials are similarly unsuccessful.

West Hartford, Conn., 1989: Nonviolent Operation Rescue protesters and several reporters are arrested outside an abortion clinic. The film and notes of reporters are confiscated by police. "Pain compliance" techniques are once again used, and again by police who do not wear identifying name plates or badges.

Los Angeles, 1989; This time, the police use "nunchakus," as well as "pain compliance" techniques, upon the nonviolent Operation Rescue protesters. The nunchakus, a weapon consisting of two night sticks connected by a chain, is wrapped around the protester's wrist and arms. The great pain that follows when pressure is applied forces the protester to walk. One man's arm is grotesquely snapped in two by a police hold.

These are but a few, and not the most ghastly, of the stories from the nearly 50 cities throughout the country where allegations of police brutality have been made by members of Operation Rescue. Hosea Williams, one of the civil rights leaders who witnessed firsthand

the brutalities in Selma, participated in a news conference in Pittsburgh to decry the brutality of the police there. To date, no national news organization has deemed the allegations worthy of coverage.

The U.S. Department of Justice found that the Pittsburgh allegations I transmitted to them "lack the indicia of prosecutive merit necessary to warrant further investigation," though it did agree to investigate some of the charges and did acknowledge that the use of excessive force by police would violate federal civil rights laws. The head of the section in charge of the investigations stated that the group was violating a court injunction, as if such a violation made perfectly reasonable the kind of treatment to which the antiabortion protesters have been

subject.

In July, I placed on the agenda of the U.S. Commission on Civil Rights a resolution to recommend to the President that he direct the Department of Justice to undertake an investigation of these allegations at the earliest possible moment. My resolution did not condone the illegality of Operation Rescue's actions. Nor did I associate myself with their cause. Rather, I sought to affirm the continued support of the government and the people of the U.S. for the rights of all protesters. After lengthy and sometimes hostile scrutiny, my resolution was dropped from the agenda.

My colleagues argued that the resolution was a "back door" way to discuss abortion, as if the subject matter of the protest determined the legitimate police response. Cong. Don

Edwards (D., Calif.) chairman of the Commission's oversight committee in the House of Representatives, joined in - not coincidentally during the middle of the debate over reauthorization of the Commission - with a direct threat: "Consideration of this issue," which "appears to violate the Commission's authorizing statute" prohibiting "the Commission from studying issues relating to abortion," would "seriously erode congressional confidence in the Commission."

Courageous Congressmen

Meanwhile, the courageous few congressmen - Bob Walker (R., Pa.) Clyde Holloway (R.,La.), Chris Smith (R.,Calif.) and Bob Traxler (D., Mich.) - who have spoken out have gone largely

unnoticed by the press.

In the aftermath of the Supreme Court's Webster decision - which substantially returns the abortion debate to the states - we can expect more anti-abortion demonstrations. We ought to guarantee that we will not also see more police violence in the handling of them. It is imperative that we as a nation assert our commitment to equal treatment before the law. Nonviolent protesters should all be accorded the same treatment no matter what the subject of protest. To do less is to destroy the most prized achievement of the civil rights of everyone. And we will have destroyed that achievement, not just for Operation Rescue, but for all."

(William B. Allen is chairman of the U.S. Commission on Civil Rights.)

JURY VERDICT STORY (IN PART) (from Orange County Register, 9/14/89)

"Los Angeles-The founder and four members of the militant anti-abortion group Operation Rescue were acquitted Wednesday on misdemeanor charges...

Jurors deliberated four days before delivering their decision. White was the only defendant in the courtroom when the verdicts were announced. The defendants were charged with trespassing, resisting arrest and conspiracy, all misdemeanors."

FEDERAL COURT DIFFERENT RESULT

You might now be thinking: "Okay you trespassed and got lucky and the jury let you off. Why are you complaining to us?"

We request that you apply 1 USC 1 to the abortion situation as you have applied it to every other Act of

Congress where personhood is at issue, even if you do not agree with the results that may follow in order to reinstate the notion that America is a nation governed by laws, not nine philosopher kings called justices who do what they want, then call it Substantive Due Process. As a reason for so holding, we cite our federal case results to show you the impossibility of the US Supreme Court acting as a legislature without far ranging results going far beyond what the justices intend. (Those of you on the Court in 1973 may recall the chief justice assuring all that whatever the opinion meant, it did not mean abortion on demand.

Those of you who are scholars may agree that perhaps the best explanation of the history of the development of the Common Law is that it was the result of

the constant effort of the king and/or Parliament to impose their wishes on Britain by passing written laws which wishes were frustrated down through the centuries by clever lawyers who noticed interpretations in the written laws that had not been foreseen by those who wrote and passed them. Did you foresee the following in 1973?

The Federal preliminary injunction, filed 3/15/89, and used as an example to show you how far some District judges will go to protect the abortion right invented in 1973, ordered in applicable part as follows (Central District of California, #CV 89-1181 AWT):

"Pending trial on the merits, defendants Operation Rescue, Jeff White, Joseph Foreman, and Dr Randy Adler (then listed possible others not by name) hereby are enjoined and restrained from:

(a) Interfering with the rights of

plaintiffs, and persons similarly situated as plaintiffs, to travel, to obtain abortions and other medical services, and to privacy, by coercion, intimidation or force;

(b) Trespassing on, sitting in, blocking, impeding or obstructing ingress or egress from any facility at which abortions, family planning or gynecological services are provided in the State of California, including conducting "sidewalk counseling" of plaintiffs and others similarly situated, in a manner which physically impedes plaintiffs' movements, and demonstrating within fifteen (15) feet of any entrance or exit to any such facility during any actions maintained by "Operation Rescue" or a similarly structured action;

(c) Physically abusing persons

entering or leaving, working at or using any services at any facility at which abortions are performed in the State of California through the conclusion of blockade activities; and

(d) Attempting or directing others to take any of the actions described in subparagraphs (a), (b) and (c) of this paragraph 1."

Paragraph 2 ordered defendants to inform rescuers of the injunction.

"3. Nothing in this preliminary injunction shall be construed to limit defendants' exercise of their First Amendment rights."

Named defendants and others were tried before Judge Tashima for civil contempt. Plaintiffs were the class of abortion providers and the class of women in California. The classes have not been certified, but contempt has

protected non named members of the classes. Absolutely no damages were granted plaintiffs. Typical of the damages sought but not granted was about $3000.00 sought by one plaintiff clinic at which demonstrators never appeared for equipment which the clinic bought and kept. The purpose of the equipment was to permit the clinic to better respond if (as did not happen at that clinic) a rescue took place. Think of the potential damages if every abortionist in California could buy equipment, then order us to pay for it, even if no rescuer ever saw the clinic.

All named defendants plus eight other people not named were found in contempt and ordered by order of August 29, 1989 to pay zero damages. We were, in spite of the total absence of damages to plaintiffs ordered to pay $111,000.00

in attorney fees for the contempt action only, to the ACLU. Presumably there might later be additional orders for additional attorney fees. None of the plaintiffs had paid the ACLU anything, nor was there any obligation for any plaintiff to pay anything nor was there any expectation that any plaintiff would pay anything to the ACLU which filed this invalid lawsuit as a labor of love and perhaps in hope of receiving attorney fees from defendant. The ACLU took the case for free in hopes that a judge might order defendants to pay. If we are again found in contempt, a fine of $10,000.00 on each of us will be added to this ordered payment.

Only the evidence on which Pastor Randy Adler was found in contempt will be included to show how little is sufficient. It comprises the next 17

lines.

" Exhibit 65 is a true and correct copy of Dr Adler meeting with Long Beach Police Department officials concerning the continued blockade of the clinic." (No arrests were made at that clinic, nor does the photo show more than Adler talking with a police officer.).

"I observed Randy Adler communicating with other people whom I believed to be involved in leading the blockade."

"Randy Adler also spoke at the rallies the first two nights. At that time he asked for contributions and pledges and encouraged people to blockade."

"During the time I was present at the clinic, I observed ...Randy Adler."

Appropriate objections as to conclusion, etc were made, but the

conclusionary statements were permitted in in spite of the fact that if Adler said any thing amounting to evidence of a contempt, plaintiffs would have had it on tape, and if Adler ever went within 15 feet of a door, it would have been on video tape and probably in photos. Plaintiffs had no such documents incriminating Adler.

Plaintiffs sound recorded every statement. They had several video tape recorders recording all relevant scenes from several angles. They took thousands of photographs. A motion to produce all said records relating to Adler resulted in no relevant evidence being produced.

There are a number of curious things about this fundamental abortion civil right. It is also a criminal offense, a felony, in Washington DC pursuant to statute found constitutional by this

court in 1971 as against a right to privacy argument by defendant Vuitch. It is also a criminal offence, a felony, in California pursuant to statute found constitutional by both this Court and the California Supreme Court to the extent it forbids abortion after viability. The clinics at which rescues were done for which contempt was found, have done and continue to do abortions after viability.

On 9/14/89, Judge Tashima agreed with us that his injunction should not have been issued in the first place by dismissing the ACLU law suit. This is nice, but he specifically refused to undo his order that we must pay the ACLU $111,000.00 in attorney fees for filing a losing law suit and obtaining an order that should never have been granted, which order we allegedly disobeyed, in

part perhaps because Federal law at the time of our alleged disobediance excused civil contempts when the respondents later won the law suit. It should be noted that the ACLU attorneys demanded and were paid at the rate of two hundred dollars per hour, even though none of them was able to show that they had ever earned even half of that, and their salaries from the ACLU were presumable far less. (We were unable to force them to state their salaries with the ACLU to limit the payment to what the ACLU might be out of pocket.

The problems of amici previously outlined herein are bad enough. Other District courts have gone farther. Rescuers have been charged with RICO violations and ordered to pay because of alleged RICO violations in numerous cases. In New York, case 88-7873, second

circuit, New York NOW et al v Terry et al, Terry's attorney was ordered to pay and did pay substantial attorney fees to plaintiffs' attorney. The hunting is so lucrative that the ACLU has published a How to Sue Operation Rescue book.

The authorities have since partially awakened. The Senate has passed a rider by Sen Armstrong which will financially punish cities that fail "to adopt and enforce a policy prohibiting the use of excessive force by law enforcement agencies...against any individuals engaged in nonviolent civil rights demonstrations." The Civil Rights Commission did investigate and recommended the Justice Department take action.

We do not really care. The blood of martyrs is the seedbed of new Christians and we are privileged to try to rescue.

THE NATURE OF THE ABORTION BATTLE

This Court is obviously groping for a way out of its abortion mess. We attempt to assist by explaining the battle in a unique way from a different perspective. If you disagree, you will at least have been told why we do as we do.

There is a tremendous difference in the commitment of the opposing sides. The leaders are perhaps committed, but most of the battle is fought by followers. The followers differ substantially in commitment. Part of the reason one becomes or remains pro abortion is one's relative lack of commitment to God, spouse, children, etc. Part of the reason one becomes or remains anti abortion is one's ability and desire to commit to one's God, one's religion, one's spouse for life, to the good of one's beloved nation, to the concept of having and

caring for one's children for any one of whom one would if necessary sacrifice one's life. The June 26th, 1989 Cincinatti Enquirer carried a story illustrating this difference which is so major it guarantees eventual victory for the anti abortion side. Jane Roe tried to get an abortion, and took her case all the way to the US Supreme Court which decided her way, but too late. She had already delivered and placed the baby girl for adoption. That girl, now 19, has apparently been located by an adoption search consultant. She's a college student living in Seattle with her adoptive parents, and is strongly pro-life. The news was broken to her in a hotel restaurant as she sat with her adoptive mother, her boy friend and her best friend. She was mortified when she learned the identity of her biological

mother. At first, though, she didn't know who Jane Roe was. The Roe v Wade case was explained to her, and she was then handed a People Magazine story about her biological mother. She looked at it and it sunk in. She threw it down and ran out of the room. "It was horrible," said the adoption search consultant. "Imagine your mother not wanting you so much that she went to the Supreme Court to get rid of you." Her biological mother, Jane Roe, (Norma McCorvey) told one reporter that she was glad she had not had the abortion and was happy to know her daughter was alive and well. Later reports, however, quoted her as saying that she was still strongly "pro Choice", and she seemed to indicate that if she had the same choice to make, she would do it all over again.

The most significant point of the article is that an adoption search

consultant located the daughter. Only a parent (McCorvey) is likely to have made the request.

Doe of Doe v Bolton is now anti abortion. McCorvey is wavering and showing dangerous signs of sentimentality. She is glad the law prevented her from having that abortion in spite of all the attention she has received from pro abortionists since.

Pro abortionists must have counted on a vast wave of women who had abortions becoming pro abortion advocates. Instead, these women are very quiet. Many have regrets and are pro life. This is some evidence for the widespread existence of an anti abortion conscience and perhaps even, dare we surmise, perhaps an anti abortion God activating it. Perhaps they know they removed something more than a piece of their own body, more than mere

tissue. Many of them act like it.

A recent poll by President Reagan's pollster, the Wirthlin agency highlights why the pro abortionists must lose in spite of recently published polls indicating still strong support for abortion. The Wirthlin poll indicated a 15% anti abortion swing in way they would vote among young voters born since abortion became widespread. Obviously this is true because 1,500,000 children every year from then pro abortion households were never born, but rather aborted. This is possibly part of the reason why abortion has remained legal in so few nations. Each succeeding generation contains relatively fewer children from the homes where abortion is favored. Politically, pro abortion is suicide. Pro abortionists might hope that the pro abortion media will convert

enough to make up the difference. The media does convert the luke warm anti abortionist. This is part of the reason why we are in Operation Rescue. If we are Christians, we must condemn abortion because the entire Christian Church before 1930 condemned abortion. Christianity has had numerous splits. Advocates of both sides have contested bitterly and done numerous things history should condemn, but never disagreed on the abortion issue. Never until this generation. If Christianity is nothing more than a species of fairy tale, this does not matter. If, as we believe, it was founded by God, it could not have been wrong for 1900 years and those claiming to be Christians and favoring abortion will be punished at their judgment. As for us, this gives us a duty, even to undergo a miniature

martyrdom at the hands of ACLU attorneys and pro abortion judges and police. Our martyrdom in Los Angeles in March was the high point of our lives. We were beaten and injured, but surrounded by joy of an intensity we never before knew. We had the typical aggravations in jail, but had never before been so happy. The grace of God was overwhelmingly present. We were Christians and the Lord was there among us in a way and with an intensity we never before expected to experience. Protestant ministers and laymen were one in the Lord and in their Christianity with Catholic priests and laymen with an intensity that must have pleased the Lord. You would be amazed at the way the other prisoners treated us. This is why we pity all, including you who will be called to account for your deeds as well as for what you should have done and did

not do. This is why the rescue movement will grow in spite of unjust judges and all the punishments. We know we will be convicted of trespass or worse. We know we will have to endure what looks like punishment until abortion is outlawed, but we will continue to act on our belief that it really is a baby and will continue to give witness to our belief.

CONCLUSION

God gives you only a limited number of votes and a limited amount of time on this great Court. We pray that you will not vote this time in a way you will regret in a few years when your few days are completed and you must answer. Until you change, we will give witness with our fortunes which will disappear and our imprisoned and injured bodies.

Respectfully submitted,

ROBERT L SASSONE, Attorney for Amici

NO 88-1125
IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

JANE HODGSON, MD, ET AL.
Petitioners,

v.

THE STATE OF MINNESOTA, ET AL.
Respondents,

Affidavit of mailing of amicus brief copies, Rule 28.2
State of California }ss.
City of Santa Ana, County of Orange }

Robert L Sassone, being first duly sworn on his oath deposes and says:

Robert L Sassone is a member of the bar of the United States Supreme Court admitted October 26, 1971. To his knowledge, on October 11, 1989, within the particular time and permitted time for serving of said amicus brief pursuant to Rule 28.2, he deposited in the United States Mailbox at Santa Ana, CA 92701 pursuant to Rule 28.2 with first class postage prepaid 40 copies of the attached amicus brief in the present case properly addressed to the Clerk of the United States Supreme Court and three copies of said amicus brief to each party addressed as follows:

JANET BENSHOOF, ESQ
ACLU FOUNDATION
132 W 43RD ST
NEW YORK, NY 10036

HUBERT HUMPHREY III
ATTORNEY GENERAL

C/O KENNETH RASCHKE,JR
ASST ATTORNEY GENERAL

515 TRANSPORTATION BLDG
ST PAUL, MN 55155

WILLIAM Z
PENTELOVITCH, ESQ
MASLON, EDELMAN,
BORMAN & BRAND
1800 MIDWEST PLAZA
MINNEAPOLIS, MN 55402

ROBERT L SASSONE, Affiant

Subscribed and sworn to before me on October 11, 1989.

Lawrence D. Sassone, Notary Public

No. 88-1125

In the Supreme Court of the United States

OCTOBER TERM, 1989

JANE HODGESON, ET A.L.,
APPELLANTS

V.

MINNESOTA, ET A.L.
APPELLEES

PETITION FOR A WRIT OF CERTIOARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR STANLEY JOHN
AS AMICUS CURIAE SUPPORTING APPELLEES

ROBERT L. SASSONE
Attorney at Law
900 North Broadway • Suite 725
Santa Ana, California 92701
(714) 547-5611

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE ON BEHALF OF RESPONDENT

Amicus hereby respectfully moves for leave to file a brief amicus curiae in the present case. Requested consent of parties is expected but has not yet been received and filed. When filed, it will make this motion unnecessary.

INTEREST OF AMICUS CURIAE

Stanley John is employed by Focus on the Family, a Protestant educational group featuring Dr James Dobson. Focus on the Family broadcasts on many hundreds of stations daily. For six months, his arm has been in first a cast, then a sling because of an injury he suffered while being arrested at a rescue. He was not resisting in any way at any time when injured.

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SUMMARY OF ARGUMENT

Argentine judges can declare laws unconstitutional and Treaties of Argentina can affect Constitutional questions. This brief consists of one Argentine court opinion, cited not as authority, but for the research and logic therein. The opinion is relevant for the historical analysis and treaties cited. Initially, abortion history is analyzed in a manner not previously presented to this Court. Subsequently, more than a dozen treaties requiring the signatories to respect preborn human life in such a manner as to preclude the legalization of abortion are cited. The US has signed many of these treaties. Killing any innocent human life became unpopular for a while after the Nazis. Many treaties of the time promise no such killing. Time has flown as has the unpopularity.

Judicial Branch

of the Argentinian Government

Given in Buenos Aires, Argentina, on the 2nd. day of June, 1989.

CASE TO BE RULED UPON: Request by Nelida Victoria Vera—entered under Docket No. 28.991, Secretariat No. 156—which appears on pg. 85/B;

WHEREAS: I must undertake the study of this request for abortion taking into account the statement made by QUINTANO RIPOLLES (Tratado, Madrid, 1962, t, 1, 4-71): "The fundamental problematic that the subject of abortion and its unnumerable facets entail, ranging from the theological, medical and legal aspects, and encompassing the literary and sentimental, renders abortion into such a passionate topic, that no other penal law subject surpasses it... in polemic passion

and diversity of legislative treatment". Even though in the case at hand we are dealing with a concrete event with circumstances and peculiarities inherent therein, I cannot forgo the exposition of the historic evolution and the different criteria applied in all the different thesis in favor of and against abortion.

I. HISTORIC EVOLUTION: Since ancient times, legislative codes such as the Code of HAMMURABI, which preceded our times by seventeen centuries, fulminated abortion, assigning severe punishment to it, which reached even capital punishment in some cases. Abortion was also penalized by age-old Assyrian and Babylonian codes, with the peculiarity indicated by Niceto Blazquez ("El Aborto", Ed. BAC, Madrid, 1977), that the culprit had to suffer the punishment, "even if the fetus was

feminine". In each culture the voluntary interruption of pregnancy was reproved, as it was in the ancient Hebrew law, as well as within the dispositions of the Vedas and in the laws of Manu.

In the Greek culture, it is attributed to Solon and Licurgo to have ruled against abortion, and the exegesis of a forensic discourse by Lisias lead us to believe there were public judicial actions in existence in order to protect embryonic life. Suetonio, Seneca and Juvenal were prompt to stigmatize such aberrations of unenlightened humanity. Even Ovid wrote anathemas against abortive women in the light of the evils that their practices derived for humanity. Likewise, under the rule of emperors Severo and Anthony, women who would abort were condemned to "exile", labeled as "extraordinary criminals".

Lactancio's rule terms abortion as "an impiety—to place criminal hands upon the work of the Lord", translating and coalescing the guiding principle —henceforth inexorable— upon which Christianism would base its secular-postulate of respect for human life, which was later on enriched by the doctrinal contributions of St. Thomas Aquinus and St. Augustine. The ecclesiastical magisterium reached the definition of the intrinsic MALICIOUSNESS OF ABORTION, based upon the certainty of the existence of a new human being from the very moment of conception.

Hence we arrive to the reasoning of Ludovico Bender, a legal philosopher (Philosophiauris, Rome, 1947) who points out that from the point of conception, the new being—who already has HIS OR HER OWN

LIFE—experiences only an ACCIDENTAL evolution, but never any SUBSTANTIAL CHANGE. And this being will follow the course of its own evolution, tending towards an end which is not that of the mother, but HIS OR HER OWN END.

Likewise, Jean Rostand, Biology Nobel Prize, asserts: "There exists a human being from the fertilization of the ovule. THE HUMAN BEING IS ALREADY COMPLETE IN THE FERTILIZED OVULE. S/HE IS complete at that point, with all his/her potentialities... therefore, any abortion is, without any doubt a small assasination". (Word, No. 173, Madrid, January 1980).

The 'nasciturus' is a new individual, and, unless we denied him/her the definition of humanity and its inherent rights, we cannot act against him or her.

If we do so, we must be aware that we are acting as a judge who condemns to death a man, and that this man is INNOCENT; and that this judge—which would be us—condemns him in order to please another human being, or, in the best of cases, in order to save her life, her honor or her happiness. And this would be to return to the Nietzscheian philosophy of of the super man, and to justify, therefore, the Nazi concentration camps and gas chambers. (Cited in Blazquez' work, pg. 130).

The fundamental truth is, as Prof. Jerome LeJeune says, is: "...that WITH ABORTION A HUMAN BEING IS KILLED."

This is stated in several international agreements which reaffirm the right to LIFE, such as the San Jose de Costa Rica Pact (American Convention of Human Rights, Aug. 1, 1975), Article Four, Paragraph

One, which says: "Every person has a right to life, and this right shall be protected by law from the very moment of conception. No one can be deprived of his/her life arbitrarily".

Likewise, Article 19 (of the above-mentioned document) declares: "Every child has a right to the protective measures inherent to his condition of minor, which are the responsibility of the family, society and State".

As for the Declaration of the Rights of Children (United Nations, Oct. 20, 1959), it says: "The child needs protection and special care, which include proper legal protection, both BEFORE, as well as AFTER his/her birth.

Within these same lines and emphasis, there is a wealth of international documents that guarantee the life of those

persons who are in gestation, and even though this is not the time to comment upon them, I shall at least make mention of them:

- American Declaration of Rights and Duties of Man, approved at the IX International American Conference, Bogota, 1948, Article One.
- Universal Declaration of Human Rights, approved and proclaimed by the United Nations General Assembly on December 10, 1948, Article Three.
- Geneva Oath. This text is complementary, within the scope of medicine, to that of the Universal Declaration of Human Rights, (Geneva, 1948) and was prepared by the World Medical Association. The following year, 1949, the International Code of Medical Ethics was proclaimed. The World Medical

Association published other statements to this effect in 1957, 1964, 1968, 1970, 1973 and 1974, to which we must add the Treaties of Nuremberg, Tokio and Helsinsky; the various national medical onthology codes, and several manuscripts from the Red Cross International Committee.

- European Convention to Safeguard the Fundamental Rights and Freedoms of Man; Rome, Nov. 4, 1950, Art. One.

- Declaration of the Rights of the Child; United Nations General Assembly, Nov. 20, 1959; Preamble and Whereas.

- International Pact of Economic, Cultural and Social Rights, approved by the United Nations General Assembly on December 16, 1966, articles Sixth and Tenth.

- International Pact of Civil and

Political Rights, approved by the United Nations General Assembly on December 16, 1966; articles 6th and 24th.

- Final Act of the International Conference on Human Rights; Teheran, April 22 through May 13, 1968, United Nations, Title II, Article One, 2nd and 6th Paragraphs.

- American Convention on Human Rights; Pact of San Jose de Costa Rica, approved by the Conference of San Jose de Costa Rica on November 22, 1969, articles 4 and 19. OUR NATIONAL LAW No. 23.054 enacted on March 1st, 1984, ADHERED TO THE SAME (above) AND STATED OUR OBLIGATION TO FULFILL (said Pact) IN ITS ENTIRETY.

- Final Act of the Conference on Security and Cooperation in Europe, Helsinsky, August 1st, 1975, Title VII.

All of the above was incorporated unto

the different provincial constitutions in an explicit and mandatory manner.

II. Position of the Catholic Church

The Holy Catholic Church, in its declaration on abortion given by the Sacred Congregation for the Doctrine of the Faith through the words of the Pontifice Sumum on July 25, 1974, ratifyied, confirmed, and ordered said declaration to be printed.

In this declaration, the Church fixes its position on the subject as follows: "It cannot but cause perplexity to see how the indiscriminate protests against the death penalty and against all forms of war arise everywhere, and simultaneously grows also the reinvidication for liberalized abortion, be it entirely or within certain cases which become incessantly more

numerous. We can never invoke freedom of opinion in order to attempt against the rights of others, most especially not in regards to the right to life. It is not a question of opposing one opinion with another, but rather one of imparting a perennial teaching of the Supreme Magistrate, which exposes the norm of morality in the light of the faith."

The tradition of the Church has always declared that human life must be protected and favored from its very beginning as well as throughout the various stages of its development. Opposing the custom of the Greco-Roman world, the Church of the first centuries has insisted upon the gap that exists on this regard between said world and the Christian tradition. It is clearly stated in the DIDACHE: "YOU SHALL NOT KILL the fruit of the womb WITH

ABORTION and YOU SHALL NOT KILL the child who is already born."

Atenagoras notes that Christians consider women who take medicines to provoke abortion as homicidal, condemning those who kill their children—including those who are still living in the womb, "where they are no longer subject to the Divine Providence alone."

Tertulian affirms the same principle with clarity: "It is a premeditated homicide to impede birth, whether the life was taken upon birth, before or after. He is a man, the one who is in the process of becoming one".

Throughout History, the Fathers of the Church, its pastors and its doctors have taugh the same doctrine. The diverse opinions in regards to the precise moment in which the spiritual soul is infused

(within the body) have not created any doubts as to the illegitimacy of abortion.

Among many other documents, suffice it to remember just a few. The First Council of Maguncia, in the year of 847, reaffirms the penalties decreed against abortion and determines that strenuous penitence must be inflicted upon women who provoke the elimination of the fruit conceived in their womb".

The Decree of Graciano recalls the following words from Pope Stephen V: "To cause death through abortion of one who had been conceived constitutes a homicide". St. Thomas, extraordinary Doctor of the Church, teaches that abortion is a grave sin, contrary to natural law. During the Rennaissance, Pope Sixtus V condemns abortion with even greater severity. A century later,

INNOCENCE XI rejects the propositions of certain canonical laxists who pretended to dispense an abortion provoked before the time in which some placed the spiritual birth (animation) of the new being. In our days, the last roman pontifices have proclaimed the same doctrine with maximum clarity. Pope Pius XI has given an explicit answer to the most serious objections. Pius XII has distinctly excluded direct abortion, that is to say, one undertaken as a means or end. John XXIII reminded us of the Early Fathers in regards to the sacred nature of LIFE, which requires GOD'S creative action from its beginning.

More recently the Second Vatican Council, presided over by Paul VI, condemned ABORTION most severely: "Life must be safeguarded from conception

onwards with maximum care, and ABORTION and INFANTICIDE are abominable crimes." The same Paul VI, talking about this subject on several occasions, did not hesitate to repeat that these teachings of the Church "have not changed and are immutable".

The respect for human life is not something that is imposed upon Christians only. Reason alone suffices to demand it, based upon what a person is and must be.

THE FIRST RIGHT OF A HUMAN BEING IS HIS/HER LIFE. Every person has other rights, some of them are more precious than others; but that right is the fundamental one, upon which rest all other rights. This is why it must be protected more than any other right. It does not behoove any society nor any Public Authority, whichever one it might be, to

acknowledge this right for some and not for others: Any bias is iniquitous, be it based on race, sex, color or religion. It is not the recognition of it made by others what establishes this right; it is something intrinsic that exists before, demands to be recognized, and the rejection of which is absolutely unjust.

The right to life remains intact for an elderly person, reduced as his (mental) capacity might be; nor has a person with an incurable disease lost this right either. This right to life is no less legitimate in a child that has just been born than it is in a mature man. From the time of fertilization of the ovule, a new life is inaugurated—one that is not that of the father nor that of the mother, but rather that of a new human being that develops onto his/her own. S/he will

never be a human being is s/he is not already so at that time. He is a MAN, the one who is in the process of becoming one.

Both Divine Law and Natural Law therefore, exclude any right to kill an innocent man. The violation of moral values is always a greater evil for the common welfare than any other. A moral dilemma is almost everywhere accompanied by grave judicial debates. The law is not obligated to sanction everything, but it cannot go against another deeper law which is greater than any human law—the natural law instilled in man by the Creator Himself as a norm which reason struggles to descipher and formulate, recognizing that it must be better understood, but one which is always bad to contradict. Human law can rennounce to the punishment thereof, but cannot declare as honest that

which is contrary to the Natural Law, because any such contradiction renders such human law a negation of the law (a non-law). On the contrary, what pertains to the law is to procure a reform of society, of the conditions of life in all spheres, beginning with the less privileged ones, to ensure a dignified reception for every human creature that comes into this world. To come to the aid of families and single mothers; to guarantee recognition for natural children and the rational organization of the adoption system: A wholesome positive policy that must be promoted so that there shall always be a concrete, honorable alternative to abortion.

Hence the importance of citing the words of Hanz Welzer in his book Introduction to the Philosophy of the Law:

"...The science of jurisprudence must meditate again upon the millennial truth that there is a Justice higher than the Law, a natural justice, a Divine equity, a rational right, measured against which injustice continues to be injustice, clothed as it might be with the form of the law, and before which the verdict pronounced in accordance with this unjust law does not constitute justice, but the contrary of Justice".

III. DOCTRINE OF THE SUPREME COURT OF THE UNITED STATES ON ABORTION

Following the alignment of different opinions it is incumbent upon us to refer to the position upheld by the Supreme Court of the United States, even more so if we take into account the notorious change that is taking place in regards to

the principle introduced in 1973. That is to say, it is extremely important to observe a progressive eversion of the permissive notions on abortion in that country.

In 1965, the Northamerican (Supreme) Court wanders, in the subject of abortion, into a new axiological definition of privacy, which was afforded until then only for specific matters which were enumerated, such as documents, papers and other belongings. But from the verdict in GRISWOLD vs. CONNECTICUT, privacy became a fundamental right, protected and superseded only by a compulsive interest of the State.

In 1973, with the Roe vs. Wade case, the so-called "FREEDOM OF CHOICE" principle was introduced. That is to say, the freedom to opt for the interruption of

the pregnancy, which decision was based on the premise that it is always better to allow some individuals the right to make inconvenient decisions than it would be to deny to all the right to make decisions that would have a trascendental implication in their destinies.

In summary, I would like to point out the following contradictions:

a) In 1973 the Court allowed abortion based upon the right to privacy of the woman, but on the other hand, it limited—in 1983—the information to be given to a woman (prior to an abortion) about the dangers implicit in the violent interruption of pregnancy, on the basis that said information would pressure women, thereby impeding the fulfillment of their free choice.

b) In 1973 the Court recognized the

legitimate interest of the State in protecting the potential for human life, but in 1986 it argued that it is unconstitutional to provide information to the woman about possible alternatives to abortion.

c) Finally, in 1973 the Court recognized the "freedom of choice" to decide upon (continuing or not) the pregnancy, but then thirteen years later, and in the name of that very same freedom of option, the Court denies the possibility of receiving information that could result in the survival of the one that progresses towards birth in the maternal womb.

IV. THE RIGHT TO BE BORN

Leaving aside all the different positions and historic evolution of the various doctrines on abortion, the fact

remains that we must rest upon a solid foundation and a basic principle which is the defense of Human Rights. Within that scope, the first of the right is the right to Life, which begins—as it has been sufficiently proven scientifically—at the very moment of conception. Says Dr. Bernard Nathanson in his argumentation: "today, with the modern techniques available, we can treat many illnesses (while) in the womb, including some fifty different surgical operations... If the being conceived is a patient who can be treated, s/he is then a person, and if s/he is a person, then s/he has a right to Life and to our every effort to preserve said Life. The same specialist adds, "rape is surely a very painful situation. Fortunately, only very few cases of rape are followed by pregnancy. But even in

this case rape, which is a terrible act of violence, cannot be followed with another, no less terrible, such as the destruction of a live being. Therefore, to attempt to erase a horrible violence with another horrible one does not seem logical; it is simply absurd and what it really does, is to augment the trauma for the woman by destroying an innocent life.

In the same sense, Dr. Bidart Campos (El Derecho, 113-479), affirms that human life is a right of the one to whom it belongs. It is a subjective right of that person and intrauterine life is a judicial asset. If that life belongs to the being that lives in the maternal womb, it must be argued without any doubt, that this same being owns the right to enjoy the perusal of this asset which is his/her own—which is called LIFE. Therefore the

judicial realm cannot disassociate itself from any living human reality, because it (the judicial realm) is the product of man for men. To be born is not to commence living, but rather to go out into the external world, once the necessary development has been achieved. The creature precedes the birth. (Cifuentes Santos, The Law, 15-956).

V. BRIEF EXPOSITION ON THE INTERPRETATION OF NORMS

The zeal shown by some classics of jurisprudence to avoid the extension of the penal law propounded by some authors, made them affirm that interpretation of said (law) was not possible. Thus we find Beccaria, who maintains that... "neither can the authority to interpret penal laws rest upon criminal judges, for the same

reason that they are not legislators". (On Crimes and Penalties, Chapter IV, pg. 75, Spanish Edition, Aguilar, 1982).

Montesquieu opined within the same lines ("L'Esprit des Lois", book 6, chap. 3): "In the republican government, it pertains to the nature of the constitution for the judges to follow the letter of the law. There is no citizen against whom one can interpret a law..." All of these came from a false concept assigned to the word 'interpretation', inferring that it must necessarily be done "in malam partem"; the true meaning of interpretation of the law is to investigate "the adequate sense of a disposition with the purpose of its application in a real life case" (Metzger). It is not a question of searching in the law and discovering "extra legem" in it, but rather "intra

legem"; the goal is to use the antecedents and means available in order to understand the intention, the spirit of the law which lives autonomously within it. But let it be clear that the goal is not -properly speaking- to search for the will of the legislator, but rather the intention of the law itself, and in that sense, as it were taughtby August Finger ("Lehrbuch des Deutchen Strafrechts, Berlin, 1904, pg. 33): ..."the completed law becomes independent from its past..."

Thus, to interpret (the law) is an operation that consists of searching not just for any will that might be contained within that law, but rather for the true one. In the practical case at hand, the will of the subscriber is-distinct from that of the subject-a judicial interpretation for which I will make some

doctrinal observations before giving my strictly personal opinion.

VI. THE CASE AT HAND

The second paragraph of Article 86 in the Penal Code says, "...an abortion practiced by a certified physician with the consent of the pregnant woman is not punishable... (Second paragraph): if such pregnancy results from rape or an attempt against decorum played upon a demented or idiotic woman. In this case, consent of her legal representative must be obtained in order to perform the abortion."

If we limit ourselves to a grammatical interpretation, laws No. 17.577 and 21.388 assigned an exculpatory quality to an abortion practiced by a certified physician with the consent of the pregnant woman, if the pregnancy resulted from a

rape upon which penal action had been initiated. The eloquence of the wording in the norm I comment upon invalidates any other analysis.

The question is: Is the abortion practiced by a certified physician with the consent of the woman punishable, if the pregnancy evolved from a rape? Or must the woman also be idiotic or demented?

Therefore, in order to interpret what the law says, we must necessarily adhere to the fundamentals that inspired our legislators to write said norm. The two hypotheses of non-punishable abortion were introduced by the Senate Commission. From the terms on which the initiative of the (Senate's) report was based, we are here concerned with the following: "the second case (referring to paragraph 2) entails a

true innovation in criminal legislation. A distinguished professor of Penal Law who was quoted several times on this report, says that the last version of the Swiss Penal Code's project of law (upon which was based the law under discussion) is extremely interesting, for it introduced a nuance that did not exist in any of the previous versions. This new version was introduced by the second commission of experts." "It is the first time -he adds- that a legislation dares legalize abortion with an eugenic purpose, to impede the birth of an abnormal or degenerated being from an idiotic or demented woman, or as a consequence of incest. Commenting on this article, Gautier points out that in the case of incest one could add considerations of ethnical order, and that when the pregnancy is the result of an

attempt committed without violence, against a woman who is idiotic, demented, unconscious or otherwise incapable of resisting, the interest of the race could be argued, even more justly so than in the case of incest. What good can come from a demented or cretin woman? It is undeniable that the law must authorize abortion when it is practiced with the intervention of a physician for the purposes of perfecting the race. The dilemma was presented in Europe during the last war in regards to the rapes perpetrated upon numerous Belgian women by drunken, reckless or criminal soldiers."

No purpose other than legislating eugenic abortion comes to light from reading the abovementioned report.

However, asks Fontan Balestra, is this to justify only the so-called eugenic

abortion due to the fact that this particular pregnancy came about as a consequence of copulation with an idiotic or demented woman—or is it also foreseen for the sentimental abortion that destroys the fruit of <u>any rape</u>? The question arises from our wording —currently in force— that says, I repeat, "...If the pregnancy results from a rape or an attempt against the decorum of an idiotic or demented woman..."

Obviously, if the legislator would have purposed to justify only the case of rape on a demented or idiotic woman, it would have sufficed for him to say: "if the pregnancy results from a rape committed upon an idiotic or demented woman" or —so as to keep in harmony with the legal terminology— he could have said, woman "deprived of reason". With this or any

other equally simple wording the law would have been made clear and the thought complete. It has been indicated that this could not have escaped the legislators, no matter how precipituously they may have proceeded, because the mere reading of this paragraph made it clear that—such as it was written—they were talking about two very different things: rape and attempt against decorum. This cannot be construed in any other way; it is understood that the legislators wanted to say something when they made express mention of what they themselves termed 'attempt against decorum'. We must consider that as Reco maintains, the attempt against decorum CANNOT give place to the conception of any child unless there has been copulation. But it just so happens that the wording of the paragraph does not have a comma

between the words "rape" and "attempt against decorum"; hence the unavoidable confusion.

All of these confusions have a clear cause. The Senate Committee takes this article from the French Commission in the Swiss project of law in which "Schandung" is translated as "attentat a la pudeur d'une femme idiote, alinee/inconsciente ou incapable de resistance" (attempt against the decorum of a woman who is idiotic, deprived/unconscious or incapable of resistance).

Truly, that is, in the technical sense, the definition of "schandung". In German law, after which the Swiss project of law was patterned in this case, (as opposed to our article 119 which designates all three cases enunciated with the word "rape") there are different technical terms used

for forced rape as opposed to the crime termed "schandung". Here the word is used more in the sense of a profanation, rather than as an attempt against decorum. Hence, the misinterpretation has two causes: the fact that the word rape has a generic acceptance in our legislation and the fact that a translation accepted into the text of the law, is correct but becomes equivocal upon being incorporated to our code in regards to the expression 'dishonest abuse'. As Soler summarizes, in order to understand this disposition, it becomes necessary to affirm that in this case the law termed as "attempt against decorum" the rape foreseen in the second paragraph of Article 119. Consequently, the impunity sanctioned in Article 86 reaches any case of rape, and not just that of the idiotic or demented

woman (Treatise, Vol. III, pg. 113).

Let it be clearly established then, that in Argentina an abortion practiced by a certified physician with consent of the woman is not punishable if the pregnancy arises from a rape. This declaration, totally in line with the norm currently in force in our country, shall be subject, on the part of the undersigned, to posterior analysis inasmuch as to what must be done with a norm which is in flagrant violation of the National Constitution, is against the precepts of public order peacefully adhered to by all the civilized countries of the world, and is against the spirit of our law in general. A norm, therefore, which stands at present in full force, against the values consecrated by the judicial bodies previously mentioned.

VII. PERSONAL OBJECTIVE AND SUBJECTIVE CONSIDERATIONS

Salvaged my opinion, enriched with several other authorized assertions already summarized herein, I shall refer to two other aspects of the matter which merit independent attention within the context of this pronouncement, due to the crude reality that both reveal.

a) The first one is a commentary on the painful situation brought before me in regards to what said situation represents for the undersigned from the viewpoint of the victim. This I can observe from two vantage points. 1) As a man I must make clear —without any reservations— that I am in full solidarity with the the victim in the anguish she is living right now. She did not choose to go through this difficult situation, and I must question

the physical relief that society's responses might be able to bring —from today on, and as long as they are needed— to this afflicted woman. I use this qualification because I have arrived to that conclusion after having made contact with her on several occasions. I tell her also, that she will not be burdened with the obligation to take care of and educate her child once he is born, if she does not wish to do so, since there are on record, at the time of this pronouncement, three formal requests for adoption, which shall be channeled through the proper procedural course in that eventuality. 2) As a judge, I can tell her that I have done everything within my reach; I have individualized the alledged perpetrators of the act that victimizes her, who remain detained, and against whom there is a

preliminary writ of -imprison-ment firmly in order for the crimes of rape, threats and illegal deprivation of freedom. It is therefore, my most deeply felt wish that someday, something or somebody might —within the limits of the law— return to the petitioner her physical and spiritual health, the vulnerability of which is made manifest in answers such as the one she gave when asked whether she would give her consent to submit herself to extraction of a sample of the amniotic liquid (clarifying for her that this represented a risk to her life): "...anything as long as they take out this filthiness I've got inside".

b) The second aspect that merits our attention, which was previously highlighted, is the degree of certainty inasmuch as the paternity of the fetus,

authorization for whose destruction was requested of the undersigned.

Obviously the rape of which the victim was the object has been accredited on record. Furthermore, we have individualized prima fascie the author of this deed, as well as a conspirator, and have regularized their due process. Now, none of this confirms in an unequivocal manner that Defendant Alanis is the father of the child whose existence has been determined in the body of the victim. The object of legal investigation to be established in regards to the petition presented by the Plaintiff is whether the Defendant is the father of the 'nasciturus' or not.

Otherwise, and within this same realm, it is to be noted that I do not question the victim's statements as to her not

having had sexual relations either before or after the event pertinent to the case, which could allot the paternity upon any third parties. However, this is only a presumption based upon the personal image I have of the victim, for there is nothing on record that may prove this point; neither is it my prerrogative to inflict upon the privacy of this young lady any further. Within this area, I must point out that even if paternity had been established through scientific methods, [to pursue this course of action] would entail an infringement upon the defensive rights of the detained; for undoubtedly, his denial to consent to the killing of his son presuppose simply and clearly the [implicit] recognition of the deed of which he is accused, which is in violation of express constitutional guarantees

(Article 18).

VIII. THE LAW DECLARES THIS ABORTION AS AN EXCULPATORY CAUSE

The basis for this determination in within the law itself, but in order to expound it I shall renounce as much as possible, to any judicial technical inference that shall render difficult the understanding of what in essence is the core of the matter brought before the undersigned. This is so because the direct recipient of the judicial implications of this pronouncement is the victim, whose understanding of the law is null, but for whom I have the responsibility of explaining to her, as clearly as is possible, why she "will not be able to take out that filthiness that she has inside" as she herself—clearly and crudely—expressed to me in one of the

interrogatories to which she was subjected.

The victim has been violated, and has become pregnant as a consequence of said violation. If she were to abort in this moment giving her consent thereto to a certified physician, this typically illegal act would not constitute a crime. This is so because the law foresees such act as an exculpatory cause. What does this mean? Well... When an act has been committed which has both subjective as well as objective characteristics of a crime—as is the case of an abortion—the law forsees a disposition by which this act which would normally be considered a crime, in this special case does not merit any penalty for the one committing it. That is the effect of an absolutorial excuse, as defined by Gimenez de Asna (The

Law and the Crime, pg. 433): "...it pertains to situations in which the law, generally due to reasons of usefulness and criminal policy, considers preferable to do away with the penalty for extremely special reasons..."

But from all that has been expounded here a truth is inferred, ever so clear, that once enunciated it shall override any other commentary: In order for this legal premise to function, first the act must be committed. To request an authorization such as the one contained in pg. 85, is to invert the logical order of things; is to distort so much the true spirit of the law —were I to grant the petition— that my decision would be, besides arbitrary, <u>delictive</u>, because I would be ordering death for an INNOCENT HUMAN being, without previous due process, without access to

defense, without the presence of any crime that might justify it, and without the prerrogative of capital punishment even exist in our legislation, etc.

In other words: We find absolutory excuses in the Penal Code—besides this article—on art. 132, or in art. 185 of the abovementioned legal body; the latter establishes, among other things, that "...they are exent from penal responsibility... for the larceny... which might be reciprocally caused: 1st. paragraph: the spouses..."

Now, no one could construe that a man or a woman would come before a judge to request authorization to steal something from their spouse; first s/he steals it, and then, on a subsequent day, should s/he be the object of a criminal investigation which might incriminate him/her, s/he

shall oppose this absolutory excuse as a defense, which, if pertinent, shall render his/her actions without penal responsibility. Here we have the same thing; if it is the wish of the petitioner to abort, let her do so. But what no one can pretend, under any concept, is to substitute beforehand for his/her penal responsibility, delegating the same upon the judge. Because in that case, then he (the judge) would be the true criminal of this story. It is not the prerrogative of the undersigned, nor that of any earthly magistrate or judge to order that an innocent person be killed, because that is what it would be. Furthermore, it does not perspire from the norm that I have been analyzing in depth for some pages now—not even through interpretative means—that I must authorize the abortion

because in so doing, even if I were to partake of the faculty that the norm under analysis imparts—to which I AM FIERCELY OPPOSED—I would be denaturing the judicial function that this (rule) represents, which is: to discount the penalty afforded to someone who has committed an act described objectively as a crime.

To end, I would like—if this is possible, and I hope it is—that someday the damnified victim herein would feel the pride that no doubt I would feel tomorrow when this person is born and can decide for his/her own what to do with his/her life and thereby address his/her actions.

IX. THE UNCONSTITUTIONALITY OF THE NORM

I must say that in the case at hand, I have assigned Dr. Lopez Lecube, Official Defender No. 5 of the Federal Capital, as

the representative for the rights of the fetus. Dr. Lopez Lecube has requested from the undersigned to declare the inconstitutionality of paragraph 2 in Article 86 of the Penal Code. Our control system for constitutionality in the federal jurisdiction is difused jurisdictionally. Therefore, it befalls sufficiently within the competence of any of the magistrates therein.

All requirements demanded by our constitutional system of law are fulfilled; there is a suit or legal proceeding in which verdict must be rendered. There is a norm which is in effect and is applicable to said legal proceeding, which I am asked to declare unconstitutional upon request by party therein, also a requisite of the law.

I have said above that I do not partake

of the faculty given by the judicial norm under analysis, and that is so because it is of the utmost priority to understand that our constitution grants the right to life—Article 33; the spirit of our Penal Code is contrary to the possibility of abortion; abortion is a crime that attacks life; the judicial asset being protected is therefore, <u>life itself</u>. I ask: Where is the judicial philosophy principle upon which the right to life could be broken when this (life) is a product of rape, or of an "attempt against decorum" performed on an idiotic or demented woman?

Changing the approach, which is the judicial asset afforded protection by the second paragraph of Article 86, that it might so successfully preempty the <u>value of life</u>, so clearly protected by our Constitution and our Penal Code? Is it

perhaps the perfection of the race—because to this end pointed the Swiss legislators, and obviously did so with most peculiar reasons already commented upon, reasons which do not apply to our reality.

This being so, there is no answer to this interrogant and we must strive then to avoid the situation in which the maternal womb might become the most dangerous place for an Argentinian to be in. Besides, the capital punishment has been excluded from our legislation. Upon what bases then, can this principle (the one of capital punishment) be incorporated for the unborn persons ... is it perhaps because they cannot defend themselves?

There is no veritable statistic that would demonstrate that all children—or at least the majority therein—resulting from incestuous copulation are degenerate, or

that those that result from fertilization of an idiotic or demented woman shall necessarily be the same as their mothers.

Therefore, I insist, there is no basis whatsoever for allowing the fall of the right to life, which is so comfortably and peaceably installed in our legislation, due to —in short— a poor copy of a foreign legislation. Consequently, the rule currently in force is, in the opinion of the undersigned, <u>UNCONSTITUTIONAL</u>, and must be declared as such.

WHEREAS, taking into account all that has been expounded upon herein, and without prejudice of the civil rights or actions that the petitioner might otherwise exercise through the pertinent means or channels, the undersigned

RULES AS FOLLOWS:

I) TO DECLARE THE RIGHT TO LIFE WHICH IS THE PROPERTY OF EVERY UNBORN PERSON.

II) NOT TO HONOR THE REQUEST TO END THE HUMAN LIFE ENGENDERED IN THE WOMB OF THE PETITIONER.

III) TO DECLARE THE UNCONSTITUTIONALITY OF PARAGRAPH 2, ARTICLE 86 OF THE ARGENTINIAN PENAL CODE.

REMIGIO GONZALEZ MORENO. TRIAL JUDGE

CONCLUSION

In abortion cases, this Court should consider the treaties cited herein.

Respectfully submitted,

ROBERT L SASSONE, Attorney for Amicus

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Translated by Leda Diaz Freire, accredited by A.T.A. (American Translators Association) and edited by James A. Miller. Human Life International, September 25, 1989.

NO 88-1125
IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

JANE HODGSON, MD, ET AL.
Petitioners,
v.
THE STATE OF MINNESOTA, ET AL.
Respondents,

Affidavit of mailing of amicus brief copies, Rule 28.2
State of California }ss.
City of Santa Ana, County of Orange }

Robert L Sassone, being first duly sworn on his oath deposes and says:
Robert L Sassone is a member of the bar of the United States Supreme Court admitted October 26, 1971. To his knowledge, on October 11, 1989, within the particular time and permitted time for serving of said amicus brief pursuant to Rule 28.2, he deposited in the United States Mailbox at Santa Ana, CA 92701 pursuant to Rule 28.2 with first class postage prepaid 40 copies of the attached amicus brief in the present case properly addressed to the Clerk of the United States Supreme Court and three copies of said amicus brief to each party addressed as follows:

JANET BENSHOOF, ESQ
ACLU FOUNDATION
132 W 43RD ST
NEW YORK, NY 10036

HUBERT HUMPHREY III
ATTORNEY GENERAL

C/O KENNETH RASCHKE,JR
ASST ATTORNEY GENERAL
515 TRANSPORTATION BLDG
ST PAUL, MN 55155

WILLIAM Z
PENTELOVITCH, ESQ
MASLON, EDELMAN,
BORMAN & BRAND
1800 MIDWEST PLAZA
MINNEAPOLIS, MN 55402

ROBERT L SASSONE, Affiant

Subscribed and sworn to before me on October 11, 1989.

Lawrence D. Sassone, Notary Public

No. 88-1125

In the Supreme Court of the United States

OCTOBER TERM, 1989

JANE HODGESON, ET A.L.,
APPELLANTS

V.

MINNESOTA, ET A.L.
APPELLEES

PETITION FOR A WRIT OF CERTIOARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR KENNETH FISHER
AS AMICUS CURIAE SUPPORTING APPELLEES

ROBERT L. SASSONE
Attorney at Law
900 North Broadway • Suite 725
Santa Ana, California 92701
(714) 547-5611

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE ON BEHALF OF RESPONDENT

Amicus hereby respectfully moves for leave to file a brief amicus curiae in the present case. Requested consent of parties is expected but has not yet been received and filed. When filed, it will make this motion unnecessary.

INTEREST OF AMICUS CURIAE

March 25, 1989, I participated in a rescue at the Los Angeles abortion clinic of Edward Allred, MD, who has been sued for malpractice hundreds of times, has paid millions in claims, has killed numerous women, and according to the LA Times owns a racing stable. I am an engineer with medical training.. Before the rescue, Mayor Bradley and police chief Gates had repeatedly been on TV warning rescuers not to come to LA and threatening to do more than merely

enforce the law if rescuers came to LA abortion chambers. When arrested, I informed the police that:

1] I was an trained in medicine;

2] they were using excessive force on my arm in an abnormal manner in accordance with the pain compliance techniques they used on hundreds on peaceful, non-resisting rescuers being arrested for alleged trespass; and

3] My arm was about to break.

About three seconds later they broke my arm.

I have not yet been allowed to go to trial. I may not go to trial, since everyone so far tried has been acquitted.

Nevertheless, the experience has — intensified my urgency relating to abortion. If efforts to rescue and to demonstrate the evil of legalized abortion can cause the LA police to act

as they did toward hundreds of peaceful rescuers on March 25, 1989, we are not as far from the jungle as I had hoped and as everyone believes.

You already must know President Reagan's public position on the prior Supreme Court invention of a "fundamental" right to abortion. You may know that he is the only recent President to publish a book ["Abortion and the Conscience of the Nation"] on a controversial political issue while in the White House. He and Abraham Lincoln are the only two Presidents to proclaim Presidential Proclamations proclaiming the rights of certain American individuals which were threatened because some claimed they were subhuman. In his book, President Reagan mentions British member of Parliament William Wilberforce who prayed with his small group for

decades to stop slavery, then finally saw success just before his death. From reading his book one gets the impression that Mr Reagan has prayed for 1 1/2 decades that you would reverse the prior Supreme Court's invented abortion right. Mr Reagan is elderly and has a body damaged by a would be assassin. I pray he will live to see you establish his "Personhood Proclamation" as law recognized by this Court, since it has already been recognized by Congress.

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SUMMARY OF ARGUMENT

The first part of this brief is President Reagan's book "Abortion and the Conscience of the Nation" setting forth his reasons as of 1984 why this honorable Court should reverse the invention of a fundamental right to abortion by a prior US Supreme Court. The second part explains 1 USC 1, passed by Congress to guarantee personhood for every individual [which of course includes preborn humans] and prior Court decisions recognizing the preeminent power of Congress to define ten different entities as persons and also to define four entities as persons for one purpose and non persons for another purpose. The theoretically interesting question is what is the duty of this Court when a prior Court has misread or as in the abortion situation ignored the intent of Congress, and the

present Congress (a previous Congress defined personhood) is too evenly balanced to pass additional legislation correcting the incorrect decision. A 1978 US Supreme Court decision sets forth the power and duty of this Court to correct the prior incorrect decision. This is even more so when the President has issued a Personhood Proclamation. (January 22, 1988). The President and this Court, lack legitimate power to create by definition persons and non persons. However, they have the power and the duty to use their power to officially proclaim a definition within the scope of a proclamation by the President and within the scope of an opinion by this Court when Congress has determined an entity to be entitled to the protection of personhood. The President has fulfilled his duty.

Abortion and the Conscience of the Nation

by

Ronald Reagan

The tenth anniversary of the Supreme Court decision in *Roe v. Wade* is a good time for us to pause and reflect. Our nationwide policy of abortion-on-demand through all nine months of pregnancy was neither voted for by our people nor enacted by our legislators – not a single state had such unrestricted abortion before the Supreme Court decreed it to be national policy in 1973. But the consequences of this judicial decision are now obvious: since 1973, more than 15 million unborn children have had their lives snuffed out by legalized abortions. That is over ten times the number of Americans lost in all our nation's wars.

Make no mistake, abortion-on-demand is not a right granted by the Constitution. No serious scholar, including one disposed to agree with the Court's result, has argued that the framers of the Constitution intended to create such a right. Shortly after the *Roe v. Wade* decision, Professor John Hart Ely, now Dean of Stanford Law School, wrote that the opinion "is not constitutional law and gives almost no sense of an obligation to try to be." Nowhere do the plain words of the Constitution even hint at a "right" so sweeping as to permit abortion up to the time the child is ready to be born. Yet that is what the Court ruled.

As an act of "raw judicial power" (to use Justice White's biting phrase), the decision by the seven-man majority in *Roe v. Wade* has so far been made to

stick. But the Court's decision has by no means settled the debate. Instead, *Roe v. Wade* has become a continuing prod to the conscience of the nation.

Abortion concerns not just the unborn child, it concerns every one of us. The English poet, John Donne, wrote: "... any man's death diminishes me, because I am involved in mankind; and therefore never send to know for whom the bell tolls; it tolls for thee."

We cannot diminish the value of one category of human life - the unborn - without diminishing the value of all human life. We saw tragic proof of this truism last year when the Indiana courts allowed the starvation death of "Baby Doe" in Bloomington because the child had Down's Syndrome.

Many of our fellow citizens grieve over the loss of life that has followed

Roe v. Wade. Margaret Heckler, soon after being nominated to head the largest department of our government, Health and Human Services, told an audience that she believed abortion to be the greatest moral crisis facing our country today. And the revered Mother Teresa, who works in the streets of Calcutta ministering to dying people in her world-famous mission of mercy, has said that "the greatest misery of our time is the generalized abortion of children."

Over the first two years of my administration I have closely followed and assisted efforts in Congress to reverse the tide of abortion – efforts of congressmen, senators and citizens responding to an urgent moral crisis. Regrettably, I have also seen the massive efforts of those who, under the banner of "freedom of choice," have so far blocked

every effort to reverse nationwide abortion-on-demand.

Despite the formidable obstacles before us, we must not lose heart. This is not the first time our country has been divided by a Supreme Court decision that denied the value of certain human lives. The *Dred Scott* decision of 1857 was not overturned in a day, or a year, or even a decade. At first, only a minority of Americans recognized and deplored the moral crisis brought about by denying the full humanity of our black brothers and sisters; but that minority persisted in their vision and finally prevailed. They did it by appealing to the hearts and minds of their countrymen, to the truth of human dignity under God. From their example, we know that respect for the sacred value of human life is too deeply engrained in the hearts of our people to

remain forever suppressed. But the great majority of the American people have not yet made their voices heard, and we cannot expect them to – any more than the public voice arose against slavery–*until* the issue is clearly framed and presented.

What, then, is the real issue? I have often said that when we talk about abortion, we are talking about two lives – the life of the mother and the life of the unborn child. Why else do we call a pregnant woman a mother? I have also said that anyone who doesn't feel sure whether we are talking about a second human life should clearly give life the benefit of the doubt. If you don't know whether a body is alive or dead, you would never bury it. I think this consideration itself should be enough for

all of us to insist on protecting the unborn.

The case against abortion does not rest here, however, for medical practice confirms at every step the correctness of these moral sensibilities. Modern medicine treats the unborn child as a patient. Medical pioneers have made great breakthroughs in treating the unborn – for genetic problems, vitamin deficiencies, irregular heart rhythms, and other medical conditions. Who can forget George Will's moving account of the little boy who underwent brain surgery six times during the nine weeks before he was born? Who is the *patient* if not that tiny unborn human being who can feel pain when he or she is approached by doctors who come to kill rather than to cure?

The real question today is not when human life begins, but, *What is the value*

of human life? The abortionist who reassembles the arms and legs of a tiny baby to make sure all its parts have been torn from its mother's body can hardly doubt whether it is a human being. The real question for him and for all of us is whether that tiny human life has a God-given right to be protected by the law – the same right we have.

What more dramatic confirmation could we have of the real issue than the Baby Doe case in Bloomington, Indiana? The death of that tiny infant tore at the hearts of all Americans because the child was undeniably a live human being – one lying helpless before the eyes of the doctors and the eyes of the nation. The real issue for the courts was *not* whether Baby Doe was a human being. The real issue was whether to protect the life of a human being who had Down's Syndrome, who

would probably be mentally handicapped, but who needed a routine surgical procedure to unblock his esophagus and allow him to eat. A doctor testified to the presiding judge that, even with his physical problem corrected, Baby Doe would have a "non-existent" possibility for "a minimally adequate quality of life"–in other words, that retardation was the equivalent of a crime deserving the death penalty. The judge let Baby Doe starve and die, and the Indiana Supreme Court sanctioned his decision.

Federal law does not allow federally-assisted hospitals to decide that Down's Syndrome infants are not worth treating, much less to decide to starve them to death. Accordingly, I have directed the Departments of Justice and Health and Human Services to apply civil rights regulations to protect handicapped

newborns. All hospitals receiving federal funds must post notices which will clearly state that failure to feed handicapped babies is prohibited by federal law.

The basic issue is whether to value and protect the lives of the handicapped, whether to recognize the sanctity of human life. This is the same basic issue that underlies the question of abortion.

The 1981 Senate hearings on the beginning of human life brought out the basic issue more clearly than ever before. The many medical and scientific witnesses who testified disagreed on many things, but not on the *scientific* evidence that the unborn child is alive, is a distinct individual, or is a member of the human species. They did disagree over the *value* question, whether to give value to

a human life at its early and most vulnerable stages of existence.

Regrettably, we live at a time when some persons do *not* value all human life. They want to pick and choose which individuals have value. Some have said that only those individuals with "consciousness of self" are human beings. One such writer has followed this deadly logic and concluded that "shocking as it may seem, a newly born infant is not a human being."

A Nobel Prize winning scientist has suggested that if a handicapped child "were not declared fully human until three days after birth, then all parents could be allowed the choice." In other words, "quality control" to see if newly born human beings are up to snuff.

Obviously, some influential people want to deny that every human life has

intrinsic, sacred worth. They insist that a member of the human race must have certain qualities before they accord him or her status as a "human being."

Events have borne out the editorial in a California medical journal which explained three years before *Roe v. Wade* that the social acceptance of abortion is a "defiance of the long-held Western ethic of intrinsic and equal value for every human life regardless of its stage, condition, or status."

Every legislator, every doctor, and every citizen needs to recognize that the real issue is whether to affirm and protect the sanctity of all human life, or to embrace a social ethic where some human lives are valued and others are not. As a nation, we must choose between the sanctity of life ethic and the "quality of life" ethic.

I have no trouble identifying the answer our nation has always given to this basic question, and the answer that I hope and pray it will give in the future. America was founded by men and women who shared a vision of the value of each and every individual. They stated this vision clearly from the very start in the Declaration of Independence, using words that every schoolboy and schoolgirl can recite:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness.

We fought a terrible war to guarantee that one category of mankind – black people in America—could not be denied the inalienable rights with which their

Creator endowed them. The great champion of the sanctity of all human life in that day, Abraham Lincoln, gave us his assessment of the Declaration's purpose. Speaking of the framers of that noble document, he said:

This was their majestic interpretation of the economy of the Universe. This was their lofty, and wise, and noble understanding of the justice of the Creator to His creatures. Yes, gentlemen, to all His creatures, to the whole great family of man. In their enlightened belief, nothing stamped with the divine image and likeness was sent into the world to be trodden on ... They grasped not only the whole race of man then living, but they reached forward and seized upon the farthest posterity. They erected a beacon to guide their children and their children's children, and the

countless myriads who should inhabit the earth in other ages.

He warned also of the danger we would face if we closed our eyes to the value of life in any category of human beings:

I should like to know if taking this old Declaration of Independence, which declares that all men are equal upon principle and making exceptions to it where will it stop. If one man says it does not mean a Negro, why not another say it does not mean some other man?

When Congressman John A. Bingham of Ohio drafted the Fourteenth Amendment to guarantee the rights of life, liberty, and property to all human beings, he explained that *all* are "entitled to the protection of American law, because its divine spirit of equality declares that all men are created equal." he said the

rights guaranteed by the amendment would therefore apply to "any human being." Justice William Brennan, in another case decided only the year before *Roe v. Wade*, referred to our society as one that "strongly affirms the sanctity of life."

Another William Brennan — not the Justice—has reminded us of the terrible consequences that can follow when a nation rejects the sanctity of life ethic:

The cultural environment for a human holocaust is present whenever any society can be misled into defining individuals as less than human and therefore devoid of value and respect.

As a nation today, we have *not* rejected the sanctity of human life. The American people have not had an opportunity to express their view on the sanctity of human life in the unborn. I am convinced that Americans do not want to

play God with the value of human life. It is not for us to decide who is worthy to live and who is not. Even the Supreme Court's opinion in *Roe v. Wade* did not explicitly reject the traditional American idea of intrinsic worth and value in all human life; it simply dodged this issue.

The Congress has before it several measures that would enable our people to reaffirm the sanctity of human life, even the smallest and the youngest and the most defenseless. The Human Life Bill expressly recognizes the unborn as human beings and accordingly protects them as persons under our Constitution. This bill, first introduced by Senator Jesse Helms, provided the vehicle for the Senate hearings in 1981 which contributed so much to our understanding of the real issue of abortion.

The Respect Human Life Act, just introduced in the ninety-eighth Congress, states in its first section that the policy of the United States is "to protect innocent life, both before and after birth." This bill, sponsored by congressman Henry Hyde and Senator Roger Jepsen, prohibits the federal government from performing abortions or assisting those who do so, except to save the life of the mother. It also addresses the pressing issue of infanticide which, as we have seen, flows inevitably from permissive abortion as another step in the denial of the inviolability of innocent human life.

I have endorsed each of these measures, as well as the more difficult route of constitutional amendment, and I will give these initiatives my full support. Each of them, in different ways,

attempts to reverse the tragic policy of abortion-on-demand imposed by the Supreme Court ten years ago. Each of them is a decisive way to affirm the sanctity of human life.

We must all educate ourselves to the reality of the horrors taking place. Doctors today know that unborn children can feel a touch within the womb and that they respond to pain. But how many Americans are aware that abortion techniques are allowed today, in all fifty states, that burn the skin of a baby with a salt solution, in an agonizing death that can last for hours?

Another example: two years ago, the *Philadelphia Inquirer* ran a Sunday special supplement on "The Dreaded Complication." The "dreaded complication" referred to in the article – the complication feared by doctors who per-

form abortions—is the *survival* of the child despite all the painful attacks during the abortion procedure. Some unborn children *do* survive the late-term abortions the Supreme Court has made legal. Is there any question that these victims of abortion deserve our attention and protection? Is there any question that those who *don't* survive were living human beings before they were killed?

Late-term abortions, especially when the baby survives, but is then killed by starvation, neglect, or suffocation, show once again the link between abortion and infanticide. The time to stop both is now. As my administration acts to stop infanticide, we will be fully aware of the real issue that underlies the death of babies before and soon after birth.

Our society has, fortunately, become sensitive to the rights and special needs

of the handicapped, but I am shocked that physical or mental handicaps of newborns are still used to justify their extinction. This administration has a Surgeon General, Dr. C. Everett Koop, who has done perhaps more than any other American for handicapped children, by pioneering surgical techniques to help them, by speaking out on the value of their lives, and by working with them in the context of loving families. You will not find his former patients advocating the so-called "quality-of-life" ethic.

I know that when the true issue of infanticide is placed before the American people, with all the facts openly aired, we will have no trouble deciding that a mentally or physically handicapped baby has the same intrinsic worth and right to life as the rest of us. As the New Jersey Supreme Court said two decades

ago, in a decision upholding the sanctity of human life, "a child need not be perfect to have a worthwhile life."

Whether we are talking about pain suffered by unborn children, or about late-term abortions, or about infanticide, we inevitably focus on the humanity of the unborn child. Each of these issues is a potential rally point for the sanctity of life ethic. Once we as a nation rally around any one of these issues to affirm the sanctity of life, we will see the importance of affirming this principle across the board.

Malcolm Muggeridge, the English writer, goes right to the heart of the matter: "Either life is always and in all circumstances sacred, or intrinsically of no account; it is inconceivable that it should be in some cases the one, and some the other." The sanctity of innocent hu-

man life is a principle that Congress should proclaim at every opportunity.

It is possible that the Supreme Court itself may overturn its abortion rulings. We need only recall that in *Brown v. Board of Education* the court reversed its own earlier "separate-but-equal" decision. I believe if the Supreme Court took another look at *Roe v. Wade*, and considered the real issue between the sanctity of life ethic and the quality of life ethic, it would change its mind once again.

As we continue to work to overturn *Roe v. Wade*, we must also continue to lay the groundwork for a society in which abortion is not the accepted answer to unwanted pregnancy. Pro-life people have already taken heroic steps, often at great personal sacrifice, to provide for unwed mothers. I recently spoke about a

young pregnant woman named Victoria, who said, "In this society we save whales, we save timber wolves and bald eagles and Coke bottles. Yet, everyone wanted me to throw away my baby." She has been helped by Sav-a-Life, a group in Dallas, which provides a way for unwed mothers to preserve the human life within them when they might otherwise be tempted to resort to abortion. I think also of House of His Creation in Coatesville, Pennsylvania, where a loving couple has taken in almost two hundred young women in the past ten years. They have seen, as a fact of life, that the girls are *not* better off having abortions than saving their babies. I am also reminded of the remarkable Rossow family of Ellington, Connecticut, who have opened their hearts and their home to nine handicapped adopted and foster children.

The Adolescent Family Life Program, adopted by Congress at the request of Senator Jeremiah Denton, has opened new opportunities for unwed mothers to give their children life. We should not rest until our entire society echoes the tone of John Powell in the dedication of his book, *Abortion: The Silent Holocaust*, a dedication to every woman carrying an unwanted child: "Please believe that you are not alone. There are many of us that truly love you, who want to stand at your side, and help in any way we can." And we can echo the always-practical woman of faith, Mother Teresa, when she says, "If you don't want the little child, that unborn child, give him to me." We have so many families in America seeking to adopt children that the slogan "every child is a wanted child" is now the emptiest of all reasons to tolerate abortion.

I have often said we need to join in prayer to bring protection to the unborn. Prayer and action are needed to uphold the sanctity of human life. I believe it will not be possible to accomplish our work, the work of saving lives, "without being a soul prayer." The famous British member of Parliament William Wilberforce prayed with his small group of influential friends, the "Clapham Sect," for *decades* to see an end to slavery in the British empire. Wilberforce led that struggle in Parliament, unflaggingly, because he believed in the sanctity of human life. He saw the fulfillment of his impossible dream when Parliament outlawed slavery just before his death.

Let his faith and perseverance be our guide. We will never recognize the true value of own lives until we affirm the value in the life of others, a value

of which Malcolm Muggeridge says: " however low it flickers or fiercely burns, it is still a Divine flame which no man dare presume to put out, be his motives ever so humane and enlightened."

Abraham Lincoln recognized that we could not survive as a free land when some men could decide that others were not fit to be free and should therefore be slaves. Likewise, we cannot survive as a free nation when some men decide that others are not fit to live and should be abandoned to abortion or infanticide. My administration is dedicated to the preservation of America as a free land, and there is no cause more important for preserving that freedom than affirming the transcendent right to life of all human beings, the right without which no other rights have any meaning.

DEFINITION OF PERSONHOOD

Congress passed Title 1 USC Section 1 in 1947, then amended it in 1948 (after hearing Nazi horror stories defining human individuals as non persons) to add the word "individual" to the definition of personhood in 1 USC 1. Congress has thus decided the abortion issue by defining "person" to include " individual", but 1 USC 1 is being ignored. Many, perhaps hundreds of US Supreme Court cases hold that Congress has power to define entities as persons or non persons for various purposes and even has power to define the same entity as a person for one purpose and as a non person for other purposes pursuant to the Fourteenth Amendment, Section 5. Congress has power to define personhood. Congress has defined "person" to include "individuals" which in turn includes pre

born humans, so that under 1 USC 1, the term "person" must include preborn humans.

IF THE PRE BORN HUMAN IS A PERSON, ABORTION IS UNLAWFUL

> "The appellee and certain amici argue that the fetus is a "person" within the language and meaning of the Fourteenth Amendment....If this suggestion of personhood is established,...the fetus' right to life is then guaranteed specifically by the Amendment."

Roe v Wade 410 US 113 at 156, 157, 35 L Ed 2d 147, 93 S Ct 705.

Roe v Wade correctly stated that states had no power to impose a state definition of personhood on the Federal Government or courts, but in no way limited the power of Congress to determine personhood of the pre born

human.

Roe v Wade was an ordinary case between two ordinary parties, even though the result was substantial. In determining whether the pre born human was a person, all the Court did was rely on the arguments submitted, [which did not include "individual or 1 USC 1], view history, and look for a definition of "person" in the US Constitution which Constitution does not define any terms therein other than describing units of government. The question of the individuality of the pre born human was never raised or considered or decided or disposed of in Roe v Wade or any other US Supreme Court abortion opinion. The ~~US~~ Supreme Court has since Roe v Wade relied on 1 USC 1 to determine personhood.

Numerous revered Americans, founding fathers and others have pointed to the

obvious defect. Abraham Lincoln in his first Inaugural Address shortly after having been elected in part because of a US Supreme Court decision separating US Constitutional protection re citizens from certain humans belonging to the "wrong" race, said it as follows:

> "...the candid citizen must confess that if the policy of the government, upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to ~~that~~ extent practically resigned their government into the hands of that eminent tribunal."

This can, of course, be read as a

criticism of Substantive Due Process, particularly as applied by recent US Supreme Courts in areas of interest to Christians.

The debates relating to the Fourteenth Amendment said much the same and the Congress that later passed the Fourteenth Amendment tried unsuccessfully to make certain that Lincoln's fear would not be the law by adding Section 5 to the Fourteenth Amendment as follows:

"The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

USUAL WAY TO DETERMINE PERSONHOOD-LOOK TO CONGRESSIONAL INTENT

In Roe v Wade, the US Supreme Court looked in a unique and probably wrong way and to a unique and probably wrong place for a definition of personhood. There are probably hundreds of US Supreme Court

opinions which have required the Court to determine whether an entity was or was not a person. On information and belief, in each of these cases other than Roe V Wade and its progeny, the Court has followed the same procedure, the procedure required by the Fourteenth Amendment as interpreted by the US Supreme Court in hundreds of non abortion cases requiring a determination of whether or not an entity is a person.

In none of these other cases has the Court merely looked where it looked in Roe v Wade. In each of these other cases, the Court has looked instead to legislation enacted into law by Congress because Congress alone has the power to enforce the Fourteenth Amendment and therefore determine and define personhood "by appropriate legislation".

The correct general rule re

determining personhood has been stated by the US Supreme Court numerous times since Roe v Wade. The rule is that the US Supreme Court does not determine personhood. The US Supreme Court determines and applies the intent of Congress to the particular situation in ruling in a case requiring a determination of whether an entity is a person. For example:

> "The petitioners contend that the word 'person' was clearly understood by Congress when it passed the Sherman Act to exclude sovereign governments. The word 'person,' however, is not a term of art with a fixed meaning wherever it is used....The Court considered the question whether the United States was a 'person' entitled to sue for treble damages as one to be decided

> not by a 'strict construction of the words of the Act, nor by the application of artificial canons of construction,' but by analyzing the language of the statute 'in the light, not only of the policy intended to be served by the enactment, but, as well, by all other available aids to construction....As in Cooper, the Court did not rest its decision upon a bare analysis of the word 'person,' but relied instead upon the entire statutory context to hold that Georgia was entitled to sue."
> "'We can perceive no reason for believing that Congress wanted to deprive a [foreign nation], as purchaser of commodities shipped in [international] commerce, of the civil remedy of treble damages which

is available to other purchasers who suffer through violation of the Act...Nothing in the Act, its history, or its policy, could justify so restrictive a construction of the word 'person' in Section 7....'"

Pfizer Inc. v India 434 US 308 at 316-318, 54 L Ed 2d 563, 98 S Ct 584 (1978)

WHEN SHOWN THAT IT MISINTERPRETED CONGRESSIONAL INTENT, THE US SUPREME COURT WILL OVERRULE A PREVIOUS PERSONHOOD DECISION

The pattern of US Supreme Court decisions relating to determining whether an entity is a person and the willingness of the Court to reverse itself when an earlier US Supreme Court decision is shown to be based on flawed scholarship is further highlighted in another 1978

case reversing an earlier US Supreme Court 42 USC 1983 decision as follows:

"In Monroe v Pape, we held that 'Congress did not undertake to bring municipal corporations within the ambit of [Sec 1983].' 365 US, at 187, 5 L Ed 2d 492, 81 S Ct 473. The sole basis for this conclusion was an inference drawn from Congress' rejection of the 'Sherman amendment' to the bill which became the Civil Rights Act of 1871, 17 Stat 13-the precursor of Sec 1983-which would have held a municipal corporation liable for damage done to the person or property by private persons 'riotously and tumultuously assembled.' 8 Cong Globe, 42d Cong, 1st Sess, 749 (1871) (hereinafter Globe). Although the Sherman Amendment did not seek to amend Sec

1 of the Act, which is now Sec 1983, and although the nature of the obligation created by that amendment was vastly different from that created by Sec 1, the Court nonetheless concluded in Monroe that Congress must have meant to exclude municipal corporations from the coverage of Sec 1 because "the House [in voting against the Sherman Amendment] had solemnly decided that in their judgement Congress had no constitutional power to impose any obligation upon county and town organizations, the mere instrumentality for the administration of state law." 365 US, at 190, 5 L Ed 2d 492, 81 S Ct 473 (emphasis added), quoting Globe 804 (Rep Poland). This statement, we thought, showed that Congress

doubted its 'constitutional power...to impose civil liability on municipalities,' 365 US, at 190, 5 L Ed 2d 492, 81 S Ct 473 (emphasis added), and that such doubt would have extended to any type of civil liability. 9

436 US 665

A fresh analysis of debate on the Civil Rights Act of 1871, and particularly of the case law which each side mustered in its support, shows, however, that Monroe incorrectly equated the 'obligation' of which Representative Poland spoke with 'civil liability.'...

436 US 683

[1c] From the foregoing discussion, it is readily apparent that nothing said in debate on the Sherman amendment would have prevented

holding a municipality liable under Sec 1 of the Civil Rights Act for its own violations of the Fourteenth Amendment. The question remains, however, whether the general language describing those to be liable under Sec 1-'any person'-covers more than natural persons. An examination of the debate on Sec 1 and application of appropriate rules of construction show unequivocally that Sec 1 was intended to cover legal as well as natural persons.

436 US 690

[1d, 2a, 3a, 4a, 5,6] Our analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress did intend municipalities and other local government units to be included among those persons to whom Sec 1983

applies."

Monell v New York City Dept of Soc Serv 436 US 658 at 664, 665, 683, 690, 56 L Ed 2d 611, 98 S Ct 2018 (1978)

THE SAME ENTITY CAN BE A PERSON FOR ONE PURPOSE BUT NOT ANOTHER SO THE DEFINITION OF ROE V WADE, IF IT IS STILL LAW,WHILE ENTITLED TO CONSIDERATION, IS NOT DETERMINATIVE

A criminal defendant is entitled to have the case against him proven beyond a reasonable doubt. In interpreting a law, a criminal defendant has the benefit of presumptions not given to the prosecution. Accordingly, it is conceivable that a law interpreted one way to benefit a criminal defendant might be interpreted another way in a different case. That is the situation in the abortion area. Roe ruled in favor of a criminal defendant. The situation is

different for any other situation, so that the preborn can be given the advantages normally given such respondents, including more normal interpretations of law. Examples of the same entity being considered a person for one purpose and not for another include:

[1] paper persons such as corporations which are persons for substantially all purposes but cannot use the self incrimination protection given natural persons; US v White (1944) 322 US 694, 88 L Ed 1542, 64 S Ct 1248.

[2] States are not persons, Fifth Amendment Due Process Clause South Carolina v Katzenbach (1966) 383 US 301, 15 L Ed 2d 769, 86 S Ct 803, but States are persons under Sec 7 of Sherman Act, now Clayton act 15 USCS Sec 15 Georgia v Evans (1942) 316 US 159, 86 L Ed 1346, 62 S Ct 972 and Hawaii v Standard Oil Co

(1972) 405 US 251, 31 L Ed 2d 184, 92 S Ct 885.

[3] Municipalities are persons Lafayette v Louisiana Power and Light Co (1978) 435 US 389, 55 L Ed 2d 364, 98 S Ct 1123, but they are not under the 1978 Bankruptcy Act. In like manner, See Monell supra.

[4] The US is not a person; United States v Cooper Corp (1941) 312 US 600, 85 L Ed 1071, 61 S Ct 742, but the US is a person Far East Conference v United States (1942) 342 US 570, 96 L Ed 576, 72 S Ct 492.

There are other similar examples.

CONGRESS HAS THE POWER TO DEFINE AS PERSON PRACTICALLY ANY ENTITY

The power given by Section 5 of the Fourteenth Amendment insofar as it applies to the issues herein has not on information and belief been limited in

any way by any case.

Among the non human entities defined as persons are:

[1] Corporations, supra;

[2] States, supra;

[3] Municipalities, supra;

[4] The United States, supra;

[5] Railroads International Brotherhood of Teamsters, etc v New York, N H & H R Co (1956) 350 US 155, 100 L Ed 166, 76 S Ct 227;

[6] Foreign Nations, Pfizer, supra;

[7] Labor Unions, United Mine Workers v Coronado Coal Co (1922) 259 US 344, 66 L Ed 975, 42 S Ct 570;

[8] An unincorporated association of manufacturers Brown v United States (1928) 276 US 134, 72 L Ed 500, 48 S Ct 288;

[9] A corporate officer, United States v Wise (1962) 370 US 405, 8 Led 2d

590, 82 S Ct 1354; and

[10] A political party, United States v Shirey (1959) 359 US 255, 3 L Ed 2d 789, 79S Ct 746.

PERSONHOOD IS DETERMINED BY 1 USC 1 UNLESS A MORE PARTICULAR DEFINITION IN A SPECIALIZED CODE SECTION IS INTENDED BY CONGRESS TO DETERMINE THE DEFINITION OF PERSONHOOD FOR A LIMITED PURPOSE

1 USC 1 states in applicable part:

"In determining the meaning of any Act of Congress, unless the context indicates otherwise-...the words 'person' and 'whoever' include...individuals".

There are perhaps 100 US Supreme Court cases agreeing with the heading of the present section of this argument, and none explicitly disagreeing. Roe, supra, does not challenge the pre eminence of 1 USC 1 even over the US Supreme Court in determining personhood, but in a much

criticized Substantive Due Process opinion merely ignores 1 USC 1 which was not cited in argument to the Court.

PRE BORN HUMANS ARE DEFINED AS INDIVIDUALS BOTH BY MEDICAL DICTIONARIES AND BY LARGE GENERAL PURPOSE DICTIONARIES

The position that preborn humans are persons is a two step logic set. The preceding shows that the word "person" includes individuals in determining the meaning of any Act of Congress, Act including the Fourteenth Amendment. Pre born humans are defined as individuals by all medical dictionaries and large general purpose dictionaries. The definition has not changed in any — material or relevant way during any time material to the present argument.

"Individual" is not a medical term of art and accordingly, is not directly

found in medical dictionaries such as Stedman's or Dorland's. What is found, however, is a definition of the newly fertilized human ovum as a zygote, which in turn is defined as an individual.

CONCLUSION

There is no real dispute over any of the necessary elements of the previous argument. Congress has the power to define "person" to include "individuals" and has done sb. The term "individual" includes pre born humans. It follows that if normal legal rules are followed, the term "person" includes pre born humans by act of Congress which is sufficient. Accordingly, this Court should reverse Roe v Wade which ignored the normal 1 USC 1 definition of person.

DATED 9/28/89

Respectfully submitted,

ROBERT L SASSONE, Attorney for amicus

NO 88-1125
IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

JANE 'HODGSON, MD, ET AL.
Petitioners,
v.
THE STATE OF MINNESOTA, ET AL.
Respondents,

Affidavit of mailing of amicus brief copies, Rule 28.2
State of California)ss.
City of Santa Ana, County of Orange)

Robert L Sassone, being first duly sworn on his oath deposes and says:

Robert L Sassone is a member of the bar of the United States Supreme Court admitted October 26, 1971. To his knowledge, on October 11, 1989, within the particular time and permitted time for serving of said amicus brief pursuant to Rule 28.2, he deposited in the United States Mailbox at Santa Ana, CA 92701 pursuant to Rule 28.2 with first class postage prepaid 40 copies of the attached amicus brief in the present case properly addressed to the Clerk of the United States Supreme Court and three copies of said amicus brief to each party addressed as follows:

JANET BENSHOOF, ESQ
ACLU FOUNDATION
132 W 43RD ST
NEW YORK, NY 10036

HUBERT HUMPHREY III
ATTORNEY GENERAL

C/O KENNETH RASCHKE,JR
ASST ATTORNEY GENERAL
515 TRANSPORTATION BLDG
ST PAUL, MN 55155

WILLIAM Z
PENTELOVITCH, ESQ
MASLON, EDELMAN,
BORMAN & BRAND
1800 MIDWEST PLAZA
MINNEAPOLIS, MN 55402

_____
ROBERT L SASSONE, Affiant

Subscribed and sworn to before me on October 11, 1989.

_____
Lawrence D. Sassone, Notary Public

No. 88-1125

In the Supreme Court of the United States

OCTOBER TERM, 1989

JANE HODGESON, ET A.L.,
APPELLANTS

V.

MINNESOTA, ET A.L.
APPELLEES

PETITION FOR A WRIT OF CERTIOARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR HERBERT RATNER, M.D.
AS AMICUS CURIAE SUPPORTING APPELLEES

ROBERT L. SASSONE
Attorney at Law
900 North Broadway • Suite 725
Santa Ana, California 92701
(714) 547-5611

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE ON BEHALF OF RESPONDENT

Amicus hereby respectfully moves for leave to file a brief amicus curiae in the present case. Requested consent of parties is expected but has not yet been received and filed. When filed, it will make this motion unnecessary.

INTEREST OF AMICUS CURIAE

Herbert Ratner, MD is a past eighty public health specialist who has taught at the University of Michigan and University of Chicago Medical Schools. He founded the La Leche League. He has been a public health officer of a city. He resides in Illinois and publishes Child and Family Magazine.

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APPENDIX 2 "'Silent Epidemic' of 'Social Disease' Makes STD Experts Raise Their Voices" by Marsha F Goldsmith JAMA June 23/30, 1989 Vol 261 No 24 p3509

SUMMARY OF ARGUMENT

This brief argues that this Court's experiment with freedom of sex has caused America more damage than all our wars combined. Those infected with sexually transmitted diseases number more than the casualties in all our wars. Those killed by sexually transmitted diseases will soon exceed those killed in all our wars. The economic cost of the right to privacy and destruction of the right to prevent pornography from influencing the young exceeds the cost of all our wars and exceeds the national debt. The other costs include a lack of commitment best illustrated by abortion which has caused our divorce, illegitimacy and numerous related undesirable rates to skyrocket. Amicus suggests the Court call of the war on America by reversing the right to privacy and the right to abortion.

SEXUALLY TRANSMITTED DISEASES

Both primitive and later societies which have adhered to nature's script and in which lifelong faithful monogamy was accepted as nature's norm have been notably free of sexually transmitted diseases. In societies in which sexual morals became lax and the sensual and erotic life became an end in itself, multiple sex partners were commonplace, abortions abounded, perversions prevailed, sexually transmitted diseases were common, an anti-child mentality developed, and the family as a functioning unit broke down.

Today, western man is undergoing a catastrophe of even greater proportions. Society is presently characterized by infidelity to family, country and religion, dissension between man and woman, single parent and broken homes, insecure childhood carried over to insecure adulthood, sex without norms, rampant sexually transmitted disease including an unusual increase of new ones, a sharp increase in the incidence of sterility, seemingly uncontrollable drug misuse, and a growing disregard of the value of life as seen in abortions on demand and in the promotion of infant and adult euthanasia under the principle that some people are better off dead.

The media is partially responsible but this Court gave the media freedom.

The damage done to the US in just a few years by the sexual freedom granted to America by this Court is approaching and will soon exceed the damage done by all our wars. The wars have caused over a million deaths and a few million wounded. The sexual revolution has caused far more wounded and in a few years more deaths.

In 1982 the Federal government spent 125 million dollars on family planning services through the Public Health Service Act alone with more money spent through other programs. Despite growing expenditures of funds on family planning services, the problem of teenage pregnancy has remained intractable. The number of conceptions for example rose 14% between 1974 and 1979, and the percentage of out-of-wedlock babies born to teenagers tripled between 1960 and 1980. It seems clear that throwing money alone at the problem is not going to solve it.

Kingsley Davis, Professor of Sociology at the University of California, Berkeley, said in 1972, "The current belief that illegitimacy will be reduced if teenage girls are given an effective contraception is an extension of the same reasoning that created the prob-

lem in the first place. It reflects an unwillingness to face problems of social control and social discipline, while trusting some technological device to extricate society from its difficulties."

"The irony is that the illegitimacy rise occurred precisely while contraception was becoming more, rather than less, widespread and respectable." U.S. Commission on Population Growth and the American Future - 1972.

The second medical problem area is S.T.D., Sexually Transmitted Diseases. The reported incidence of gonorrhea in the United States has hovered around one million per year in recent years and seems to be leveling off, massive underreporting is a recognized fact. As startling as this figure is the rate of chlamydia infections is thought to be 2-3 million cases per year. This infection

is very difficult to diagnose as the offending bacteria only grow in human cells. Among the major non AIDS sexually transmitted diseases are gonorrhea, genital herpes, cytomegalo virus, chlamydia, T-myco plasma, hepatitis B, syphyllis, trichomonas, crab lice, and genital warts.

Another S.T.D. of viral etiology is genital warts. While this condition is curable, it is evident today that certain varieties of the human papilloma virus, the offending organism, are responsible for the third medical problem noted earlier, cervical intra-epithelial neoplasia, CIN, no pun intended. Others have noted that the first fallout from the sexual revolution, was a tremendous upsurge in the rate of venereal disease. Now evidence from several quarters suggests an alarming second wave of fallout;

a sharp increase in the incidence of cancerous and pre-cancerous lesions of the cervix among teenagers and young women.

All data herein is from US Covernment Sources, the CDC, NIH or US Vital Statistics.

AIDS, the most frightening and deadly sexually transmitted disease, has killed about 60,000 Americans according to the official body count. Unfortunately, many deaths from AIDS probably go unreported because of the connotation involved when death from AIDS is reported. Far greater than today's AIDS death count is what we expect in the near future. Over 100,000 have been diagnosed as having AIDS symptoms and they can be expected to live only short time. The number believed infected exceeds one million, and most of these are expected to be killed by the

disease before the year 2000.

Other sexually transmitted diseases also take a toll. At the end of the second World War, there were five known sexually transmitted diseases. Now there are fifty. One of these which many have not even heard of, causes about 10,000 deaths annually. The STDs cause far more deaths than those credited to them because of under reporting. Cervical cancer, as one example among many, is far more frequent than a generation ago. Why? The increase is among those women who have had certain sexually transmitted diseases. The disease makes the cervical area more likely to develop cancer. These deaths are blamed on cancer, not the sexually transmitted diseases which are a proximate cause. Again and again we see that the risk factors are early commencement of sex, frequency of one

night stands, number of partners, and the other factors which are more frequently found in the "sexually liberated".

Each of the sexually transmitted diseases causes great harm, but this Brief will limit itself to selected detailed information in Appendix 1, "The Economic Cost of Pelvic Inflammatory Disease" by Washington, Arno and Brooks, JAMA, 4/4/86, Vol 255, No 13, p1735-1738 and Appendix 2, "'Silent Epidemic' of 'Social Disease' Makes STD Experts RAise Their Voices", JAMA June 23/30, 1989, Vol 261, No 24. Many similar sources could be quoted and can be found on the JAMA or NIH indices.

In summary, The dollar cost of the increase in sexually transmitted diseases exceeds the cost of all US wars and, if not too rigorous a connection is demanded, can be shown to exceed the

national debt. The number of infected exceeds the number of casualties in all our wars by perhaps ten to one. The number killed is now a large fraction of the number killed in our wars and is likely to exceed the number killed in all our wars by the year 2000.

In a relatively disease free nation, the one night stand is relatively safe because one catches sexually transmitted diseases from one's partner. If only one percent of potential partners who sleep around are infected, one would have to have sex with about 50 before being exposed to the potential of a sexually transmitted disease. In practice, the odds are even better, because even if unprotected, one might not catch the disease. In addition, condoms might help a little (but only a little. Condoms are not even 90% effective in preventing

conception over the course of a year. The sperm is far larger and easier to stop via a barrier than many disease causing agents and a woman is only fertile a short time each month. This indicates that condoms should not be relied on to stop sexually transmitted diseases. This is in accord with the data. Condom sales this decade were the greatest in history and they apparently did little to slow the spread of sexually transmitted diseases.)

We are now in a situation where some people sleep around and others do not. Those who were virgins before marriage and are loyal afterwards are seldom infected, although they could have had the bad luck to marry an infected person. Those who only sleep around a little are less likely to be infected than those who sleep around a lot. Now if you go to bed

with a stranger, which of the preceding is it likely to be? Of course, the person who will go to bed with you is far more likely to have gone to bed with others. You are, for disease catching potential, going to bed with everyone your partner has previously slept with. Considering 20,000,000 or more infected with certain sexually transmitted diseases, this may include nearly everyone likely to share a one night stand with you. The practical effect is that if you play, you are going to pay.

Of course, this Court is not the sole cause of the sexual revolution. It is, probably the primary cause directly and indirectly via the licence it has given the media. There used to be censors who limited the media. This Court killed that concept and so has been a proximate cause of the sexually arousing material we now

call TV, Movies, books, etc. This Court did not invent the pill, but this Court poured gasoline on the spark the pill ignited.

Accordingly, by its right to privacy and freedom of sexually suggestive or explicit speech decisions, this Court has killed the previously effective opposition and unleashed the sexual storm that is wreaking havoc today.

NON DISEASE PROBLEMS

The damage to America related to the sexual revolution goes far beyond sexually transmitted diseases. A substantial minority still clings to the Judeo Christian ethic which protects them from the worst of the storm. The majority which have no strong religious protection bear the brunt.

The divorce rate is now so high that half of this years marriages will

probably end in divorce. The cost of all the true love that could not happen is high. The suicide rate is down, except among the youth which pays the highest price for the sexual freedom this Court has sold. Illegitimacy is way up, three times as high as a generation ago, with 60% of black children born out of wedlock. The cost of this illegitimacy in increased welfare roles and decreased production from children damaged by lack of a father and two parent home exceeds the national debt. There are lots of subtle costs. How about the "good kid" who is afraid to date or party because of the one night stand expectation? How about the kids who suffer through divorce or near divorce. How about all the marriages held together but just barely because one partner lacks commitment?

There used to be this thing called

commitment. Some would say it was the opposite of freedom. I say it is the fulfillment of freedom. This Court's decisions have made commitment harder to find and harder to give. Abortion is the ultimate denial of commitment.

As if that were not enough, the forces unleashed by this Court and its allies are destroying Western Civilization. The future belongs to the descendants of those who have children. This is an obvious statement. Who is having children? Not the descendants of our peers. Our old America is not reproducing itself. The percentage of residents of America whose parents were born in Mexico is greater than it was when much of America was ruled by Mexico. I am certain the future culture which will descend from this change will have many good points, but it will not be the

Western Civilization that did so much for the world in recent years and centuries. I think the passing of that culture is regrettable.

Any public health specialist could go on for volumes discussing these or related problems. We will spare you and trust that this brief will remind you of many of the things you must have observed which are fairly common knowledge. The saddest proof that the right to privacy and related decisions of this Court which have let the sexual monster out of the bottle is that the penalties have fallen in proportion on those who have taken most advantage of the "freedom" (some would say licence) this Court unleashed on an America unable to digest them without severe disproportionately great agony.

CONCLUSION

Would that this Court had given greater thought to the story of Pandora's Box before launching America on this journey from the land of commitment to the land of sexual freedom from everything except sexually transmitted disease. After all the troubles, there was one thing left in the box, hope. I hope you reverse the right to privacy and once more encourage true lasting love and commitment.

Respectfully submitted,

ROBERT L SASSONE, Attorney for Amicus

APPENDIX 1

THE ECONOMIC COST OF PELVIC INFLAMMATORY DISEASE by A Eugene Washington, MD; Peter S Arno, PhD; Marie A Brooks, MBA
JAMA 4/4/86 Vol 255 No 13

PELVIC inflammatory disease (PID), the most common serious complication of sexually transmitted diseases, is a medical and public health problem that has risen to alarming proportions. Each year more than 1 million women in the United States experience an episode of PID, with at least one fourth of them suffering one or more serious long-term sequelae. Acute PId increases a woman's risk for recurrent PID, chronic pelvic pain, ectopic pregnancy, and infertility. Risk for both ectopic pregnancy and infertility increase sevenfold after one episode of PID. Dyspareunia, pelvic adhesions, pyosalpinx, inflammatory residua, and tubo-ovarian abscess may also follow.

Overall, such complications occur in approximately 15% to 20% of cases and often require subsequent surgical intervention. These troublesome medical consequences of PID are often associated with great emotional stress, can have a major effect on a woman's sexual as well as reproductive health, and can threaten her fertility.

Economically, PID and its consequences also represent a substantial burden. NEARLY 300,000 women are hospitalized annually for PID, and women make over 2.5 million outpatient visits for PID each year. In addition to these sizable direct medical costs are indirect costs due to lost wages and the lost value of household management. Too often, these indirect costs are overlooked when considering the economic burden of illness to individuals.

In this article, we estimate the direct and indirect cost for PID and PId-associated ectopic pregnancy and infertility in the United States for 1984 and project costs through 1990.

METHODS DIRECT COST

"Direct cost" in our analysis refers to health care expenditures and represents the value of goods and services actually used to treat PID or its effects. Charges for medical care are used to approximate cost.

PID.-We examined the bills of women admitted to two hospitals in San Francisco for PID to estimate the average cost of hospitalization. Bills from hospital A covered women admitted between August 1983 and July 1984 (N=54); those from hospital B covered admissions from September 1982 through August 1983 (N=35). Estimates based on local

data were then compared with averages computed using data from state and national sources. We used average cost per admission at hospital A ($2,865) in our analysis because it was the lowest estimate of all sources and one of the most current.

For outpatient PID, we estimated average cost per visit (including cost of office visit, laboratory tests, and drugs) to be $60, based on data from the American Medical Association and the Health Care Financing Administration. We assumed 2.5 outpatient visits per case of PId. Our total average cost of $150 for outpatient PID is close to the average cost of $180 obtained from national sources. Surgical procedures resulting from an acute episode of PID average a minimum $1,250 at hospital A. This figure represents the minimum charge

for use of the operating room and the recovery room, plus fees for surgery and anesthesiology.

Ectopic Pregnancy.-We estimated the average cost for hospitalization for ectopic pregnancy to be $4,115 by adding the average cost of a surgical procedure ($1,250) to the average cost of hospitalized PID ($2,865). Outpatient visits for ectopic pregnancy average the same cost as for out-patient PID ($60). We assumed two visits per case- one before and one after hospitalization.

Infertility.-We estimated the average cost of a complete infertility evaluation and management (including laparoscopy, microsurgery, and possible in vitro fertilization) to be $2,500. Assuming that 10% of women with PID-related infertility seek medical care, we conservatively

computed an average cost of $250 for PID-associated infertility consultations. This relatively low estimate for infertility consultation is used because the precise cost of infertility is difficult to determine.

INDIRECT COST

"Indirect cost" in our analysis refer to lost productivity and represents the value of output foregone by women suffering from PID, PID-associated disability (ectopic pregnancy or infertility), or premature death caused by PID. Indirect costs are measured by lost wages due to not working and/or the value of household management that is not performed because of illness. Complete descriptions of the methods for computing indirect costs of illness have been published else-

where.

Lost Wages-Total wages lost were calculated by multiplying four variables for each condition and age group: (1) mean annual earnings, (2) percent of women with earnings, (3) disability factors, and (4) number of cases. Mean annual earning for women ages 15 to 44 years and the percent of women with earnings in this same age group were obtained from published data. To compute a disability factor, we divided the number of working days a woman was disabled by the number of working days in a calendar year (245). Assuming ten days of disability for outpatient PID, 21 for hospitalized PId, 28 for ectopic pregnancy, and 14 for infertility, we computed disability factors of 0.041, 0.086, 0.114 and 0.057, respectively. The methods for estimating the number of cases are

described below.

Lost Value of Household Management.- the total lost value of household management was also computed by multiplying four variables for each condition and age group: (1) mean annual value of household management for employed and unemployed women, (2) percent of women with and without earnings, (3) disability factors, and (4) number of cases. The mean annual values of household management for employed and unemployed women were computed by multiplying hours spent in each kind of domestic tack by the wages for corresponding occupations.

Lost Value of Lifetime Earning From Deaths.-the present value of lifetime earnings was obtained from published data. we selected the median value for women

aged 15 to 44 years because the age at death is not known. A discount rate was used to convert a future stream of earnings into its present worth. Discounted at 4%, the present value of lifetime earnings is $395,649 per person, and discounted at 6% the value is $301,570. The later is used in our baseline analysis. Estimates of the annual number of deaths among women hospitalized for PID range from 150 to 1,200, we used the mean of these two points (675) in our analysis. Twenty-four maternal deaths occur annually among women with PId-associated ectopic pregnancy.

Incidence estimates

Pelvic Inflammatory disease.-The numbers of women hospitalized for PID and number of PID-associated surgical procedures are based on

published data from the Hospital Discharge Survey conducted by the National Center for Health Statistics. For outpatient PID, we analyzed published data from National ambulatory Medical Care Survey to calculated visits to office-based physicians (1,744,700) and from the National Heath Survey of Physician Visits to estimate the number of visits to clinics and emergency rooms (768,700).

Ectopic Pregnancy.-Incidence estimates for ectopic pregnancy are from published data from the Hospital Discharge Survey. Based on attributable risk estimates, we assumed 50% of morbidity and mortality of ectopic pregnancy is caused by PID.

Infertility.-Using data from a study of women with laparoscopically verified

salpingitis followed up for ten years, we assumed that 20% of the approximately 1 million women with PID each year will become infertile.

RESULTS - Direct Cost

Total direct costs for PID and PID-associated ectopic pregnancy and in fertility are estimated to be $1.23 billion. The direct cost of PID alone accounts for 87% of that total. Hospitalized care for PID represents 72% of overall Pid costs and 62% of total direct cost. Ectopic pregnancy that is associated with PID accounts for 90& of total direct cost. Hospitalized care for PID-associated ectopic pregnancy represents 97% of the overall cost of PID-associated ectopic pregnancy and 8.8% of the total direct cost. Infertility accounts for 4.1% of the total direct cost.

RESULTS - Indirect Cost

Indirect costs of PID, PID-associated ectopic pregnancy, and infertility are estimated to total $1.39 billion. Indirect costs due to lost wages represent 35% of the total indirect cost, with PID itself accounting for 79% of overall lost wages and 28% of total indirect cost. Lost value of household management accounts for 50% of the total indirect cost, with PID representing 78% of the overall lost value of household management and 39% of the total indirect cost. Ectopic pregnancy, infertility, and premature death account for 4.9%, 13.4%, and 15.2%, respectively, of the total indirect cost.

RESULT - Projection Through 1990

By 1990, the estimated cost of PID and associated ectopic pregnancy and infertility will total $3.50 billion per year, assuming the annual medical care inflation of 5% and the incidence of PID

remain constant during this period. (The annual average percentage change in inflation for medical care services between 1980 and 1984 was 9.8%.) If the rate of PID increases by 1% per year, the total cost will exceed $3.72 billion annually by 1990. With a 1% decline in incidence each year, the cost of PID and its associated sequelae will still reach $3.3 billion per year by 1990. For the total cost of PID to drop below $2 billion by 1990, (with a constant medical care inflation rate of 5%), the incidence of PID would have to decline annually by about 10%. Such a decline could result in a savings of $1.86 billion in 1990 alone, and $6.44 billion during the six-year period from 1984 to 1990.

COMMENT

Our analysis indicates that PID and its sequelae cost more that $2.6 billion each year, placing a substantial economic burden on society. It is Important to note that this figure may, in fact, underestimate the cost of PID and PID-associated ectopic pregnancy and infertility for several reasons. First throughout this analysis we used conservative figures. The direct costs of infertility, in particular, may be markedly underestimated given the increasing demand for infertility consultation an the emergence of sophisticated but expensive, new techniques for infertility management. Moreover, no indirect costs were included for male partners of women undergoing infertility evaluation, although they are included in the medical evaluations, and no direct or indirect costs were calculated

for infertility caused by asymptomatic (and unrecognized) PID.

Second, our incidence data do not reflect the most recent trends for the majority of the outcomes we examined. For example, the more recent data on ectopic pregnancy show a 23% increase in the annual incidence for 1983 over the figure we used form 1980, as well as increases in the rates of hospitalization for PID (Centers for Disease Control, unpublished data, 1985). Third only women aged 15 to 44 years are included in this analysis. Although firm data are not available, rates of sexually transmitted diseases may be rising among teenagers younger than 15 years, and these girls may be experiencing PID and its sequelae at an increasing rate. Women older than 44 years also contribute marginally to the acute problem and

may suffer some chronic sequelae requiring hospitalization and surgery. Exclusion of women at both extremes contributes to an underestimation of the overall cost. Finally, psychosocial cost are not included for PID, ectopic pregnancy (with its resultant fetal loss), of infertility. Each of these may be a major life event with an incalculable impact on an individual or family.

Compared with a recent analysis, our estimated direct costs are lower when direct costs of only gonococcal PID, ectopic pregnancy, and infertility from that report are extrapolated to all PID, ectopic pregnancy, and infertility ($1.23 vs $1.93 billion). The difference observed in these two estimates is accounted for by the higher estimate of hospitalized PID

cost ($0.91 vs $1.38 billion) and the substantially higher estimate of infertility cost ($50 vs $335 million) in the previous report. Another estimate of the total cost for PID and associated ectopic pregnancy made five years ago was lower that ours ($1.26 vs $2.38 billion). Most of this difference is accounted for by lower estimates of average hospital cost and number of cases for both PID and ectopic pregnancy used in the earlier analysis. Thus, considering these two comparisons and the methodological concerns raised above, our cost estimate seems reasonably to approximate the lower range of the true economic burden of PID in the United States in 1984.

Trends in PID closely shadow those of sexually transmitted diseases. Rates

of sexually transmitted diseases have risen among adolescents, as have PID rates. In fact, sexually active adolescents, who have the most reproductive years at risk, are almost ten times as likely to develop PID as women aged 20 years or older. Chlamydia trachomatis has emerged as the most prevalent bacterial sexually transmitted disease in the United States and is now also the leading cause of nongonococcal PID. This organism is a cause of asymptomatic disease in up to 70% of lower genital tract infections in women. An equal number of cases of tubal damage and infertility may be caused by clinically inapparent C trachomatis infection. Consequently, improved knowledge about sexually transmitted diseases, especially regarding risk factors for development of PID and its sequelae, and application of that

knowledge to demonstrated control strategies for sexually transmitted diseases should be supported. Prevention of lower genital tract sexually transmitted diseases, as well as arresting their ascension to vulnerable upper genital tract organs, remains the most cost-effective approach to reducing the incidence of and large investment of PID.

In summary, PID is clearly a major public health problem, with serious economic as well clinical and emotional implications. The rising costs of PID can be interrupted by establishing and maintaining effective prevention and control programs for PID and sexually transmitted diseases; such efforts could by 1990 save nearly $2 billion in that year alone. Clinicians must understand the risk factors for development of PID, maintain a higher index of suspicion for the wide range

of clinical presentations associated with PID, and provide timely, effective treatment to patients and to their sex partners.

APPENDIX 2

'SILENT EPIDEMIC' OF 'SOCIAL DISEASE' MAKES STD EXPERTS RAISE THEIR VOICES

by Marsha F Goldsmith JAMA June 23/30 1989 Vol 261, No 24

Immunological virgins seem to be almost the only kind one finds among adolescents anymore, and that fact may in part account for the tremendous increase in sexually transmitted diseases (STDs) in the United States.

At a symposium in New York City on "The 'Other' STDs: A Silent Epidemic," sponsored by the American Medical Association and the Centers for Disease Control (CDC), Atlanta, Ga, authorities who have worked on stopping STD spread for years said the situation is now nearly out of control.

("Other" recognizes that acquired immunodificiency syndrome (AIDS) has become the overwhelming concern, leaving different STDs in the shade. The meeting was supported by a grant from Burroughs Wellcome Company.)

A major reason for STD increase is that young people are being exposed to infection, and acquisition is often rapid and symptomatic. A great many of the more than 70% of people who are sexually active by age 19 years may have an initial exposure to an STD, become infected, and pass the infection on without ever feeling ill or knowing they've been infected.

Only years later – when gonorrhea and/or *Chlamydia* have left scarred Fallopian tubes that may mean an ectopic pregnancy, or human papillomavirus (HPV) or hepatitis B virus has led to cancer, or genital herpes or syphilis has resulted in a damaged infant – may the cost of careless sex become apparent.

And that's exactly what is going on, state the experts. "We have to think seriously about this or we're going to have an entire infertile cohort," says Mary Ann Shafer, M.D., assistant director, Division of Adolescent Medicine at the University of California, San Francisco, School of medicine.

According to John LaMontagne, Ph.D., director of the Microbiology and Infectious Diseases Program at the National Institute of Allergy and Infectious Diseases (NIAID), Bethesda, Md, these are the best estimates of what else is happening: Each year in the United States, there occur 1 to 2 million new cases of gonorrhea, 4 million new cases of chlamydial infection, and 500,000 to 1 million new cases of pelvic inflammatory disease. There are 12 million cases of genital warts (caused by

HPV), with 750,000 new ones per year, and 20 to 30 million cases of symptomatic genital herpes infection (herpes simplex virus type 1 or 2 [HSV-1 or 2]), with 500,000 new ones per year.

Yvonne Bryson, M.D. associate professor pediatrics, University of California, Los Angeles, School of Medicine, says new studies show there are many more cases of asymptomatic genital herpes infection. "I don't think most obstetricians are aware of this yet," she says, citing some startling figures.

In Atlanta, Los Angeles, and Seattle, Wash, says Bryson, as many as 65% of pregnant women may have "silent" HSV-2 infection. While women known to have genital herpes are well managed, "the problem is the women, and their doctors, who don't know." Bryson says, "There should be a push of development of

screening tests. We may have to change our thinking about general screening during pregnancy."

Syphilis accounts for about 100,000 new STD cases annually - including congenital cases, which rose fourfold in the 3 years 1985 through 1987 and continue to go up.

According to King K. Holmes, M.D., Ph.D., professor and vice-chair, Department of Medicine, University of Washington School of medicine, Seattle, syphilis is up twofold among black men and up threefold among black women. Gonorrhea is 20 times higher in blacks than in whites. Specific figures were unavailable on Hispanics, but it's known that STDs occur disproportionately among lower socioeconomic groups, primarily among blacks and Hispanics.

That's true even after correcting for reporting bias, which occurs because of how data are gathered, says Willard Cates, M.D. M.P.H., director, Division of Sexually Transmitted Diseases, at the Centers for Disease Control. That agency collects its data from the states and Cates says physicians underreport. Up to 80% of reports come from public STD clinics and fewer than 20% come from private physicians. In reality, he says, the occurrence of these diseases among public and private patients is probably equal. But many more poor people have turned to public clinics for STD treatment, and clinics report scrupulously.

Now that's changing, said Holmes. Public health clinics can no longer afford to handle the overwhelming caseload. They close earlier, waiting time is

longer, and people who most require their services don't have access to care.

Holmes said he thinks the most practical strategy for coping with the STD epidemic in populations at high risk is to establish high school-based sex education programs that include treatment clinics. "We don't know what behavioral interventions work, and the crack-using population [who exchange sex for drugs] isn't very well studied, but we've got to treat this epidemic," he says.

According to Shafer, the *Chlamydia* epidemic is even worse. She said that in many parts of the country, "infection is extremely common and entirely undetected." *Chlamydia* is the most prevalent STD in young women, affecting 15% to 20% (three to five times the rate for gonorrhea), and is mostly asymptomatic. And

9% to 11% of young men have asymptomatic infection, she says.

It's time to reevaluate STD prevention programs, traditionally geared to females, said Shafer, adding, "It's easy to screen males using a leukocyte esterase test that can be one on a urine specimen for 20 cents a stick." She believes "we should be treating all sexually active men. But we also need a better treatment for *Chlamydid*. We have to tell patients, 'Take this medicine for 7 days and you'll feel nauseated.' How can we get teenagers to do that when they don't even realize they're ill?"

Shafer doesn't believe more research will solve all the problems, because "we're dealing with the interaction of biology and behavior. No matter how much money we pour into studies, we'll never completely control STDs medically because

there'll always be a new one. The bottom line is changing behavior."

The same thing is said about AIDS, of course. Now, much more federal funding is directed toward AIDS research than toward the "other STDs." This year the NIH has almost $604 million for AIDS. All other STDs combined are allocated $60 million. (Next year, the AIDS figure is more than $750 million and for other STDs, about $65 million.) The NIAID gets about $40 million of the NIH's annual "other STD" budget, and spends about one third of the amount on herpesvirus research. (Gonorrhea is second and *Chlamydia* third.) Several other institutes share the total, notably the national Cancer Institute, which studies the many varieties of HPV, three types of which are believed to be the principal cause of genital cancers. LaMontagne

said, "Despite the need, the NIH money spent on STDs has not greatly increased. The pattern of support is unchanged over the last decade."

The NIAID has made substantial accomplishments in studying STDs. It has supported research to improve diagnosis of chlamydial infection using hybridization techniques, and investigators at its Rocky Mountain Laboratory have made progress toward developing chlamydial vaccines. With the National Institute of Child Health and Human Development, it has begun a study on vaginal infections and prematurity.

The institute has pioneered in developing model systems to propagate HPV, supported research that led to using the polymerase chain reaction for diagnosing HPV infections, and established the value of interferon for treating them. This is

of particular interest to Thomas Becker, M.D., Ph.D., assistant professor of medicine at the University of New Mexico School of Medicine in Albuquerque. Although genital HPV infection is extremely common, Becker said, and more than 60 types of the virus have been identified, scientists still have more questions than answers about these viruses.

Known risk factors for acquiring HPV include having multiple sexual partners, using oral contraceptive pills, being immunocompromised, and smoking cigarettes. Becker says, "Treatment for the lesions has been suboptimal, which is frustrating for the physician and the patient." Add to this worry about the cancer connection, and Becker says, "HPV infection will be of growing concern in the next 3 years."

Another viral disease ought to be of increasing concern now, thinks Miriam Alter, Ph.D., chief of Surveillance Activity, Hepatitis Branch, in the CDC's Division of Viral Diseases. A recent study showed that only 10% of physicians recognize heterosexual activity as a risk factor for hepatitis 2, she says. But each year, 78,000 cases occur that way, of which 6000 will result in chronic disease and 1600 in death. Alter is angry because all this illness is preventable.

Wendy Wertheimer, deputy executive director of the American Social Health Association, began her presentation with the telephone number of its national STD hotline (1-800-227-8922). Knowing it is probably a good idea because, Wertheimer said, considering the size of the problem in relation to the money being spent to find a solution, "We're trying to contain

a 4-alarm fire with a few buckets of water."

She said the association is calling for a "dramatic increase" in federal and state funding, and decried the fact that the issue "has become so politicized, reflecting a national fear of sex." Moreover, said Wertheimer, medical schools have an "abysmal record" in training their students to deal with STDs, and the present lack of funds for training resident physicians will make providing needed care even more difficult.

NO 88-1125
IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

JANE HODGSON, MD, ET AL.
Petitioners,
v.
THE STATE OF MINNESOTA, ET AL.
Respondents,

Affidavit of mailing of amicus brief copies, Rule 28.2
State of California }ss.
City of Santa Ana, County of Orange }

Robert L Sassone, being first duly sworn on his oath deposes and says:
Robert L Sassone is a member of the bar of the United States Supreme Court admitted October 26, 1971. To his knowledge, on October 11, 1989, within the particular time and permitted time for serving of said amicus brief pursuant to Rule 28.2, he deposited in the United States Mailbox at Santa Ana, CA 92701 pursuant to Rule 28.2 with first class postage prepaid 40 copies of the attached amicus brief in the present case properly addressed to the Clerk of the United States Supreme Court and three copies of said amicus brief to each party addressed as follows:

JANET BENSHOOF, ESQ
ACLU FOUNDATION
132 W 43RD ST
NEW YORK, NY 10036

HUBERT HUMPHREY III
ATTORNEY GENERAL

C/O KENNETH RASCHKE,JR
ASST ATTORNEY GENERAL
515 TRANSPORTATION BLDG
ST PAUL, MN 55155

WILLIAM Z
PENTELOVITCH, ESQ
MASLON, EDELMAN,
BORMAN & BRAND
1800 MIDWEST PLAZA
MINNEAPOLIS, MN 55402

_____
ROBERT L SASSONE, Affiant

Subscribed and sworn to before me on October 11, 1989.

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Lawrence D. Sassone, Notary Public